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ADRIENNE R. RAFF,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

January 4, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11501-97
AGENCY DKT. NO. 410-10/97

ADRIENNE R. RAFF,
Petitioner,
v.
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent

Charles Auffant, Esq., for petitioner

Cherie I. Maxwell, Esq., for respondent
(Sills, Cummis, Zuckerman, Radin, Tishman, Epstein & Gross, attorneys)

Record Closed: November 16, 1998 Decided: November 20, 1998

BEFORE **IRENE JONES**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on December 9, 1997, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

A hearing was scheduled for November 19 and 20, 1998 but were adjourned because the parties agreed to settle the matter. A fully executed Stipulation of Settlement was filed in the OAL on November 16, 1998. A copy is attached hereto and made a part hereof.

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

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

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

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

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

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

11/20/98
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

11/24/98
DATE

D.N. Centanni/jf
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 30 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

CHARLES I. AUFFANT
Attorney at Law
661 Franklin Avenue
Nutley, New Jersey 07110
973-661-4545
Attorney for Petitioner

ADRIENNE R.. RAFF,	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW**
Petitioner,	**OAL DOCKET NO. EDOR-11501-97N** **AGENCY REFERENCE NO. 410-10/97**
vs.	***CIVIL ACTION***
NEWARK PUBLIC SCHOOLS,	**STIPULATION OF SETTLEMENT**
Respondent,	

The above captioned parties agree to settle this matter on the following terms and conditions:

1. Petitioner Adrian R. Raff will resign her permanent teaching position with the Newark Public Schools by letter of resignation dated no later than August 1, 1998.

2. The Newark Public Schools will pay Petitioner her entire withheld increment for the 1997-1998 academic year.

3. Petitioner will apply for retirement with the Teachers Pension and Annuity Fund. Respondent, Newark Public Schools will assist Petitioner, if required, in obtaining, executing and delivering any and all, documents within their custody or control required by the Pension Board.

4. Upon payment of the entire withheld increment in this matter, Petitioner will withdraw the above referenced action and direct her counsel to forward her resignation to the Newark Public Schools.

5. Petitioner agrees that she shall not claim or seek any entitlement's which may have accrued after June 30, 1998

I have read foregoing, understand same and agree to be bound by the terms and conditions contained therein.

Dated: September 2, 1998

Adrian R. Raff-Prekop

Adrian R. Raff

Dated: September 2, 1998

State of Maine
Waldo County, SS

Notary Public, Judith B Howard
State of Maine, My Commission Expires
August 8, 2000

Dated: 10/13/98

mcw 10/14/98

Beverly L. Hall

Newark Public Schools
DR. BEVERLY L. HALL
(Please Print Name)
State District Superintendent
Title

Dated:

Cherie L Maxwell

Attest

OAL DKT. NO. EDU 11501-97
AGENCY DKT. NO. 410-10/97

ADRIENNE R. RAFF,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

January 4, 1999

Date of Mailing, January 4, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

IN THE MATTER OF THE TENURE	:	
HEARING OF CAPTAIN CHARLES DREYER,	:	
SCHOOL DISTRICT OF THE TOWN-	:	COMMISSIONER OF EDUCATION
SHIP OF PEMBERTON, BURLINGTON	:	DECISION ON REMAND
COUNTY.	:	
	:	

January 4, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2645-98

(ON REMAND EDU 615-97)

AGENCY DKT. NO. 3-1/97

IN THE MATTER OF THE TENURE HEARING OF CAPTAIN CHARLES DREYER, BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY

Frederick W. Hardt, Esq., for the petitioner

Richard A. Friedman, Esq., for the respondent (Zazzali, Zazzali, Fagella & Nowak, attorneys)[1]

Record Closed: November 9, 1998 Decided: November 24, 1998

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

This matter concerns the charges brought against the petitioner, Charles Dreyer, by the respondent, Board of Education of the Township of Pemberton, Burlington County, alleging that the petitioner no longer holds the appropriate qualification to teach military science and seeks his dismissal. The petitioner requested a hearing, and the matter was transmitted to the Office of

[1] Steven R. Cohen of the law firm of Selikoff & Cohen, P.A., is not listed as a party for the reasons stated on page 2 of the initial decision.

Administrative Law (OAL) on February 4, 1997 (EDU 615-97) for a hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

After extensive settlement conferences, the matter settled and I issued an initial decision incorporating the settlement on February 19, 1998.

The matter was remanded by the Commissioner of Education and was received by the OAL on April 3, 1998 (EDU 2645-98). The parties again engaged in extensive settlement negotiations.

Steven R. Cohen entered an appearance in this matter on behalf of the Pemberton Township Education Association (PTEA) by letter dated July 15, 1998. Mr. Cohen stated since the respondent has alleged bumping rights to a number of positions held by members of the PTEA that the PTEA and some of its individual members want to intervene in the matter if it does not settle. Mr. Cohen did not participate in the settlement negotiations.

On November 9, 1998, I received a fully signed stipulation of settlement, which sets forth the terms of the settlement. This settlement is attached and is incorporated herein.

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

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

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

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

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

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

November 24, 1998
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

NOV. 24, 1998
DATE

D. N. Antanaitis /jc
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 30 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

ml

Draft: 9/16//98

Law Offices of
FREDERICK W. HARDT
300 Chester Avenue, Suite 101
P.O. Box 840
Moorestown, NJ 08057
(609) 234-4141
Attorney for Pemberton Township Board of Education

RECEIVED
1998 NOV -9 A 9:30

IN RE TENURE CHARGES AGAINST CHARLES DREYER	:	Before the Commissioner of Education Agency Docket No: 3-1/97
	:	Stipulation of Settlement

The parties to this matter, the Pemberton Township Board of Education and Captain Charles W. Dreyer, Jr., having reached an Agreement to resolve the matter before the Court and it being determined that it is appropriate and necessary to reduce this understanding to writing to avoid confusion during its implementation:

NOW THEREFORE IT IS Agreed by and between the Parties subject to approval of the Commissioner of Education as follows:

1. Resignation For and in consideration of the mutual covenants and understandings set forth in this stipulation, Captain Charles W. Dreyer, Jr., upon execution of this agreement hereby resigns his position with the Pemberton Township School District (District) as its instructor of Army Junior R.O.T.C. It is understood that submittal of this resignation will allow the District to fill the instructor position with another and that Captain Dreyer will no longer have any right, claim or entitlement to this position, or any other position within the district but subject to the Commissioner's approval.

2. Payment For and in consideration of the mutual covenants and understandings set forth in this stipulation the District agrees to continue to pay

Captain Dreyer his salary, for the position he held with the District prior to the withdrawal of his Army J.R.O.T.C. authorization, through March 26, 1999 in one installment payable within 30 days of January 1, 1999 provided that this agreement is approved by the Commissioner by January 1, 1999. In the event the Commissioner shall fail to approve this agreement by January 1, 1999, then the payment shall be made within 30 days of the date that the Commissioner approves this agreement. This shall not include any entitlement to benefits.

3. Payment until approval In accordance with N.J.S.A 18A:6-14 the District will pay Captain Charles W. Dreyer, Jr., his salary and benefits until the Commissioner approves the settlement.

4. Rationale for Settlement.

a. Board's Position. On or about October 15, 1996 the Department of the Army in a letter signed by Colonel Roy Zinser withdrew Captain Dreyer's authorization as a Army Junior ROTC instructor effective September 27, 1996. The District asserts that this withdrawal eliminates one of the two elements needed under N.J.A.C. 6:11-8.7 to obtain an endorsement under N.J.A.C. 6:11-6.2(a) 15 to teach military science in a New Jersey school system. To the District the endorsement is a nullity and without it, Captain Charles W. Dreyer, Jr., is not permitted to teach military science in this state. The present "tenure charge " is brought solely on the withdrawal of this authorization , which to the Board prevents him from teaching the course he was hired to teach and not on any finding of fault. The District denies any violation of Captain Dreyer's substantive or procedural rights in the manner in which the authorization was withdrawn. See: Rivkin v. Dover Tp.

Rent Leveling Board, 143 N.J. 352 (1996) The District further asserts that even if the allegation has merit the proper forum to air this allegation is in the proceedings provided by the Army not the present procedure

b. Dreyer's Position. Captain Charles W. Dreyer, Jr., asserts that the District's position is incorrect, that he still holds a valid endorsement as a teacher of military science, and that with the sole exception of Army J.R.O.T.C. he is still authorized to teach military science and to fill any position that requires only an instructional certification, but no particular endorsement.

Captain Charles W. Dreyer, Jr., also asserts that withdrawal of the Army's authorization was improperly brought about in derogation of both procedural and substantive rights which he possesses. This allegation asserts that the former high school principal falsely, maliciously and with neither notice nor a reasonable opportunity to be heard made disparaging reports on his job performance which led the Army to revoke his authorization. See: Washington v. Kirksey, 811 F2d. 561 (11th Cir., 1987).

c. Parties' Agreement. The parties agree that no formal authorization to file the reports was given by the Board and that none of the reports allege moral turpitude, criminal activity, or misconduct in office.

3. Public Benefit of Settlement The Board is aware of the public's interest in the proper handling of tenure charges to insure that unqualified persons do not continue to teach when diligence at this stage might prevent difficulties in the future. However, based on its review of the total circumstances which includes an evaluation of the time and expense in maintaining the tenure charge, the uncertainty

of the ultimate result which might be obtained, and the lack of any allegation that Captain Dreyer presents any threat to the children of New Jersey, the parties believe that it is in the best interests of the District, Captain Dreyer, and the public to resolve this matter by settlement. This Settlement resolves all claims against any entity or person which were or which could have been brought under the facts of this case either in this administrative proceeding or in any other forum having jurisdiction over any potential claim, suspension, or other legal action suggested by the facts under review, including any request by the Board for revocation or suspension of or action against Captain Charles W. Dreyer, Jr.'s teaching certificate. However, Captain Dreyer by signing this agreement acknowledges that he has been advised of the Commissioner's duty pursuant to N.J.A.C. 6:11-3.6 to refer tenure determinations for possible revocation of certificate. Except for this potential action, the settlement shall act as a bar to the assertion of these claims. In furtherance of this understanding it is agreed that:

a. The District will respond to all inquiries concerning Captain Charles W. Dreyer, Jr.'s employment with the District by providing the fact of such employment, his name, his title, his position, his salary, payroll record, length of service with the District, the amount and type of pension he is receiving, if any, and that he left the service of the District on the date that this Agreement is approved by the Commissioner for the reasons set forth in this Agreement which shall be made available to the extent required by Executive Order # 11 (1974) Section A Upon this settlement except as provided by law and Executive Order #11 (1994) Section A, the personnel file for Captain Charles W. Dreyer, Jr. will be sealed. If

access to the file is requested the District will provide notice of such inquires, the name of the inquirer, and the information supplied. to Captain Charles W. Dreyer, Jr. to his last known address. The above notwithstanding, Captain Dreyer shall be permitted access to his personnel file at times reasonable convenient to all parties.

b. Although the parties agree that its restoration will not create any right to re-employment with the District, the District agrees to use its good faith best efforts to have Captain Charles W. Dreyer, Jr.'s Authorization to teach Army J.R.O.T.C. restored by the Department of the Army. It agrees to issue a letter to be within 30 days of the Commissioner's approval reviewed and approved prior to submission by Captain Charles W. Dreyer, Jr.'s attorney to the Department of the Army. This letter will indicate that the Board of Education has not conducted any hearing to determine or evaluate any of the underlying facts involved in the withdrawal, has given no formal authorization to file the reports utilized in the Army proceeding, knows of no allegation in any such report which alleges moral turpitude, criminal activity, or misconduct in office, can not comment on the accuracy of any of the observations previously made by supervisors of the District, did not prior to the request for withdrawal ,authorize the request to be made, and notes that two (2) of the supervisors who had made earlier requests for withdrawal are no longer in the employ of the District. The District does not warrant that the Department of the Army will grant the request for authorization.

9/28/98 MC 10/26/98 10/22/98

c. By signing this stipulation Captain Dreyer waives any right to re-employment with the District in any job title or classification. This agreement, however, does not prevent or bar re-employment of Captain Charles W. Dreyer, Jr.

by the District.

d. Within 30 days of the date of this agreement is approved, the parties agree to issue a joint public statement which will indicate that the proceedings were not based on any allegation of wrongdoing or misconduct on the part of Captain Dreyer.

e. Within 30 days of the date of this agreement is approved by the Commissioner the parties agree to issue a letter of recommendation covering Captain Charles Dreyer, Jr.'s employment with the District. This statement shall be approved by Captain Dreyer's counsel prior to issuance. The statement shall be issued at any time another employer seeks comment on Captain Dreyer's employment with the District.

IN WITNESS HEREOF the parties have set there hands and seals this 26th day of October 1998

Attest:

Witness

Pemberton Board of Education

By

Captain Charles W. Dreyer, Jr. 9/28/98

H:\MUN\PBED\DOCS\STIPSET3

OAL DKT. NOS. EDU 2645-98 and EDU 615-97 (ON REMAND)
AGENCY DKT. NO. 3-1/97

IN THE MATTER OF THE TENURE	:	
HEARING OF CAPTAIN CHARLES DREYER,	:	
SCHOOL DISTRICT OF THE TOWN-	:	COMMISSIONER OF EDUCATION
SHIP OF PEMBERTON, BURLINGTON	:	DECISION ON REMAND
COUNTY.	:	
	:	

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

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement. This matter shall be referred to the State Board of Examiners pursuant to *N.J.A.C.* 6:11-3.6 for action against respondent's certificate as it deems appropriate.*

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

January 4, 1999
Date of Mailing, January 4, 1999

(SB) 2-99

SBE #469-04/98-169
SB # 2-99
SB # 55-99

IN THE MATTER OF THE REVOCATION :
OF THE TEACHING CERTIFICATES OF : STATE BOARD OF EDUCATION
THERESA A. LUCARELLI BY THE STATE : DECISION
BOARD OF EXAMINERS. :

Decided by the State Board of Examiners, November 5, 1998

Remanded by the State Board of Education, May 5, 1999

Decision on remand by the State Board of Examiners, September 23, 1999

For the Petitioner-Respondent, Arlene G. Lutz, Deputy Attorney General (John J. Farmer, Attorney General of New Jersey)

For the Respondent-Appellant, Wills, O'Neill & Mellk (Arnold M. Mellk, Esq., of Counsel)

On September 23, 1999, the State Board of Examiners rendered a decision in which it determined that the teaching certificates of Theresa A. Lucarelli (hereinafter "appellant") should be revoked due to unbecoming conduct. In an earlier decision, the Commissioner of Education had ordered that the appellant be dismissed from her tenured employment in the Brielle School District for threatening the Superintendent of Schools in a series of handwritten notes.

On December 17, 1999, the appellant filed a notice of appeal from the Board of Examiners' decision to the State Board of Education. By letter dated January 6, 2000, the Director of the State Board Appeals Office acknowledged receipt of that notice and

Apr. 5, 2000

advised the appellant that the State Board had not yet received the record in this matter, which was to be certified to it by the Attorney General's Office on behalf of the Board of Examiners pursuant to N.J.A.C. 6:2-1.8(b). Consequently, the briefing schedule was placed into abeyance pending receipt of the record.

By letter dated February 7, 2000, the Director of the State Board Appeals Office advised the appellant that the record had now been certified to the State Board. The Director added:

> Perusal of the record, however, reveals that the decision by the State Board of Examiners, which is the subject of this appeal, was rendered on September 23, 1999. N.J.S.A. 18A:6-29 requires that notice of appeal to the State Board must be taken within 30 days after the Board of Examiners has filed its decision. See N.J.A.C. 6:2-1.3. Pursuant to N.J.A.C. 6:2-1.4(a), the decision of the Board of Examiners is deemed filed three days after the date of mailing to the parties. In this instance, the exact date of mailing is not evident from the record. However, the Board of Examiners' decision does indicate that it was mailed "September, 1999." Even assuming that the decision was mailed on September 30, you were was required to file a notice of appeal on or before November 3, 1999 under the statutory time limit that governs appeals to the State Board of Education.
>
> Since your notice was not filed until December 17, this matter has been referred to the Legal Committee of the State Board of Education for consideration of the effect of your failure to file timely notice. If you wish to provide an explanation for such filing, you must do so by filing an original and 17 copies of an affidavit setting forth your explanation by February 22, 2000. The briefing schedule will remain in abeyance pending the Legal Committee's review of this issue.

On February 16, 2000, the counsel for the appellant submitted a certification in support of the filing date of the appeal. In his certification, counsel for the appellant indicated that the Board of Examiners' decision, although dated September 23, 1999,

had not been mailed until November 12, and that he had not received it until November 15. He attached a copy of the envelope from the Board of Examiners, which shows a postage meter date of November 12, along with a copy of the cover sheet from the Board of Examiners' decision time-stamped in his office on November 15.

Counsel for the appellant acknowledged that his notice of appeal had still been filed two days late, but averred that his secretary had miscalculated the filing deadline. He attached a certification from his secretary, who confirmed that she had miscalculated the due date for the appeal by two days.

Pursuant to N.J.S.A. 18A:6-28, appeals to the State Board must be taken "within 30 days after the decision appealed from is filed." The State Board may not grant extensions to enlarge the time specified for appeal. N.J.A.C. 6:2-1.5(a). In contrast to the period for filing petitions to the Commissioner of Education, see N.J.A.C. 6:24-1.2; N.J.A.C. 6:24-1.15, the time limit within which an appeal must be taken to the State Board is statutory, and, given the jurisdictional nature of the statutory time limit, the State Board lacks the authority to extend it. Mount Pleasant-Blythedale Union Free School District v. New Jersey Department of Education, Docket #A-2180-89T1 (App. Div. 1990), slip op. at 5. The Appellate Division has "consistently concluded" that appeals must be timely filed and that "neither an agency nor our court on appeal may expand a mandatory statutory time limitation." In the Matter of the Special Election of the Northern Burlington County Regional School District, Docket #A-1743-95T5 (App. Div. 1996), slip op. at 3, citing Scrudato v. Mascot Sav. & Loan Ass'n, 50 N.J. Super. 264 (App. Div. 1958).

As the Court explained in Scrudato, supra, at 269: "Where a statute sets up precise time limits within which an aggrieved party may seek recourse to administrative adjudication, those limits have been held mandatory and not subject to relaxation. The agency is without power to waive them and proceed to hearing and determination notwithstanding noncompliance." The Court in Scrudato found that the fact that an application to the Commissioner of Banking and Insurance was filed only two days after the statutory deadline for such filing did not mitigate the invalidity of such action. The Court stressed that "[e]ven a minor deviation from the statutory limit in a particular case is fatal....This is not a mere technicality, but fundamental to the proper and necessary restraint of the exercise of judicial and administrative discretion. The remedy for results that either tribunal may deem unjust or unwise lies not in disregard of the statutory limitation, but in corrective legislation." Id. at 271.

In Schaible Oil Co. v. New Jersey Dept. of Envtl. Protection, 246 N.J. Super. 29 (App. Div. 1991), certif. denied, 126 N.J. 387 (1991), the Court stressed that "[f]irmly embedded in our law is the principle that '[e]nlargement of statutory time for appeal to a state administrative agency lies solely within the power of the Legislature...and not with the agency or the courts.' Hess Oil & Chem. Corp. v. Doremus Sport Club, 80 N.J.Super. 393, 396, 193 A.2d 868 (App. Div. 1963), certif. denied, 41 N.J. 308, 196 A.2d 530 (1964) (citations omitted)...."

In Yorke v. Board of Education of the Township of Piscataway, decided by the State Board of Education, July 6, 1988, aff'd, Docket #A-5912-87T1 (App. Div. 1989), the Court upheld the dismissal of an appeal by the State Board where it found that the notice of appeal had been filed one day late by the appellant's counsel, who alleged that

he had misread or misunderstood the applicable regulations. The Court added that even if the statute could be construed to permit enlargement of the time for filing an appeal, the appellant therein had failed to establish good cause. See also In the Matter of the Grant of the Charter School Application of the International Charter School of Trenton, etc., Docket #A-004932-97T1 (App. Div. 1998) (the Court, upon reconsideration, upheld the State Board's dismissal of an appeal filed one day late).

In the instant case, the Board of Examiners' decision was rendered on September 23, 1999 and, according to the information provided by the appellant, mailed on November 12. Accordingly, pursuant to N.J.A.C. 6:2-1.4, the decision appealed from was deemed filed on November 15, 1999, three days after it was mailed. Therefore, as mandated by N.J.S.A. 18A:6-28, see N.J.A.C. 6:2-1.3(a); N.J.A.C. 6:2-1.4(a), as computed under N.J.A.C. 6:2-1.4(b), the appellant was required to file his notice of appeal to the State Board on or before December 15, 1999. As previously indicated, the appellant's notice of appeal was not filed until December 17.

Even if N.J.S.A. 18A:6-28 can be construed to provide us with the authority to enlarge the time limit for filing an appeal, we find no substantive basis to warrant doing so in this particular instance. While counsel for the appellant avers that the late filing resulted from a miscalculation by his secretary, it ultimately was his responsibility to assure compliance with the statutory filing requirements.

Accordingly, we dismiss the appeal in this matter for failure to file notice thereof within the statutory time limit as computed under the applicable regulations.

April 5, 2000

Date of mailing APR [illegible] 2000

3-99

IN THE MATTER OF THE TENURE	:	
HEARING OF DIANNE DAVIS, STATE-	:	
OPERATED SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
CITY OF NEWARK, ESSEX COUNTY.	:	DECISION
	:	

January 4, 1999

State of New Jersey
Office of Administrative Law

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3960-97
AGENCY DKT. NO. 84-3/97

IN THE MATTER OF THE TENURE HEARING OF DIANNE DAVIS, STATE-OPERATED SCHOOL DISTRICT OF CITY OF NEWARK

Gregory G. Johnson, Esq., for petitioner

Robert T. Picket, Esq., for respondent

Record Closed: October 5, 1998 Decided: November 19, 1998

BEFORE **ELINOR R. REINER**, ALJ:

This matter involves tenure charges of unbecoming conduct and gross insubordination certified by the State-Operated School District of the City of Newark (District) against Dianne Davis under the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 to -18.1.

Dianne Davis is a tenured teaching staff member employed by the District. Tenure charges wee filed against Ms. Davis on February 11, 1997. By resolution adopted on March 4, 1997, the state district superintendent found the existence of probable cause to certify tenure charges which, if true, are sufficient to warrant dismissal or reduction in salary. Basically, the charges allege that Ms. Davis committed seven separate acts constituting unbecoming conduct during the school years 1993/94 and 1994/95. The charges further allege that respondent has failed to comply with the

directive to undergo a psychiatric examination. As a result of her determination, the state district superintendent suspended Ms. Davis without pay effective March 4, 1997.

On March 16, 1997, the district filed its written tenure charges with the Commissioner of Education (Commissioner). Respondent filed an answer on April 11, 1997. Subsequently, on April 21, 1997, the Commissioner transmitted this matter to the Office of Administrative Law (OAL) for determination as a contested case.

The matter was assigned to the undersigned judge on May 21, 1997. After notice to all parties, a telephone prehearing conference was held on June 30, 1997 and a hearing scheduled for June 8, 9, 10, 11 and 12, 1998 at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey. The matter was heard on June 8, 9, 10 and 12, 1998. Prior to the continuation of the hearing, the parties agreed to a settlement, subject to approval by the Commissioner.

In accordance with the decision of the State Board of Education in *Cardonick v. Brooklawn Bd. of Educ.,* 193 *S.L.D.* ___ (State Board April 6, 1983), the record of any proposed settlement must include:

> . . . the nature of the charges, circumstances justifying the settlement, consent or authorization by the board of education and the teacher to the proposed agreement, the Administrative Law Judge's finding that the teacher entered into the agreement with a full understanding of his rights, and (a finding) that the agreement is consistent with the public interest.

On August 17, 1998, the parties appeared and the terms of the settlement were placed on the record. Counsel for both parties set forth the reasons why the settlement would be in the public interest. In addition, the parties have prepared a stipulation of settlement, which is attached and fully incorporated in this decision. The state district superintendent approved the settlement terms on September 16, 1998.

Based on my review of the record, I **FIND** that the proposed settlement is consistent with the public interest for the following reasons:

1. Dianne Davis has been employed as a teacher by the District or its predecessor for a number of years.

2. It is anticipated that continuation of the hearing in this matter would require additional hearing dates and would be costly. The parties would incur additional costs of paying their attorneys for the remainder of the trial, as well as for post submission briefs.

3. Under the proposed terms of settlement, Ms. Davis will resign from her position effective December 1, 1998. In exchange, she would receive her salary and health benefits until December 1, 1998.

4. Under the best of circumstances, it is unlikely that the tenure hearing would be concluded, an initial decision rendered by the administrative law judge and a final decision by the Commissioner prior to that date. Regardless of whether it won or loss, the district would incur the expense of paying Ms. Davis' annual salary probably at least until that point.

5. Ms. Davis suffers from a medical condition. She has essentially admitted a psychiatric disorder by evidencing her intent to apply for a disability retirement based upon *inter alia* evidence of this disorder. As such, continuation of the hearing would not be in her interest or the public's interest.

6. An essential provision of the agreement obligates Ms. Davis to voluntarily relinquish her teaching certificates within thirty days from the date of final approval of the settlement agreement by the Commissioner. Further, Ms. Davis is aware that, pursuant to *N.J.A.C.* 6:11-3.6, the Commissioner of

Education may refer this matter to the State Board of Examiners for any action which it may deem appropriate.

7. Before entering into this agreement, Ms. Davis fully understood her rights and had an adequate opportunity to consult with legal counsel.

8. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that the terms of the settlement are in the public interest.

It is **ORDERED** that the parties comply with the settlement terms and that the proceedings are hereby concluded.

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

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

November 19, 1998
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

11/24/98
DATE

Receipt Acknowledged:
D. W. Cantanucci Jr.
DEPARTMENT OF EDUCATION

NOV 30 1998
DATE

Mailed to Parties:
Barbara A Hen
OFFICE OF ADMINISTRATIVE LAW

al

Received 10/5/98 SR.

Gregory G. Johnson, Esq.
17 Academy Street, Suite 208
Newark, New Jersey 07102
973-642-0001
Attorney for Newark Public Schools

IN THE MATTER OF THE TENURE HEARING OF DIANNE DAVIS

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK

BEFORE THE COMMISSIONER OF EDUCATION
OFFICE OF ADMINISTRATIVE LAW

OAL Docket No. EDU 3960-97N

STIPULATION OF SETTLEMENT

This Agreement made on August 17, 1998, by and between the parties, petitioner State-Operated School District of the City of Newark ("District"), and respondent Dianne Davis, a tenured teacher, residing at 827 West 8th Street, Plainfield, New Jersey 07063.

WHEREAS, Ms. Davis is a tenured teacher employed by the District;

WHEREAS, on or about February 11, 1997, tenure charges were filed against Ms. Davis based upon numerous acts of conduct unbecoming and for acts of insubordination, including refusal to comply with a directive to undergo a psychiatric examination;

WHEREAS, on March 4, 1997, the State District Superintendent acted to certify the charges against Ms. Davis, and suspended her for a 120 day suspension without pay pending a hearing pursuant to *N.J.S.A.* 18A:6-14.

WHEREAS, on or about April 11, 1997, Ms. Davis's attorney filed an Answer denying the Charges with the Commissioner of Education; and

WHEREAS, in light of the nature of charges, and medical condition of the respondent, it is in the best interest of the parties to resolve the charges before the Commissioner of Education;

NOW THEREFORE BE IT RESOLVED, the parties hereby stipulate and agree as follows:

1. Ms. Davis intends to immediately apply for a disability retirement based upon *inter alia* evidence of a psychiatric disorder. The District will not oppose Ms. Davis' application for disability retirement.

2. The District agrees to withdraw the tenure charges in this case. Ms. Davis hereby resigns her teaching position, effective December 1, 1998. (See attached letter as Exhibit "A")

3. Ms. Davis is entitled to her full salary and health benefits until December 1, 1998. Ms. Davis agrees never to seek employment with the District in the future.

4. Ms. Davis specifically acknowledges that she has been advised of the duty of the Commissioner of Education pursuant to *N.J.A.C.* 6:11-3.6(a)(1) and *In re Cardonick* concerning referral to the State Board of Examiners for possible action regarding Ms. Davis's teaching certification. Ms. Davis agrees to voluntarily relinquish her teaching certificates within 30 days from the date of final approval of the Settlement Agreement by the Commissioner.

5. The parties respectively acknowledge that each has had ample opportunity to seek independent legal counsel, financial or other advice regarding this Agreement, and that each is signing this Agreement freely and voluntarily, without coercion, duress or pressure from the other party.

6. This Agreement constitutes the full Agreement between the parties.

7. By entering this Agreement, each party releases and discharges the other with respect to all claims or rights that either party may have against the other. This includes all claims, including those of which either party is not aware and those not mentioned herein. It specifically includes all claims which Ms. Davis may have respecting tenure, discrimination

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5b

on any basis, rights under any collective bargaining agreement, disability payments, sick leave, salary or any other matter pertaining to her employment, except the salary and benefits granted in Paragraph X 3.

8. This Agreement is subject to approval by the State District Superintendent, Office of Administrative Law, and Commissioner of Education.

FOR THE EMPLOYEE

X _____
Dianne Davis

Dated: 8/17/98

_____
Robert T. Pickett, Esq.
Attorney for Ms. Davis

Dated: 8/17/98

FOR THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK

_____
Dr. Beverly L. Hall

Dated: 9/16/98

_____
Gregory G. Johnson, Esq.

Dated: Aug. 17, 1998

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Aug-13-98 02:30P

5C

August 17, 1998

Dr. Beverly L. Hall
State District Superintendent
Newark Public Schools

Dear Dr. Hall:

In accordance with the Settlement Agreement, I hereby resign my tenured teaching position effective December 1, 1998.

Very truly yours,

Dianne Davis

EXHIBIT "A"

AUG-13-98 02:30P P.05

Robert T. Pickett
Attorney At Law
303 Hartford Road
South Orange, New Jersey 07079

(973)378-2480
(973)378-8806 fax

RECEIVED
OFFICE OF GENERAL COUNSEL
98 SEP 10 PM 12:0

September 2, 1998

Gregory G. Johnson, Esq.
Attorney At Law
17 Academy Street
Newark, New Jersey 07102

Re: In The Matter of the Tenure Hearings of Diane Davis
OAL Docket Nos. EDU 10912-96N

Dear Mr. Johnson:

As a follow-up to our discussion last week and your recent correspondence regarding our understanding on the settlement in this matter, please note my agreement and understanding that the 120 day salary withheld by the school district has been waived by the Respondent. It was never her understanding that she was entitled to that salary in light of the proposed Stipulation of Settlement. I thought the proposed agreement was clear on that point.

Thank you for your kind consideration. If there are any questions, please call.

Very truly yours,

Robert T. Pickett

Robert T. Pickett

RTP:lc

OAL DKT. NO EDU 3960-97
AGENCY DKT. NO. 84-3/97

IN THE MATTER OF THE TENURE	:	
HEARING OF DIANNE DAVIS, STATE-	:	
OPERATED SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
CITY OF NEWARK, ESSEX COUNTY.	:	DECISION
	:	

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

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

In accordance with the terms of the settlement agreement this matter shall be transmitted to the State Board of Examiners for action against respondent's certification. In this regard, it is directed that the original of each instructional certificate issued by the State Board of Examiners possessed by respondent be submitted by respondent's attorney to the State Board of Examiners by certified mail within 30 days of the date of this decision, together with a sworn statement of respondent that she does not oppose the revocation of such certificate(s).*

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

January 4, 1999
Date of Mailing, January 4, 1999

4-99

CONCETTA B. CAPONEGRO, VIRGINIA DEVANE, HOWARD JOHNSON, NORMAN JEFFRIES AND BESSIE WHITE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners, senior staff whose positions were abolished during State takeover, alleged they were improperly denied 60 days' pay and that due to contracts of employment, each petitioner should have been awarded his or her full position for the entirety of the 1995-96 school year. District contended implied contracts did not exist between petitioners and the District.

ALJ concluded that petitioners were not entitled to their full salary for the 1995-96 school year, finding that their claim of an implied employment contract failed because any claims based on law or contract are superseded by *N.J.S.A.* 18A:7A-44(a) and 7A:42a(3). ALJ determined, with the exception of Petitioner Johnson whose position was terminated in accordance with *N.J.S.A.* 18A:7A-42(a)(3), petitioners' claim to payment for 60 calendar days was granted. Petitioners' claim for payment of accrued sick, vacation and personal leave days was denied, as the statute does not provide for such relief. District was to determine whether petitioners had received the appropriate payment as established by the ALJ.

Commissioner affirmed, with clarification.

January 4, 1999

State of New Jersey
Office of Administrative Law

INITIAL DECISION

OAL DKT. NO. EDU 11980-95

AGENCY DKT. NO. 370-9/95

CONCETTA B. CAPONEGRO,
VIRGINIA DEVANE, HOWARD JOHNSON,
NORMAN JEFFRIES and BESSIE WHITE,
Petitioners,
v.
STATE-OPERATED SCHOOL DISTRICT OF
THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Sanford R. Oxfeld, Esq., for petitioners
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Philip E. Stern, Esq., for respondent
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: November 18, 1998 Decided: November 18, 1998

BEFORE **ELINOR R. REINER**, ALJ:

On September 18, 1995, petitioners Concetta B. Caponegro, Virginia Devane, Howard Johnson, Norman Jeffries and Bessie White filed a petition of appeal with the Commissioner of Education alleging that they were each improperly denied 60 days' pay and that due to implied contracts of employment, each petitioner should be

awarded his or her full position for the entirety of the 1995-96 school year. Respondent filed an answer on November 1, 1995, alleging *inter alia* that implied contracts do not exist between any of the petitioners and respondent and that petitioners are not entitled to additional compensation for any accumulated vacation, personal or sick days or to 60 days' pay pursuant to *N.J.S.A.* 18A:7A-44.

On November 6, 1995, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The matter was assigned to the undersigned judge on December 15, 1995. A prehearing conference was held on March 11, 1996, and the hearing was scheduled to begin on September 30 1996, at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey. The parties appeared on September 30, 1996, at which time the issues were isolated and the hearing was held. The matter continued on October 1, 1996, November 19, 1996, November 26, 1996, and January 23, 1997. At the conclusion of the hearing, the parties acknowledged that the record might have to be supplemented. By letter dated March 14, 1997, respondent's attorney indicated that the record should remain open pending respondent's review of its records and possible settlement of the matter. By letter dated July 11, 1997, counsel for petitioners requested that the stipulation entered into by the parties stand and that the matter proceed to conclusion. Additional conferences were held thereafter in regard to possible resolution of the matter, etc., and on April 27, 1998, the parties appeared and a briefing schedule was established. The briefing schedule was subsequently revised and the record closed after the submission of all documentation.

ISSUES

The parties have agreed to the following:

Devane Issues:

1. Whether the statute, *N.J.S.A.* 18A:7A-44(a), applies to Devane, who is not a civil service employee and is an at-will employee?

   a. If the statute applies, does the statute contemplate 60 calendar days or 60 work days?

2. Is Devane entitled to accumulated vacation, sick and personal days?

   1. If Devane is entitled to accumulated vacation days is she entitled to an entire year's credit, if notified of termination after July 1?

3. Was there an implied contract of employment for the 1995-96 school year, July 1, 1995 – June 30, 1996?

White Issues:

1. Is White entitled to any salary for the period September 9, 1995, until October 2, 1995, pursuant to *N.J.S.A.* 18A:7A-44(a)?

2. Is White entitled to accumulated vacation, sick, and personal days?

   a. If White is entitled to accumulated vacation days is she entitled to an entire year's credit, if notified of termination after July 1?

Caponegro Issues:

1. Is Caponegro entitled to accumulated vacation, sick and personal days?

a. If Caponegro is entitled to accumulated vacation days is she entitled to an entire year's credit, if notified of termination after July 1?

Jeffries Issues:

1. Was there an implied contract of employment for the 1995-96 school year, July 1, 1995 – June 30, 1996?

2. Does *N.J.S.A.* 18A:7A-44(a) contemplate 60 calendar days or 60 work days?

3. Is Jeffries entitled to accumulated vacation, sick and personal days?

a. If Jeffries is entitled to accumulated vacation days is he entitled to an entire year's credit, if notified of termination after July 1?

Johnson Issues:

1. Is Johnson entitled to accumulated vacation, sick and personal days?

a. If Johnson is entitled to accumulated vacation days is he entitled to an entire year's credit, if notified of termination after July 1?

2. Was there an implied contract of employment for the 1995-96 school year, July 1, 1995 – June 30, 1996?

FACTS

The stipulated facts, which provide some background to this matter, may be summarized as follows:

Virginia Devane:

A. Devane received a letter dated July 21, 1995 (J-3) stating that she was an "at-will" employee and was being terminated immediately. She was given no other position.

B. She did not receive 60 days' pay; she received no pay.

C. She did not receive accumulated vacation, sick and personal days.

D. She was hired in September 1971.

E. She was not a civil service employee.

F. She was executive director for Board affairs.

Bessie White:

A. White received a letter dated July 12, 1995 (J-4) stating that pursuant to *N.J.S.A.* 18A:7A-44(a) her position was abolished. She was given no other position.

B. She received salary for the period from July 12, 1995, to September 8, 1995.

C. She did not receive accumulated vacation, sick or personal days.

D. She was hired in January 1973.

E. As a civil service employee she received a preliminary notice of disciplinary action (J-8) dated September 18, 1995, and a final notice of disciplinary

action dated February 16, 1996, authorizing her removal effective October 2, 1995. The matter is now before the Merit System Board.

F. She was executive director of management and budget.

Connie Caponegro:

A. Caponegro received a letter dated July 12, 1995 (J-10) stating that pursuant to *N.J.S.A.* 18A:7A-44(a) her position of acting executive director was being abolished. She was returned to her position of assistant personnel director.

B. She received a salary for assistant personnel director for 60 calendar days.

C. As a civil service employee, she received a preliminary notice of disciplinary action (J-11); she is still awaiting a hearing officer's decision.

D. She was hired in November 1982.

E. She received no vacation, sick or personal days.

F. She was on a paid suspension from August 16, 1995, until March 13, 1996.

Norman Jeffries:

A. Jeffries received a letter dated July 12, 1995, stating that his position of executive controller was being eliminated.

B. He received no other position.

C. He received 45 days' pay for 60 calendar days.

D. He was hired in October 1975.

E. He received sick days at a one-to-three ratio.

F. He did not receive vacation or personal days.[1]

Howard Johnson:

A. Johnson received notification dated July 12, 1995 (J-16) advising him that pursuant to *N.J.S.A.* 18A:7A-42(a)(3) his employment as chief auditor was being terminated.

B. He received no other position.

C. He received no pay.

D. He received accumulated vacation pay. He received credit for 1.66 days for July 1995 (J-18; J-19).

E. He did not receive sick days or personal days.

F. His date of hire was December 15, 1971.

[1] See Foot Note #7 below.

TESTIMONY

First to testify was Dr. Joseph M. Capello, business administrator of the Millburn Board of Education. He was employed by the Newark Board of Education as the acting State-operated district's superintendent from July 12, 1995, to July 15, 1996. He served as the auditor general for the State from September 1, 1995, to July 12, 1996. He testified that senior staff members were all senior executives who served at the pleasure of the executive superintendent, Eugene Campbell. He referred to his memorandum (P-1) to Campbell in which he confirmed Campbell's comment that senior staff members are "not issued employment contracts but serve at his pleasure." Capello also stated that Campbell had informed him that if senior staff do not receive letters of termination by the end of the school year they are renewed for the forthcoming school year. He received a memorandum from Campbell which confirmed his understanding (P-2). He testified that on June 28, 1995, Devane was a senior executive, director of board affairs. Johnson was not a member of the senior staff; he was chief auditor. Jeffries was an at-will employee, not a senior cabinet member. Capello said that the assistant executive superintendent and the senior executive director constituted the senior cabinet. He stated that Bessie White was senior staff and Caponegro was not senior staff. He further indicated that level-one staff means the same as senior staff.

Capello further testified that when he left the employ of the Newark school board he received vacation days and 1 sick day for every 5 sick days he had accumulated. On cross-examination, he referred to a memo to senior staff and all at-will employees dated June 29, 1995, from Eugene C. Campbell. He indicated that senior staff can be at-will employees and serve at the pleasure of the board. Although he stated that the superintendent made senior staff appointments, he did not recall if the superintendent required board approval for those appointments.

Next to testify was Eugene C. Campbell, employed by the Newark Board of Education from September 1960 until October 1995. The State took over the district on

July 12, 1995. He served as executive superintendent from December 1984 until October 1995. Campbell explained that those who reported directly to him received a letter of termination if they were not to be employed for school year 1995-96. He also sent a letter advising of employment for the following school year. He stated that Caponegro was the executive director of human resource services. She was part of the senior staff and an at-will employee. Campbell said that Devane, Johnson, Jeffries and White were also part of the senior staff and at-will employees.

Campbell also testified to the vacation-day policy. He indicated that all senior staff were twelve-month employees and each July received 20 days' vacation. Pursuant to board policy, there was a cap on the number of vacation days that could be accumulated. It was either 40 or 60 days unless he permitted the employee to go beyond that number. Campbell approved the utilization of vacation days and could authorize the employee to carry over more days. All of the petitioners were permitted to carry over whatever days they had accumulated. Further, some individuals did not work the entire year, but received all of their vacation days. Campbell testified that senior staff received 1 day's pay for every 3 sick days accumulated. Upon leaving the position at the end of the year, senior staff could turn in their sick days and get paid. Personal days were treated the same.

On cross-examination, Campbell indicated that the board did not have to vote on his appointment decisions. However, he always made sure that he notified the board of these decisions, if not for a board vote then for informational purposes (P-3). He did not know any senior staff member who did not receive 20 vacation days up front or did not receive 20 vacation days if he or she left before the end of the school year. He said that senior staff received 3 personal days per year even if they left in the middle of the year. He was not sure if senior staff could accumulate personal days.

On further examination, Campbell said that during the State takeover, he advised Capello that he had offered employment to the senior staff. He informed Capello around June 28 or 29, 1995, of his intention to reemploy the senior staff. On

cross-examination, he admitted that he had not told the deputy commissioner of education or the assistant commissioner of education of his reemployment of the senior staff. He informed them of the staff members at issue here and also made a specific plea for the internal audit department.

Concetta Caponegro testified that on the last day that she worked, August 16, 1995, individuals were employed as senior staff. Senior staff had three choices in regard to personal days: they could use them, lose them if not utilized by June 30, or buy 1 day's pay for 3 personal days prior to June 30. They could also add personal days to sick days and buy them back on a one-to-three ratio.

Howard A. Johnson testified that he began working as a principal clerk on December 15, 1971, and became permanent in the position of senior accountant in 1984. He received a letter dated September 29, 1995, from acting internal counsel Hope R. Blackburn (J-18) in regard to accrued vacation days through July 12, 1995. Blackburn wrote that Johnson would receive a credit of 30.16 days, including a credit of 1.66 days for July 1995 vacation days. His paycheck reflected this. He alleged that he should have received 48.5 vacation days, 28.5 carried over plus 20 days up front. Instead, he received 28.5 plus 1.66. He stated that this had never been pro-rated before and that a number of individuals received the full 20 days. He further testified that he had 31 available sick days and 3 personal days and that in the past he was paid for sick days on a one-to-three ratio.

Adele White-Eutsey, employed by respondent as the supervisor of payroll, testified for respondent. She was responsible for processing and administering payments to District employees in the form of salary, etc. She explained the vacation day policy in regard to confidential or executive staff employees. Although such an employee would receive 20 vacation days on July 1, if the employee left before the end of the school year, the employee would receive only the number of months worked times 1.66 for vacation days. If an employee worked beyond the fourteenth of a month, the employee would receive the full entitlement for that month. She said that no

employee would receive the entire year's allotment unless he or she worked the full year.

On cross-examination, White-Eutsey explained that there was a policy as to how many vacation days an employee could accrue. Senior management could accrue three years' worth, and all other titles could accrue two years' worth. She testified that Howard Johnson was not senior management, so he could accrue a maximum of 40 days. Referring to J-19, she indicated that the excess 8.5 days over the 40 days that Johnson had accrued would be deducted. Since in the past there was a problem as to who was senior staff and who was not, she was not surprised that Eugene Campbell said that Johnson was senior staff.

White-Eutsey further explained that senior staff did not get paid for accumulated sick days unless at the end of the year they bought back sick and personal days. (Senior staff would receive payment for sick days on a one-to-three ratio if requested by the end of June.) An employee could accrue sick days, but if the employee left there was no buying back the sick days; an active employee could buy back personal and sick days. Also, an employee could get payment for sick days on a one-to-five ratio on retirement. She testified that since Caponegro, Devane, White and Jeffries were senior staff, they could each receive payment for personal and sick days on a one-to-three ratio, 1.66 vacation days for each month they worked beyond the fourteenth day of the month, and 60 accrued vacation days. Johnson was not senior staff; he received the maximum of 40 accrued vacation days plus 1.66 vacation days for each month he worked beyond the fourteenth day of the month. He could buy back sick days on a one-to-four ratio.

In further testimony, White-Eutsey stated that payments were made to petitioners, but she could not determine what was paid to them. She did not have the specific documentation to determine this. She contended that she would have to check her records to determine whether the individuals received the vacation days they should have received. She stated that all but Johnson should receive 60 vacation

days' pay. They would not receive payment for sick and personal days unless they had requested it by the end of June. She further opined that they should have received 60 calendar days' pay upon termination.

DISCUSSION

On July 12, 1995, the State Board of Education created a State-operated school district in the city of Newark pursuant to *N.J.S.A.* 18A:7A-34 to -52. Petitioners were employed by the Newark Board of Education until their positions were abolished in the takeover. Concetta B. Caponegro was the executive director of human resources; Virginia Devane was the executive director of the office of board affairs; Howard Johnson was the chief auditor of the internal audit department; Norman Jeffries was the executive controller; and Bessie White was the executive director of management and budget. The positions of petitioners Caponegro, Devane, Jeffries and White were abolished in accordance with *N.J.S.A.* 18A:7A-44(a), while Johnson's position was abolished in accordance with *N.J.S.A.* 18A:7A-42(a)(3).

Petitioners contend that they were separated from employment without receiving proper compensation from the State-Operated School District of the City of Newark ("District"). Specifically, petitioners maintain that they are entitled to their full salary for the 1995-96 school year because of the existence of an implied employment contract between them and the Newark Board of Education. If an implied employment contract did not exist, petitioners maintain that they are entitled to payment for 60 work days instead of 60 calendar days and payment for the sick, vacation and personal leave days they accumulated until their date of separation from employment.

Implied Employment Contract Claim

Petitioners assert that they entered into an employment agreement based on former superintendent Eugene Campbell's assurances that they would be employed for the 1995-96 school year. Petitioners also assert that the former superintendent

confirmed his decision in a memorandum dated June 29, 1995, which stated, "Please be informed that you are notified that your employment will continue for the 1995-1996 school year." Consequently, petitioners contend that they justifiably relied upon the superintendent's assurances that they would continue to be employed by the Newark Board of Education from July 1, 1995, until June 30, 1996.

The statutory provision under which petitioners' (except for Howard Johnson)[2] positions were abolished provides in pertinent part:[3]

> *Notwithstanding any other provision of law or contract*, the positions of the district's chief school administrator and those executive administrators responsible for curriculum, business and finance, and personnel shall be abolished upon creation of the State-operated school district. The affected individuals shall be given 60 days' notice of termination or 60 days' pay. *The notice or payment shall be in lieu of any other claim or recourse against the employing board or the school district based on law or contract.*
>
> [*N.J.S.A.* 18A:7A-44(a) (emphasis added).]

The statutory provision establishes the rights petitioners have after the abolishment of their positions. Petitioners are entitled to 60 days' notice or 60 days' pay. The explicit language of the statute provides that the notice or payment "shall be in lieu of any other claim or recourse against the employing board or the school district based on law or contract." *Ibid.*

---

[2] Petitioner, Howard Johnson's termination was in accordance with *N.J.S.A.* 18A:7A-42(a)(3) which provides only for his immediate termination upon creation of the State-Operated School District. As such, for the reasons set forth in this section, Johnson is also not entitled to payment under an implied employment contract.

[3] Petitioners admit that they were properly terminated pursuant to *N.J.S.A.* 18A:7A-44(a). They make no assertion nor do they provide evidence that they were in fact terminated pursuant to *N.J.S.A.* 18A:7A-44(c).

Even if a contract existed,[4] the statutory provision takes precedence over the contract. This interpretation conforms with the legislative intent. The Public School Education Act of 1975, *N.J.S.A.* 18A:7A-1 to -52, provides the State-operated school district with strong powers to modify and amend the practices of previously ineffective or failed local school administrations. The Department of Education has accepted responsibility for monitoring or taking over local public schools and providing corrective action. *City Ass'n of Supervisors and Adm'rs v. State-Operated Sch. Distr. of the City of Newark*, 311 *N.J. Super.* 300 (App. Div. 1998).

Once the determination has been made that the State will take over a school district pursuant to *N.J.S.A.* 18A:7A-34 to -52, certain procedures must be followed. *N.J.S.A.* 18A:7A-44(a) provides for the abolishment of the positions of the district's chief school administrator and the executive administrators. *N.J.S.A.* 18A:7A-44(b) and (c) set forth the reorganization procedures the State district superintendent must follow with respect to the district's central administrative and supervisory staff. The statutory language clearly establishes the Legislature's intent to have a complete restructuring of a school district the State has determined to be mismanaged. That intent would be thwarted if persons employed by the former school district were allowed to remain in their positions because of employment contracts with the former school district. Consequently, petitioners are not entitled to payment under an implied employment contract, but are entitled under *N.J.S.A.* 18A:7A-44(a) to receive 60 days' notice or 60 days' pay.

[4] It is noteworthy that even if petitioners can explain how this implied contract claim can be maintained in light of the explicit statutory prohibition, they have failed to demonstrate that notification from the former superintendent constituted a legally binding contract absent ratification by the former Newark Board of Education.

"60 days' pay" Provision

Petitioners' positions were abolished pursuant to *N.J.S.A* 18A:7A-44(a).[5] They do not dispute that the language of the statute mandates the abolishment of their positions. Accordingly, petitioners contend that they are entitled to payment for 60 work days, which would constitute payment for 12 weeks. The District disagrees with that interpretation of the statute and contends that the petitioners are entitled to payment for 60 calendar days, which would constitute payment for 8.57 weeks.

The general rules of statutory construction provide:

> In the construction of the laws and statutes of this state . . . *words and phrases shall be read and construed with their context, and shall*, unless inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated, *be given their generally accepted meaning, according to the approved usage of the language.*
>
> [*N.J.S.A.* 1:1-1.1 (emphasis added).]

Thus, words of a statute are to be given their ordinary and well understood meaning in the absence of any explicit indication of special meaning. *Levin v. Parsippany-Troy Hills*, 82 *N.J.* 174, 182 (1980); *Fahey v. Jersey City*, 52 *N.J.* 103, 107 (1968); *Safeway Trails, Inc. v. Furman*, 41 *N.J.* 467, 478, *cert. denied*, 379 *U.S.* 14, 13 *L. Ed.* 2d 84, 85 *S. Ct.* 144 (1964). A statute must also be considered in the context of the entire section and in a manner that gives the statute a common-sense meaning that advances the legislative purpose. *In re Boyan*, 246 *N.J. Super.* 300, 314 (App. Div. 1991), *rev'd on other grounds*, 127 *N.J.* 266 (1992); *Cressey v. Campus Chefs, Div. of CVI Serv., Inc.*, 204 *N.J. Super.* 337, 342-43 (App. Div. 1985); *Gillen v. Sheil*, 174 *N.J. Super.* 386, 392 (Law Div. 1980).

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[5] Petitioner Howard Johnson's termination was in accordance with *N.J.S.A.* 18A:7A-42(a)(3), which does not contain a 60 days' notice or 60 days' pay provision.

According to the above rules of statutory construction, the first step is to look at the actual language of the statute. *See In re K.L.F.*, 275 *N.J. Super.* 507, 514 (Ch. Div. 1993). *N.J.S.A.* 18A:7A-44(a) states that individuals whose positions are abolished are entitled to receive 60 days' notice of termination or 60 days' pay. Because there is no explicit indication of a special meaning for "60 days' pay," the words should be given their ordinary and well understood meaning. In an employment context, "60 days' pay" means that an employee will be paid for 60 calendar days.

The 60 days' notice or 60 days' pay provision is plainly remedial in nature. The statutory section providing for 60 days' notice of termination or 60 days' pay is intended to provide relief for those individuals who immediately lose their positions upon the State's takeover. The District contends that because the Legislature provided the District with an option of notifying petitioners 60 days in advance of termination or paying them for 60 days, the 60 days must be calculated in the same manner. This seems both the obvious and fair result. Courts have interpreted 60 days to mean two months for notification purposes. *See Canfield v. Board of Educ. of the Borough of Pine Hill*, 97 *N.J. Super.* 483, 487 (App. Div. 1967), *rev'd on other grounds*, 51 *N.J.* 400 (1968).[6] Since the Legislature intended to provide petitioners with 60 days' pay as a remedial measure, in lieu of notification, calculating the payment using calendar days is in keeping with the plain meaning and the legislative intent of the statute. The most reasonable construction of the 60 days' pay provision is that petitioners are entitled to payment for 60 calendar days.

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[6] *See also Roberts v. Orange*, 102 *N.J.L.* 721 (E. & A. 1926), in which the court held that the plaintiff was not entitled to full payment for the two years he was out of work due to illness. The City of Orange paid the plaintiff for two months of each year based on a 60 days' pay provision in a municipal resolution, and the court accepted this application of the resolution provision without addressing whether the 60 days should be calendar days or work days.

Payment for Accrued Sick, Vacation and Personal Leave Days

Affidavits were submitted by petitioners outlining the amounts they claim are owed them by the District for accumulated sick, vacation and personal days. Specifically, Concetta Caponegro claims entitlement to $13,676.20; Virginia Devane claims entitlement to $32,015.85; Howard Johnson claims entitlement to $24,403.20 and Bessie White claims entitlement to $94,822.90.[7]

Petitioners are not entitled to compensation for their accumulated sick, vacation, and personal leave days. Petitioners' positions were abolished pursuant to *N.J.S.A.* 18A:7A-44(a),[8] which applies to "the district's chief school administrator and those executive administrators responsible for curriculum, business and finance, and personnel." These individuals are only entitled to either 60 days' notice of termination or 60 days' pay, which "shall be in lieu of any other claim or recourse against the" school district. *N.J.S.A.* 18A:7A-44(a). Absent from subsection (a) is language that would entitle petitioners to accumulated leave time.[9]

In contrast, *N.J.S.A.* 18A:7A-44(c), which governs the abolishment of the "positions of the central administrative and supervisory staff . . . , other than those positions abolished pursuant to subsection a," provides:

> Employees or officers not hired for the reorganized staff shall be given 60 days' notice of termination or 60 days' pay. The notice or payment shall be in lieu of any other claim or recourse against the employing board or the school district based on law or contract. Notwithstanding this limitation,

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[7] Petitioner Norman Jeffries was paid in full for his unused sick, vacation and personal leave days, as indicated in his post-hearing brief, May 22, 1998.

[8] But note, petitioner Howard Johnson's termination was in accordance with *N.J.S.A.* 18A:7A-42(a)(3).

[9] Similarly, as it pertains to Howard Johnson, *N.J.S.A.* 18A:7A-42(a)(3) contains no provision for payment for accumulated vacation, sick and personal days.

> *nothing herein shall preclude an individual from asserting upon separation from service any legal contractual right* to health care coverage, annuities, *accrued vacation days, accrued sick leave*, insurance and approved tuition costs.
>
> [Emphasis added.]

The right to claim accrued vacation days and sick leave is explicitly provided to individuals whose positions are abolished under subsection (c). Administrative Law Judge Springer's initial decision in *Cirasa v. State-Operated School District of the City of Paterson*, 95 *N.J.A.R.*2d (EDU) 141, may aid in determining the legislative intent for the difference in the two subsections. The ALJ stated:

> Once the State takes over the operation of a mismanaged local school district, the wholesale restructuring process proceeds in three well-defined phases. "[U]pon creation of the State-operated district," the four top management positions . . . are immediately "abolished." *N.J.S.A.* 18A:7A-44(a). . . .
>
> Within the next six months,[10] the State district superintendent "shall prepare a reorganization of the district's central administrative and supervisory staff and shall evaluate all individuals employed in central administrative and supervisory positions." *N.J.S.A.* 18A:7A-44(b). Employees falling within this category automatically lose their positions as soon as the reorganization is implemented. The controlling statute expresses this result in clear and emphatic language: "Notwithstanding any other provision of law or contract, the positions of the central administrative and supervisory staff . . . shall be abolished upon the reorganization of the State-operated school district's staff." *N.J.S.A.* 18A:7A-44(c). . . .
>
> The third and final phase of restructuring the district's management concerns the evaluation and possible dismissal of building principals. *N.J.S.A.* 18A:7A-45.
>
> [95 *N.J.A.R.*2d (EDU) at 144-45.]

[10] The Legislature has extended the period for reorganization of the district to one year. *N.J.S.A.* 18A:7A-44(b).

staff, subsection (c), and to treat those individuals covered by the two subsections differently. For example, the Legislature provides for the rehiring of individuals whose positions are abolished under subsection (c), but not for the rehiring of individuals whose positions are abolished under subsection (a). More importantly, and as discussed above, the express language of *N.J.S.A.* 18A:7A-44(c) provides the individuals affected by that subsection with the right to assert claims relating to accrued vacation and sick days, while *N.J.S.A.* 18A:7A-44(a) does not.

Because the actual words of a statute are to be looked at when analyzing a statute, and subsection (a) does not contain any language granting individuals affected by that subsection the right to claim accrued vacation, sick or personal leave days, such individuals are not entitled to make claims for accrued leave. Accordingly, petitioners, whose positions were abolished pursuant to *N.J.S.A.* 18A:7A-44(a), are not entitled to compensation for their accrued sick, vacation, and personal leave.

CONCLUSION

Petitioners are not entitled to their full salary for the 1995-96 school year. Their claim of an implied employment contract fails because any claims based on law or contract are superseded by *N.J.S.A.* 18A:7A-44(a). Petitioners Caponegro, White, Devane and Jeffries should receive payment for 60 calendar days. Petitioners may not receive compensation for their accrued sick, vacation, and personal leave days since the statute does not provide for such relief.

ORDER

It is hereby **ORDERED** that petitioners' claim for full salary for the 1995-96 school year and for accrued sick, vacation and personal leave days is denied. Petitioners' claim to payment for 60 work days is denied. With the exception of petitioner Howard Johnson, petitioners' claim to payment for 60 calendar days is granted.

Respondent is to determine whether petitioners have received the appropriate payment as established herein. If petitioners have not received 60 calendar days' pay, they are to receive it immediately. However, if petitioners have received moneys for accrued sick, vacation and personal leave days, respondent is to be reimbursed.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 18, 1998
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

11/24/98
DATE

Receipt Acknowledged:
D.N. Antanaitis/lp
DEPARTMENT OF EDUCATION

NOV 30 1998
DATE

Mailed to Parties:
Barbara A Harnek
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

For Petitioners:

Dr. Joseph M. Capello
Eugene C. Campbell
Concetta B. Caponegro
Howard A. Johnson

For Respondent:

Adele White-Eutsey

List of Exhibits

JJ-1 Stipulated facts regarding Devane and White

JJ-2 Stipulated facts regarding Caponegro, Jeffries and Johnson

J-1 Letter to Virginia Devane from Barbara Anderson, dated July 13, 1995

J-2 Letter to Barbara Anderson from Virginia Devane, dated July 17, 1995

J-3 Letter to Virginia Devane from Beverly L. Hall, dated July 21, 1995

J-4 Letter to Bessie White from Barbara Anderson, dated July 12, 1995

J-5 Letter to Beverly Hall from Bessie H. White, dated July 24, 1995

J-6 Civil Service certification for Bessie White, dated August 20, 1984

J-7 Newark Board of Education employee's status form, dated September 5, 1984, for Bessie White

J-8 Preliminary notice of disciplinary action, dated September 18, 1995, for Bessie White, attached to request for personnel action, dated December 23, 1991

J-9 Final notice of disciplinary action for Bessie White, dated February 16, 1996

J-10 Letter to Concetta Caponegro from Barbara Anderson, dated July 12, 1995

J-11 Preliminary notice of disciplinary action to Concetta Caponegro,

J-12 Notification of certification for a position to Howard A. Johnson regarding appointment dated May 31, 1990

J-13 Letter to John McDonnell from Howard A. Johnson, dated August 17, 1994

J-14 Letter to Howard A. Johnson from John J. McDonald, dated August 25, 1994

J-15 Personnel report, local government employee system, regarding Howard A. Johnson, dated June 14, 1995

J-16 Letter to Howard A. Johnson from Barbara Anderson, dated July 12, 1995

J-17 Employee's status form, Newark Board of Education, for Howard A. Johnson, dated August 29, 1995

J-18 Letter to Howard Johnson from Hope R. Blackburn, dated September 29, 1995

J-19 Time report for Howard Johnson, dated July 7, 1995

J-20 Letter to Hope Blackburn from Sanford R. Oxfeld, dated October 11, 1995 (two pages)

J-21 Letter to Howard Johnson from Hope R. Blackburn, dated November 9, 1995

J-22 Check from Newark public schools to Howard A. Johnson, dated November 9, 1995, check no. 569060

J-23 Stub for check no. 569060 for Howard Johnson

J-24 Letter to Sanford Oxfeld from Hope R. Blackburn, dated November 13, 1995

P-1 Memo to Eugene Campbell from Dr. Joseph M. Capello regarding senior staff, dated June 28, 1995

P-2 Memorandum to Joseph M. Capello from Eugene C. Campbell, dated June 29, 1995

P-3 Memorandum to senior staff and all at-will employees from Eugene C. Campbell, dated June 29, 1995

CONCETTA B. CAPONEGRO, VIRGINIA DEVANE, HOWARD JOHNSON, NORMAN JEFFRIES AND BESSIE WHITE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions and the District's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4.

Initially, petitioners reiterate that, contrary to the Administrative Law Judge's (ALJ) findings, they were entitled to rely upon the offer of employment for the 1995-95 school year extended to them by the former Executive Superintendent of Schools, Eugene Campbell. Petitioners underscore that, according to Campbell's testimony, his appointment decisions did not require ratification by the former Board. Citing *Peck v. Imedia, Inc.*, 293 *N.J. Super.* 151, 168 (App. Div. 1996) to advance the proposition that an individual is entitled to proceed on a theory of promissory estoppel by virtue of her reliance on a promise for employment, petitioners argue that "***it is hard to imagine a more definite promise of employment than that contained

in Mr. Campbell's June 29, 1995 'Notice of Continued Employment.'" (Petitioner's Exceptions at p. 3)

Petitioners next challenge the ALJ's conclusion that the "60 day" provision referred to in *N.J.S.A.* 18:7A-44a means 60 calendar days, rather than 60 work days. In this regard, petitioners assert that the ALJ fails to consider the language of *N.J.S.A.* 18A:6-14, which provides that a board may, upon certification of tenure charges to the Commissioner of Education, suspend that person with or without pay, but if a determination is not made within 120 *calendar* days, then the full salary of that person shall resume. Contending that this provision is dispositive, petitioners aver,

> ***it is clear, that when the Legislature in the Education Laws decided that a time period was to be computed based upon "calendar days," it has specifically so stated. Clearly, if the Legislature intended that Executive Administrators should receive only 60 calendar days' pay it would have used the exact same verbiage that it used in the tenure statute. (*Id.* at p. 6)

Petitioners reason that *N.J.S.A.* 18A:7A-44a, which is remedial in nature, as recognized by the ALJ, should be liberally construed for the benefit of the persons to be protected. (*Id.*)

Petitioners further find it "mind boggling, considering the quantity of the dollars involved and the number of years of service of the Petitioners***" that the ALJ would have concluded that they were not entitled to payment for accumulated sick, vacation or personal days. (*Id.* at p. 8) Petitioners cite a recent decision of the Appellate Division, which establishes that "teachers' accumulated sick leave compensation was not a 'mere expectancy' but rather was either an accrued or vested right." (*Id.*, citing *In the Matter of Morris School District Board of Education*, 310 *N.J. Super.* 332 (App. Div. 1998)) Petitioners add,

> In essence what the Administrative Law Judge has done herein is allow, with absolutely no analysis, the decades and scores of Petitioners' meritorious service to the Newark School District to be

> forfeited in direct contravention to the Appellate Division decision in *Morris* based upon her lame interpretation of one phrase of the statute in question. *** (*Id.* at p. 9)

Petitioners contend that the ALJ has broadly interpreted what she viewed as a waiver provision in *N.J.S.A.* 18A:7A-44a, so as to improperly bar their claims, contrary to what they view as the rules of statutory construction. (*Id.* at p. 10, citing *Young v. Schering Corp.*, 141 *N.J.* 16 (1995))

Finally, petitioners contend that the ALJ denies Petitioner Johnson recovery of accumulated sick, vacation and personal leave time by applying *N.J.S.A.* 18A:7A-44a, rather than 18A:7A-42a(3). In this regard, petitioners remind that Johnson was already paid for part of his accumulated leave days. (*Id.* at p. 13) Moreover, petitioners note that *N.J.S.A.* 18A:7A-42a(3) contains no provision specifying that 60 days' pay "shall be in lieu of any other claim," as does *N.J.S.A.* 18A:7A-44a.

In reply, the District contends that the ALJ correctly rejected petitioners' implied contract claim. The District underscores that *N.J.S.A.* 18A:7A-44a addresses petitioners' rights upon separation from employment, providing that such employees shall be terminated upon creation of the State-operated school district, "*[n]otwithstanding any other provision of law or contract.*" (emphasis in text) (District's Replies at p. 2) Moreover, the District asserts that,

> [a]ssuming that Petitioners can explain how their implied contract claim can be maintained in light of the explicit statutory prohibition, they are unable to prove the existence of an agreement since such implied agreement required ratification by the former Newark Board of Education. Even as the former Executive Superintendent, Eugene Campbell was required to obtain the ratification by the former Newark Board of Education of any decisions made with respect to Petitioners' employment. *N.J.S.A.* 18A:17A-5(c). (*Id.* at p. 3)

Thus, the District reasons that Campbell's offer of employment was invalid and without legal effect. As to the significance of *Peck, supra*, the District argues that *Peck* concerned private

sector employment, rather than the public sector employment, as herein, which was created and is governed by statute. (*Id.*)

The District next asserts that the ALJ correctly construed the 60 days' pay provision in *N.J.S.A.* 18A:7A-44a, arguing that petitioners' reading conflicts with the statute's "notice of termination" provision which has been interpreted by the Appellate Division as 60 *calendar* days. (*Id.* at pp. 4-5)

Finally, the District reasons that the ALJ appropriately rejected petitioners' claim for accrued sick, vacation and personal leave time, and the District should, therefore, be reimbursed for all payments made in connection with such claims, as the payment constitutes an improper diversion of public monies. (*Id.* at p. 5) In this regard, the District finds that the *Morris* case, as cited *supra* by petitioners to advance their claim, is inapposite to the matter herein. Rather, the District points out that the Legislature expressly

> ***defined a class of employees covered under *N.J.S.A.* 18A:7A-44(c) who could assert a claim for accrued vacation and sick leave. However, Petitioners, as at-will executive administrators, were not covered by a collective bargaining agreement and were not employees defined under *N.J.S.A.* 18A:7A-44(c)." (*Id.* at p. 6)

The District concludes that "***the remedial effect of *N.J.S.A.* 18A:7A-44(a) is to provide the State-District Superintendent with strong powers to modify and amend the practices of previously ineffective or failed local school administrators," (*id.* at pp. 6, 7) and maintains that petitioners' claims for accrued sick, vacation and personal leave time are without merit.

Upon careful and independent review of the record in this matter, the Commissioner determines to affirm the initial decision of the ALJ, with clarification as set forth below. Initially, the Commissioner notes that the parties do not refute that Petitioners Devane,

White, Jeffries and Caponegro were terminated in accordance with the provisions of *N.J.S.A.* 18A:7A-44a. That statute provides,

> *Notwithstanding any other provision of law or contract*, the positions of the district's chief school administrator and those executive administrators responsible for curriculum, business and finance, and personnel shall be abolished upon creation of the State-operated school district. The affected individuals shall be given 60 days' notice of termination or 60 days' pay. *The notice or payment shall be in lieu of any other claim or recourse against the employing board or the school district based on law or contract.* Any individual whose position is abolished by operation of this subsection shall be entitled to assert a claim to any position or to placement upon a preferred eligibility list for any position to which the individual may be entitled by virtue of tenure or seniority within the district. No individual whose position is abolished by operation of this subsection shall retain any right to tenure or seniority in the positions abolished herein. (Emphasis added) (*N.J.S.A.* 18A:7A-44a)

Neither do the parties dispute that Petitioner Johnson, formerly the Chief Auditor for the Newark Board, was terminated in accordance with *N.J.S.A.* 18A:7A-42a(3), which provides that

> The State district superintendent of school shall, subject to the approval of the commissioner or his designee, make all personnel determinations relative to employment, transfer and removal of all officers and employees, professional and nonprofessional, *except that the services of the district auditor or auditors and attorney or attorneys shall be immediately terminated by creation of a State-Operated school district****. (emphasis added) (*N.J.S.A.* 18A:7A-42a(3))

The Commissioner concurs with the ALJ that, even assuming, *arguendo*, petitioners can establish that a contract for their employment for the 1995-96 school year, in fact, existed, the language in both statutes, cited above, renders it abundantly clear that, upon creation of the State-operated School District of the City of Newark on July 12, 1995, *any* employment "contract" was extinguished. (Initial Decision at p. 14) It was the intent of the Legislature that, upon establishment of a State-operated school district, the chief executive officers of the district

would be dismissed. (See Statement to A-4644, Senate Education Committee.) Thus, the Commissioner affirms that none of the petitioners has a viable claim to continued employment for the 1995-96 school year, pursuant to *N.J.S.A.* 18A:7A-42a(3) and 18A:7A-44a.

With respect to petitioners' claims that if they were not entitled to continued employment for the 1995-96 school year, then they are entitled to 60 working days' pay, rather than 60 calendar days', the Commissioner affirms that Petitioner Johnson has no entitlement to 60 days' severance pay of either kind, pursuant to *N.J.S.A.* 18A:7A-42a(3). (See *Massa v. State-Operated School District of the City of Jersey City*, 92 *N.J.A.R.* 2d (EDU) 52 (1991), aff'd at 366 establishing that attorneys and auditors employed by the District were not entitled to pay in lieu of the 60 days' notice of termination upon State-operation.)

Further, notwithstanding petitioners' plea that the language set forth in *N.J.S.A.* 18A:6-10 should be dispositive herein, the Commissioner concurs with the ALJ, for the reasons set forth at pages 16 and 17 of her initial decision, that Petitioners Devane, White, Jeffries and Caponegro are entitled to 60 *calendar* days' pay, prorated in accordance with the salaries each was receiving on July 11, 1995, just prior to State-operation.[1]

Finally, with respect to petitioners' claims for payment for accumulated sick, vacation and personal leave time, the Commissioner finds that neither *N.J.S.A.* 18A:7A-42a(3), in the case of Petitioner Johnson, nor *N.J.S.A.* 18A:7A-44a, supports petitioners' claims. Here, the Commissioner finds it noteworthy that *N.J.S.A.* 18A:7A-44a specifies that the employee's 60 days' pay "***shall be in lieu of *any other claim* or recourse against the employing board or the school district based on law or contract." (emphasis added) Even more persuasive, however, is

[1] It is herein noted that Petitioner White was paid her salary for 60 calendar days (initial decision at p. 5) and Petitioner Caponegro was paid for 60 calendar days at the salary for an assistant personnel director, the position to which she returned after State-operation, rather than as the acting executive director. (*Id.* at p. 6) The record further indicates that Jeffries has received 45 days' pay for 60 calendar days. (*Id.* at p. 7)

that while *N.J.S.A.* 18A:7A-44c contains a "waiver" provision similar to that in subsection (a), subsection (c) nevertheless *explicitly* provides that employees whose positions are abolished pursuant thereto may assert "***upon separation from service any legal contractual right to health care coverage, annuities, accrued vacation days, accrued sick leave, insurance and approved tuition costs." Clearly, if the Legislature had intended to allow claims for accumulated sick, vacation and personal leaves from employees terminated pursuant to *either* 18A:7A-44a or 18A:7A-42a(3), it would have so provided.

Additionally, the Commissioner rejects the precedential value petitioners place on *Morris, supra.* There, the Appellate Division reviewed and affirmed a decision rendered by the Public Employees Relations Commission which established, *inter alia*, that the Morris Board's proposal to cap paid leave entitlements, rather than permit the accumulation of sick leave as deferred compensation upon retirement, as was its practice for 45 years, must be stayed, since the Association "***had not knowingly waived the vested rights of its members to accrued sick leave compensation***." *Morris, supra* at 336. Unlike the situation herein, the *Morris* Court was particularly concerned not just with an employee's right to deferred compensation, but with *the Association's power to bargain away such rights* "***absent knowing consent by those who would be adversely affected." (*Id.* at 345) The cases cited by the Court in support of its holding involved employees working under collective bargaining agreements. Moreover, contrary to petitioners' characterization, the Court *explicitly* stated that it took no position with respect to whether a teacher's accumulated sick leave compensation constituted an "accrued right," a "vested interest" or a "mere expectancy." (*Id.* at 341) To the contrary the Court confirmed, "We think there is no profit in dealing in labels such as 'vested right,' 'accrued interest' or 'mere expectancy.' None fits precisely, and it would be a mistake to choose one and be driven by the

choice." (*Id.* at 343) The Commissioner, therefore, rejects the weight ascribed to *Morris* by petitioners with respect to their claims for sick leave, and, instead, finds that the ALJ's conclusion in this regard may not be dismissed as a "lame interpretation of one phrase of the statute in question," as petitioners have urged. (Petitioners' Exceptions at p. 9)

Accordingly, the Commissioner adopts the initial decision of the ALJ, as clarified herein, and directs that the District pay Petitioner Devane for 60 calendar days and Petitioner Jeffries for 15 calendar days, prorated according to the annual salary each enjoyed just prior to State-operation. To the extent Petitioner Caponegro's 60 calendar days' payment was at the rate for an assistant personnel director rather than that of an acting executive director for human resources (initial decision at p. 6), and assuming the former rate is less than the latter, she is to be reimbursed for any differential. Petitioners are entitled to no further compensation. Petitioners Jeffries and Johnson are directed to reimburse the District for the amount each received as compensation for accumulated sick, vacation or personal leave time.[2]

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

[2] In the case of Petitioner Jeffries, the District may offset any obligation to pay him the balance of the 60 calendar days' severance by the amount he received as compensation for accumulated sick, vacation or personal leave time.

[3] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

January 4, 1999
Date of Mailing, January 4, 1999

4-99

EDU #11980-95
C # 4-99
SB # 3-99

CONCETTA B. CAPONEGRO, VIRGINIA DEVANE, HOWARD JOHNSON, NORMAN JEFFRIES AND BESSIE WHITE,

PETITIONERS-APPELLANTS,

V.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, January 4, 1999

For the Petitioners-Appellants, Balk, Oxfeld, Mandell & Cohen (Sanford R. Oxfeld, Esq., of Counsel)

For the Respondent-Respondent, Sills, Cummis, Radin, Tischman, Epstein & Gross (Philip E. Stern, Esq., of Counsel)

The State Board of Education affirms the decision of the Commissioner of Education for the reasons expressed therein. We reject the petitioners' contention that the Commissioner misinterpreted the statutes at issue herein. Like the Commissioner, we find it clear from the language of those statutes that the Legislature had not intended to allow claims for accumulated sick, vacation and personal leave by individuals whose employment was terminated pursuant to either N.J.S.A. 18A:7A-44a or N.J.S.A. 18A:7A-42a(3) following the creation of a State-operated school district.

In so doing, we note that the petitioners have alleged for the first time in their arguments before us that these statutes impaired their "contractual right" to receive accumulated pay for unused sick, vacation and personal days in violation of the New

Apr. 7, 1999

Jersey and federal constitutions. Upon review of petitioners' argument, we find that they have failed to establish such a violation. Nor do we find that their claim requires further fact-finding or educational expertise. (It is now well established that when a controversy arising under the school laws presents constitutional issues, "such issues should merely be noted....Factual presentations relevant to the constitutional issues may be made, however, to ensure an adequate record for determination on appeal. In this way both the integrity of the administrative system and the [party's] right to a judicial determination of constitutional issues will be preserved." Parents for Student Safety, Inc. v. Board of Education of the Morris School District, decided by the State Board of Education, February 5, 1986, slip op. at 5, aff'd, Docket #A-3257-85-T7 (App. Div. 1987), quoting Paterson Redevelopment Agency v. Schulman, 78 N.J. 378, 388 (1979). Moreover, "in litigation to resolve purely constitutional claims,...although an agency may base its decision on constitutional considerations, such legal determinations do not receive even a presumption of correctness on appellate review." Bd. of Ed. v. Neptune Educ. Ass'n., 293 N.J. Super. 1, 9 (App. Div. 1996), quoting Abbott v. Burke, 100 N.J. 269, 298-99 (1985). Nonetheless, the Court stressed that "[w]here the broader subject matter of a case is within the purview of an administrative agency's authority, it is valuable to have the insights and policy reflections of that agency, even if the only issue to be decided is one of constitutional dimensions, in respect of which the agency is seen to have no particular expertise or authoritative decisional role." Id.)

We therefore affirm the decision of the Commissioner.

April 7, 1999

Date of mailing APR 09 1999

4-99

EDU # 11980-95
C # 4-99
SB # 3-99
APP. DIV. #A-4596-98T5

CONCETTA B. CAPONEGRO, VIRGINIA DEVANE, HOWARD JOHNSON, NORMAN JEFFRIES AND BESSIE WHITE,

PETITIONERS-APPELLANTS,

V.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, January 4, 1999

Decided by the State Board of Education, April 7, 1999

Remanded by the Appellate Division, April 14, 2000

For the Petitioners-Appellants, Balk, Oxfeld, Mandell & Cohen (Sanford R. Oxfeld, Esq., of Counsel)

For the Respondent-Respondent, Sills, Cummis, Radin, Tischman, Epstein & Gross (Cherie L. Maxwell, Esq., of Counsel)

This matter is before us pursuant to a remand by the Appellate Division.

The petitioners, senior staff members whose employment was terminated following the creation of a State-operated school district in Newark prior to the start of the 1995-96 school year, sought compensation for 1995-96 in addition to payment for their accumulated vacation, sick and personal days.

On April 7, 1999, the State Board of Education affirmed the decision of the Commissioner of Education, agreeing that the petitioners were not entitled to their full

JUNE 7, 2000

salaries for 1995-96 or to payment for accumulated sick, vacation and personal leave. The State Board rejected the petitioners' contention that the Commissioner had misinterpreted the pertinent statutes. Like the Commissioner, the State Board found that it was clear from the language of those statutes that the Legislature had not intended to allow claims for accumulated sick, vacation and personal leave by individuals whose employment was terminated pursuant to either N.J.S.A. 18A:7A-44a or N.J.S.A. 18A:7A-42a(3) following the creation of a State-operated district. In addition, the State Board found that the petitioners had failed to establish that these statutes had impaired their "contractual right" to receive accumulated pay in violation of the New Jersey and federal constitutions. The State Board also agreed with the Commissioner that the petitioners were entitled to compensation for 60 calendar days, rather than 60 work days, upon their termination.

On April 14, 2000, the Appellate Division reversed the decision of the State Board to the extent that it denied the petitioners compensation for accumulated vacation and sick days. The Court concluded that the vested-rights portion of the statutory benefit package, i.e., accumulated vacation and sick leave, could not constitutionally be withheld. The Court found that the petitioners were entitled to that deferred compensation to the extent that their pre-takeover contracts of employment required such payment upon termination of employment in the same manner as if their employment had been voluntarily terminated. Consequently, the Court remanded this matter "for reconsideration and calculation of these benefits in accordance with the policy and procedure manual of the Board and, to the extent appropriate, the Board's past practices." It also remanded "for a determination of whether [petitioner] Johnson's accumulated vacation limit is forty or sixty days." In all other respects, the Court affirmed the decision of the State Board.

In view of the Court's decision, we remand this matter to the Commissioner for such proceedings as may be required to fulfill the specific terms of that decision. We do not retain jurisdiction.

June 7, 2000

Date of mailing JUN 09 2000

5-99

IN THE MATTER OF THE TENURE	:	
HEARING OF THOMAS JABOUR,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
DELAWARE VALLEY REGIONAL	:	DECISION
HIGH SCHOOL DISTRICT,	:	
HUNTERDON COUNTY.	:	
	:	

SYNOPSIS

Board certified tenure charges of incapacity against respondent industrial arts teacher. Issue of alleged work-related injury is pending at Division of Workers' Compensation.

As respondent conceded that he was incapacitated as a result of his work-related condition and unable to work as an industrial arts teacher, the ALJ found that he was incapacitated and concluded that the Board established by a preponderance of credible evidence that respondent's tenure must be removed. Motion for summary decision was granted.

Commissioner adopted findings and determination in initial decision as his own. Commissioner dismissed respondent from his tenured position as of the date of this decision and referred the matter to the State Board of Examiners for action against his certificate as it deems appropriate.

JANUARY 8, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING SUMMARY DECISION
OAL DKT. NO. EDU 08524-98S
AGENCY DKT. 400-9/98

BOARD OF EDUCATION OF THE DELAWARE VALLEY REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,
Petitioner,
v.
THOMAS JABOUR,
Respondent.

John E. Collins, Esq., for Petitioner (Carroll, Weiss & Josephson, attorneys)

John E. Croot, Esq., for respondent (Rand, Algeier, Tosti & Woodruff, attorneys)

Record Closed: November 5, 1998 Decided: November 24, 1998

BEFORE **JEFF S. MASIN**, ALJ:

The Delaware Valley Regional High School Board of Education (Board) filed a tenure charge with the Commissioner of Education (Commissioner) on September 2, 1998, in which it alleged that Thomas Jabour, a tenured teacher in the District, was incapacitated from performing the position for which he is tenured and therefore sought to remove his tenure, pursuant to *N.J.S.A.* 18A:6-10. The Commissioner transferred the case to the Office of Administrative Law pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

Mr. Jabour has filed a separate petition with the Commissioner, Agency Dkt. No. 367-8/98, OAL DKT. NO. EDU 10116-98, in which he seeks the restoration of salary and benefits to which he claims entitlement. He contends therein that the Board failed to comply with its obligations under *N.J.S.A.* 18A:30-2.1, which provides that he is entitled to receive up to one year of salary if he is absent from his employment "as the result of a personal injury caused by an accident arising out of and in the course of his employment," and also the Family Leave Act, *N.J.S.A.* 34:11B-1 to -16. He disputes the Board's understanding of its obligations under *N.J.S.A.* 18A:30-2.1, as it has, in his view, illegally charged his absence against his annual or accumulated sick leave. He seeks to consolidate the tenure charges with his petition. The Board opposes consolidation.

The Board now moves for summary decision on the tenure charges, pursuant to *N.J.A.C.* 1:1-12.5. As incapacity is recognized as a basis for dismissal of a tenured employee under *N.J.S.A.* 18A:6-10, the Board contends that, pursuant to the standard for determining a motion for summary decision as explicated by the New Jersey Supreme Court in *Brill v. Guardian Life Insurance Co.*, 142 *N.J.* 520 (1995), the matter may be decided without the need for testimony, as there is no dispute of material fact relevant to the tenure charge since Mr. Jabour concedes that he is in fact incapacitated from performing his job as a tenured Industrial Arts teacher. As for the claims regarding salary and benefits asserted in Jabour's petition, the Board believes that these are irrelevant to the determination of the tenure charge, and can be decided after a determination is made by the Division of Worker's Compensation whether the injury suffered by Jabour did in fact arise out of and in the course of employment.

Mr. Jabour's response to the motion plainly states that he "admits that, at this time, he is incapacitated as a result of his work related condition and unable to work as an Industrial Arts Teacher." Letter Brief, dated October 26, 1998, pg. 2. He argues against the motion on the grounds that the tenure charge is "premature." This argument arises from his contention that his disability is related to a work connected injury, which occurred when he witnessed an accident in class on March 25, 1997, in which a student lost three fingers while using power equipment. He contends that, pursuant to *N.J.S.A.* 18A:30-2.1, he is entitled to receive his full salary for one calendar year without having his absence charged to his annual or accumulated sick leave. He argues that the district improperly charged his sick leave through April 17, 1998. He believes that

he properly should be eligible for pay through April 1999. Thus, he should still be receiving pay at this time. Until his sick leave is exhausted, a tenure charge based upon his incapacity is premature.

Mr. Jabour relies upon an unpublished decision rendered by Honorable Lilliard Law, A.L.J., in *The Matter of the Tenure Hearing of Verga*, OAL DKT. NO. EDU 0215-83, Initial Decision June 3, 1983, *adopted* by the Commissioner of Education, Final Decision, July 21, 1983. In *Verga*, a tenured janitor was injured in an accident arising out of and in the course of the performance of his duties on May 13, 1982. He was absent from his employment for approximately four months as a direct result of this injury. A dispute arose as to his ability to return to work as of September 13, 1982, his physician having certified him for return with a brace, but the Board's doctor having concluded that the brace was restrictive and potentially harmful to Verga. The Board determined to consider Verga's ability to physically perform his job, and it certified tenure charges to the Commissioner on October 19, 1982. While much of Judge Law's decision addressed concerns about the Board having acted improperly when it violated the Commissioner's 15-day policy regarding appropriate time for an employee to respond to the Board concerning the Board's proffered charges, Judge Law also considered the respondent's argument that the Board failed to comply with the dictates of *N.J.S.A.* 18A:30-2.1. Verga contended that this statute reflected a determination of the Legislature that where an employee suffered an injury which arose from and in the course of the performance of duties, the Board could not seek the removal of the tenured employee, but must continue his or her salary, for one year, or until the Board agreed that the employee was capable of resuming employment. The Board responded that where the proofs are sufficient to establish permanent and total disability for the performance of the employment, there is no prohibition against proceeding with a tenure charge for incapacity.

Judge Law concluded that the Board had violated the 15-day policy and further determined that it could not use "the device of certifying charges against respondent in order to avoid its mandated obligation of compensating respondent for a legitimate and statutorily protected claim." Such conduct was "unconscionable and should not be allowed to stand." *Verga, supra*, Initial Decision, at page 21. The Commissioner affirmed Judge Law's decision,

cautioning that the obligations under *N.J.S.A.* 18A:30-1.2 were only applicable when the precise conditions of the statute were met. *Id.*, Final Decision, at 25.

The Board disputes the significance of *Verga.* First, it contends that the case merely stands for the proposition that where the conditions were met, the Board had an absolute obligation to compensate Mr. Verga for up to one year pursuant to *N.J.S.A.* 18A:30-2.1. Second, in *Verga* the parties were in dispute as to whether he was incapacitated from further service at the time when the tenure charges were brought, a mere four months after the accident. Here, the Board has paid Jabour for the time the Board believes he was entitled to receive pay, which was for more than one year. If there is a question as to whether the Board properly paid Jabour what he is entitled to, corrections can be made to properly compensate him. As for the issue of disability, in contrast to *Verga*, here Jabour admits his total and permanent disability. The Board here did not certify tenure charges for approximately seventeen months following the accident, as opposed to just four months in *Verga*. Thus, the Board submits that it has not acted prematurely.

DISCUSSION

The Board seeks to remove Mr. Jabour's tenure because he is incapacitated from performing the requirements of the position of Industrial Arts Teacher. That fact is not in dispute; he readily concedes that he is incapacitated and offers no suggestion of a likely favorable change in his condition . Unlike *Verga*, there is no difference between the parties on this subject. Thus, the sole material issue regarding his ability to perform his job is resolved. The only argument which Jabour raises against the present issuance of a decision removing his tenure is that the Board has not honored what he believes is their legal obligation under *N.J.S.A.* 18A:30-1.2. That obligation can only be fixed once the appropriate forum determines whether the admitted disability arose from and in the course of employment. That determination is reserved for the Workers' Compensation Judge. If the decision is in Mr. Jabour's favor, he is entitled to certain monies, but that determination in no way will affect his status as a person incapable of performing the tenured employment. There is no reason why a decision on the tenure charge cannot be rendered at the present time. Such a decision should not prejudice his right to seek redress from the Board at a later time if the compensation case ends favorably for him. His current petition will survive the tenure determination, and remain inactive till such time as it may properly be

reactivated and resolved in light of the compensation decision. The request for consolidation is **DENIED.**

CONCLUSION

Mr. Jabour has offered no arguments or authorities which require that a decision on his tenure status await any other proceedings. Therefore, as the issue of incapacity is conceded, and there are no material facts in dispute, I **FIND** that he is incapacitated from performing his position as an industrial arts teacher and **CONCLUDE** that the Board has established by a preponderence of the credible evidence that Mr. Jabour's tenure must be removed. The motion for summary decision is **GRANTED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 24, 1998
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

Dec. 3, 1998
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 1 1998
DATE

Barbara A Harnett
OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETITIONER:

None

FOR THE RESPONDENT:

Exhibit A Petition signed by David B. Rand dated 8/4/98

Exhibit B Commissioner of Education Decision, dated 7/21/83, *IMO the Tenure Hearing of Salvatore A. Verga, School Dist. of the Twsp. of Ocean, Monmouth Co.*, OAL DKT. NO. EDU 0215-83

OAL DKT. NO. EDU 08524-98S
AGENCY DKT. NO. 400-9/98

IN THE MATTER OF THE TENURE	:	
HEARING OF THOMAS JABOUR,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
DELAWARE VALLEY REGIONAL	:	DECISION
HIGH SCHOOL DISTRICT,	:	
HUNTERDON COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions.

Upon careful and independent review of the record in this matter, the Commissioner determines to affirm the initial decision of the Administrative Law Judge (ALJ) finding that the Board has established that respondent is incapacitated from performing his responsibilities as a teacher of industrial arts. The Commissioner notes that not only does respondent concede his total and permanent disability (initial decision at p. 4), but two physicians affirm that he is presently unable to resume his instructional duties, and will be incapable of doing so in the foreseeable future.

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein. Respondent is deemed dismissed from his tenured position as a teacher as of the date of this decision. This matter shall be referred to the State Board of Examiners pursuant to *N.J.A.C.* 6:11-3.6 for action against his certificate as it deems appropriate.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

6-99

C # 6-99L
SB # 7-99
APP. DIV. #A-5555-98T1

BOARD OF EDUCATION OF THE TOWNSHIP OF BERKELEY, OCEAN COUNTY,	:	
PETITIONER-APPELLANT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION AND LEO F. KLAGHOLZ, COMMISSIONER OF EDUCATION,	:	
RESPONDENTS-RESPONDENTS.	:	

Decided by the Commissioner of Education, January 8, 1999

Decided by the State Board of Education, May 5, 1999

Remanded by the Appellate Division, August 22, 2000

For the Petitioner-Appellant, Patrick Sheehan, Esq.

For the Respondents-Respondents, Elizabeth Doyle, Deputy Attorney General, and Nancy Kaplen, Assistant Attorney General, of counsel (John J. Farmer, Attorney General of New Jersey)

On May 5, 1999, the State Board of Education affirmed the decision of the Commissioner of Education dismissing the petition filed by the Township of Berkeley, a constituent municipality within the Central Regional High School District, challenging a determination by the Department of Education that it was not entitled to Senior Citizen Supplemental Stabilization Aid for the 1998-99 school year under the Comprehensive Educational Improvement and Financing Act.

Oct. 4, 2000

Berkeley Township appealed that determination to the Appellate Division, and, on August 22, 2000, the Court reversed our decision. Finding the legislative intent to be clear, the Court concluded that Berkeley Township was entitled to Senior Citizen Supplemental Stabilization Aid for the 1998-99 school year, and it remanded this matter to the State Board.

In view of the Court's decision, we remand this matter to the Commissioner for such proceedings as may be required to assure compliance with that decision.

October 4, 2000

Date of mailing OCT 06 2000

SB/6-99

SB #6-99

IN THE MATTER OF THE DENIAL OF	:	
THE CHARTER SCHOOL APPLICATION	:	STATE BOARD OF EDUCATION
OF THE IBRAHIM CHARTER SCHOOL,	:	DECISION
PASSAIC COUNTY.	:	

Decided by the Commissioner of Education, January 29, 1999

For the Appellant, Syed M. Tariq-Shuaib, pro se

For the Participant Commissioner of Education, Michelle L. Miller, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

Ibrahim Charter School (hereinafter "appellant") filed an appeal to the State Board of Education from a letter decision of the Commissioner of Education dated January 28, 1999 denying its application to establish a charter school in the 1999-2000 academic year. The Commissioner indicated in his letter that the appellant had submitted an incomplete application which was lacking in detail. He further indicated that the financial data submitted by the appellant was not relevant to the proposed school and that a cash flow statement had not been provided.

Appellant subsequently requested to include an additional document in the record of this matter, contending that the record, which was prepared for the State Board by the Deputy Attorney General representing the Commissioner in this appeal, omits an "addended complete application" it had filed with the Commissioner. The Commissioner opposes this request, stating that appellant had not filed its "addended"

MAR. 3, 1999

application until February 8, 1999, after its previously submitted application had been rejected.[1]

We have considered the arguments made by the appellant in light of the record provided to us on behalf of the Commissioner, including the application submitted by the appellant and the recommendation of the Department's reviewers to deny that application. On the basis of this review, we conclude that the appellant has failed to demonstrate an entitlement to establish a charter school pursuant to N.J.S.A. 18A:36A-1 et seq.

In so doing, we have not considered the "addended" application submitted to us by the appellant. The appellant does not dispute the Commissioner's assertion that this application was not filed in a timely manner. Rather, appellant argues that it was denied the opportunity to modify the application it had previously submitted or to provide an addendum thereto. The regulations governing charter schools, N.J.A.C. 6A:11-1.1 et seq., authorize the filing of "subsequent information as addenda to [charter school] applications" only upon request of the Department of Education. N.J.A.C. 6A:11-2.1(c). In this case, the Department did not request additional information from the appellant.

The State Board of Education therefore affirms the Commissioner's decision to deny appellant the grant of a charter for 1999-2000.

March 3, 1999

Date of mailing MAR 05 1999

[1] We note that charter school applications are required to be filed with the Commissioner no later than August 15 in the year prior to starting a charter school. N.J.A.C. 6A:11-2.1(b)3.

8-99

IN THE MATTER OF THE TENURE	:	
HEARING OF SAAD RADWAN,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF CARTERET,	:	DECISION
MIDDLESEX COUNTY.	:	
	:	

SYNOPSIS

Board certified tenure charges of unbecoming conduct, insubordination and other just cause against respondent custodian. Respondent contended tenure charges were a subterfuge for discrimination based on religion and national origin.

Following a lengthy hearing, wherein numerous witnesses testified, and review of the record, the ALJ concluded that the Board established by a preponderance of credible evidence that respondent was guilty of unbecoming conduct, insubordination and failure to properly perform his duties. As to respondent's claim of discrimination, the ALJ found that respondent was carefully watched because of his belligerent behavior toward supervisors and coworkers. ALJ ordered respondent removed from his position as a custodian.

Commissioner found no reason to disturb the credibility determinations and factual findings of the ALJ, due regard being given to the person who heard the live testimony and assessed the witnesses' behavior. Thus, the Commissioner concurred with the ALJ and adopted the findings and determination in initial decision as his own. Respondent was ordered dismissed from his position as a tenured custodian as of the date of this decision.

January 14, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6259-97
AGENCY DKT. NO. 233-7/97

CARTERET BOARD OF EDUCATION,
MIDDLESEX COUNTY,

Petitioner,

v.

SAAD RADWAN,

Respondent.

Viola S. Lordi, Esq., on behalf of petitioner (Wilentz, Goldman & Spitzer, attorneys)

Ashton E. Thomas, Esq., on behalf of respondent

Record Closed: September 15, 1998 Decided: November 25, 1998

BEFORE **SOLOMON A. METZGER,** ALJ:

This matter arises out of a decision by the Carteret Board of Education (Board) to seek respondent's dismissal as a tenured custodian, pursuant to *N.J.S.A.* 18A:6-9. The matter was transmitted to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14F-1 through -13. A hearing was conducted over the course of nineteen days and the record closed on September 15, 1998, with receipt of the last post-hearing memorandum. An order of extension is in effect.

The questions presented are whether respondent was insubordinate and/or failed to carry out his assigned duties to the extent that his dismissal is warranted. Respondent maintains that the tenure charges are a subterfuge for discrimination based on religion and national origin, as well as retaliation for filing a complaint with the Division on Civil Rights.[1]

A few facts are undisputed. Respondent is forty-five years old and was born in Egypt. He is a member of the Islamic faith. Respondent arrived in the United States in 1981 and commenced employment with the Board in January 1991. He was assigned initially to the Columbus School. In November 1991 he was transferred to Carteret High School, where he remained until September 1993, when he was returned to Columbus School. Respondent was granted tenure in January 1994. He was transferred to Carteret Middle School at the commencement of the 1996-97 school year. In September 1996, respondent filed a complaint with the Division on Civil Rights, and a local newspaper article reported this on September 20, 1996. Respondent was suspended on May 6, 1997, pending these proceedings.

Charles J. Bartley has been employed by the Board for twenty-five years and in 1991 was the principal of Columbus School. He testified that when respondent first came to work he performed well, but problems soon emerged. Respondent did not clean his area satisfactorily. Mr. Bartley recalled one incident involving a refrigerator that was so dirty the muck could just about be scraped off the interior walls. When he pointed this out, respondent insisted that the refrigerator was clean and refused to do anything further about it. Mr. Bartley testified that respondent took instruction poorly and on a number of occasions answered him in a belligerent tone. Respondent did not get along well with the other custodians in the building and often complained that he received arduous assignments, while they loafed about. Mr. Bartley thought the work was evenly divided. When Mr. Bartley brought his concerns about respondent to the attention of the then superintendent, respondent was transferred. Mr. Bartley testified that he had not sought this result and thought that respondent should stay at Columbus School and learn to conform his behavior or be fired, but the central office took the matter out of his hands.

[1] There was some discussion about consolidating the civil rights complaint with the instant matter, but respondent withdrew his filing with the Division on Civil Rights just prior to hearing, and either has filed or expects to refile in federal district court. Nevertheless, respondent raised the civil rights issues as a defense.

Joseph A. Torre was employed by the Board for twenty-seven years and retired in January 1997. He became principal of Carteret High School in January 1992. Mr. Torre testified that respondent began running into trouble at Carteret High School in the spring of 1992. Mr. Katz, the physical education teacher, complained that the gymnasium area was not being adequately cleaned. Mr. Torre confirmed for himself that the gym and locker rooms were dusty and dirty and he spoke to respondent about it. Respondent was obstreperous and denied any deficiency. Respondent seemed to prefer painting to cleaning and he was instructed to focus on cleaning (P-47); the Board employs maintenance men to paint. Respondent's performance did not improve and criticism was met with the suggestion that Mr. Torre was picking on him.

Mr. Torre testified that on August 11, 1992, respondent was involved in an altercation with Bruce Elliot, another janitor at Carteret High School. Mr. Torre was on vacation at the time, but the police were called and the only eyewitness, a Robert Wilder, reported that respondent started the fight (P-5). The Board reviewed the matter and suspended respondent for six days (P-8). There was a second incident involving these two custodians on April 1, 1993, for which the police were called, but apparently there were no fisticuffs and no witnesses. Discipline was not meted out to either employee, but Mr. Elliot was transferred to separate the two of them.

Respondent was transferred back to Columbus School in September 1993, and Mr. Torre went on to become assistant superintendent in July 1994. Mr. Torre's next substantial contact with respondent came on August 27, 1996. That evening there was a Board meeting and he and the superintendent, S. Louis Panigrosso, were talking at the front of the room while the Board was in executive session. Respondent approached Mr. Panigrosso to complain about a pending assignment change that was bringing him from the day shift at Columbus School to the afternoon/evening shift at the new Carteret Middle School. Mr. Torre testified that construction and expansion at the new middle school had engendered numerous changes (P-36), but respondent thought that his former mother-in-law, a secretary employed by the Board, was responsible for his placement. In his mind she was attempting to disrupt his visitation time with his children.

Mr. Torre testified that he attempted to explain that there had been a reorganization and that respondent's mother-in-law had nothing to do with the decision, but respondent became loud.

Mr. Torre took respondent and Mr. Panigrosso into his office across the hall so that members of the public would not hear. Once in the office respondent became increasingly agitated, as did Mr. Torre, and to end the discussion Mr. Torre got up to leave. At that point respondent yelled "You're all fucking going down" and additional profanities. Mr. Torre responded with "Who the hell do you think you are talking to?" and Mr. Panigrosso called in Mr. Packard, the manager of buildings and grounds, who stood between the two men. The shouting continued and, having heard the noise, some Board members came in to try to calm things down. At this point Mr. Packard called the police, but respondent left the building and Mr. Torre decided not to file a complaint. He did prepare an incident report (P-35).

Mr. Torre testified that respondent injured his back on March 11, 1996, and was in and out of work for a few months. His 9:00-a.m.-to-6:00-p.m. schedule was pushed up one hour so that he could attend physical therapy appointments in the evening. Respondent did tell him that work was interfering with his ability to get to therapy, but Mr. Torre did not believe it.

John G. Terebetsky has been employed by the Board for twenty-eight years. In September 1994 he became the principal at Columbus School, where respondent was then assigned. Mr. Terebetsky testified that he is most concerned with good housekeeping, and soon after his appointment he met with the custodians to emphasize this. In the latter part of September, respondent remonstrated with him that his duties were onerous by comparison to those of the other janitors in the building. Mr. Terebetsky thought that the custodial work was evenly divided.

Mr. Terebetsky testified that on October 3, 1994, Nancy Kozimor, the vice principal, told him that respondent refused her instructions to clean a girls' bathroom in the basement. Mr. Terebetsky went down to speak to respondent about this and told him to clean the bathroom. Respondent was surly during this conversation and, to Mr. Terebetsky's surprise, said "If you put it in writing I will do it." Mr. Terebetsky advised respondent that if he did not proceed to the task immediately, he would consider it insubordination. Respondent complied. P-21; P-50.

Mr. Terebetsky testified that on February 7, 1995, at about 10:30 a.m. he received a report that there was snow and ice on a set of outside steps and he asked respondent to take care

of it. Respondent was the only custodian in the building at the time and he was unloading a supply truck. Respondent said that he had to unload the truck, and although this was not a particularly pressing assignment, Mr. Terebetsky went to find Ed Wawrzynski, the supply clerk, to unload the truck while respondent cleared the steps. As Mr. Terebetsky and Mr. Wawrzynski walked toward the truck delivery area, respondent approached them and began shouting. Mr. Terebetsky testified that he tried to calm respondent because there were classrooms nearby, but respondent continued to yell and then stalked off. Mr. Terebetsky instructed Mr. Wawrzynski to finish unloading the truck and Mr. Terebetsky went outside and cleaned up the stairway. P-25. There was a meeting with Superintendent Panigrosso about this incident and respondent apologized for his behavior. Mr. Terebetsky denied saying "You should be thankful you work here, if it was up to me the job would go to an American."

Mr. Terebetsky testified that on May 10, 1995, he was monitoring lunch, as is his custom. Custodians are generally present to clean up spills; lunchroom aides, usually parents, help the children open milk containers, and they clear the tables when lunch is done. Pizza was being served that day. Toward the end of the period, as the children were getting ready to exit and the lunchroom aides were wiping the tables, Mr. Terebetsky saw Pat Teixeira, an aide, yelling and following respondent. He was walking away from her holding two slices of pizza, which he then threw in the garbage. Mr. Terebetsky heard respondent say in an angry voice "You don't deserve this," to which Ms. Teixeira responded "You're an asshole." The two then continued to yell at each other in the presence of the children. Mr. Terebetsky reprimanded both of them. Mr. Terebetsky testified that respondent somehow decided that Ms. Teixeira purloined these pizza slices and that it was his job to right the situation. He was merely there to mop up, and, in any case, Ms. Teixeira later explained that she purchased these slices for her children, but they weren't hungry so she intended to save them for later (P-26; P-27).

Mr. Terebetsky testified that he frequently had to mediate between respondent and the other custodians; respondent generally felt that everyone was out to get him. He questioned every assignment. Mr. Terebetsky gave respondent a respectable evaluation in September 1995, but he testified that this was the beginning of the school year (R-78).

Mr. Terebetsky testified that on March 11, 1996, respondent injured his back and was out of work for a while. He denied that respondent's section was not cleaned in his absence.

James McFadden has been employed by the Board for twenty-five years. He began as a teacher, and in July 1996 became vice principal of the new Carteret Middle School. The building was previously known as the Lincoln School and an addition was being completed over the summer. This was the first time the district would have a middle school and there was considerable work to be done to make the building ready by September. Custodian assignments were not a priority at the time and when school began the janitors were simply given daily directions. Over the course of the next few months he and the principal, Patricia Holmes, prepared and amended written divisions of labor for the custodians (R-2; R-2A; R-5), which he felt were fair. Respondent complained that he had the most demanding assignment. The two day-shift janitors, Mike Kepich and Jim Mets, had less square footage to clean, but their routines were frequently interrupted to assist teachers and administrators and to clean up the messes that middle school students invariably make. Mr. McFadden testified that in his opinion Don Macfie, who shared the 1:00-p.m.-to-10:00-p.m. shift with respondent, had the most difficult janitorial responsibilities, because he had no open areas to clean. Mr. Macfie maintained the second floor, which consists mainly of classrooms, requiring him to move chairs and tables before he swept the floor and to wash a number of sinks.

Mr. McFadden testified that on the afternoon of October 11, 1996, he asked respondent to clean-up fecal matter in a men's room, after respondent refused a teacher's request to do so. Respondent declined because this was not in his area. Mr. McFadden testified that this bathroom was in Mike Kepich's section, but he was out that day. After respondent refused he closed the bathroom and called Mr. Macfie to do the job (P-39).

Mr. McFadden testified also about an incident in February 1997. The custodians had been instructed to set up tables for a science fair. Respondent was unhappy because Mr. Kepich was not helping and he picked up the schematic for the tables, threw it at Mr. McFadden and stormed out of the gym. Mr. McFadden testified that he was shocked; he did not prepare a memo.

On April 30, 1997, at about 3:00 p.m., just after the school day was finished, Mr. McFadden was in a hallway talking to Brian Sosnowski, a groundskeeper, and Mike Kepich. Respondent approached in an agitated state. He wanted to know why Mr. Kepich was not in the gym helping him set up chairs for an awards assembly that evening. Mr. McFadden told respondent to leave and they could talk about it later, but respondent became enraged, tore off the back brace he was wearing and began flailing it in his hands. Respondent pointed his finger at Mr. McFadden and said that he was part of the problem. Mr. McFadden testified that respondent was out of control and he felt threatened. P-41. Shortly thereafter he went to talk with Ms. Holmes about the incident, and when he entered her office he could see that she was shaken. She told him that respondent had just been there and had angrily "ripped his shirt open." She was flushed, jittery and complaining of chest pain. Mr. McFadden walked Ms. Holmes out of the building to her car.

Patricia Holmes has been employed by the Board for twenty-eight years. She began as a teacher and became principal of the Lincoln School in 1991. In 1996, when the Lincoln School became Carteret Middle School, she continued on as building principal. Ms. Holmes testified that she and her staff worked throughout the summer to ready the building, but there was still much to be done when the school year began. The janitorial staff received verbal instructions daily for the first few weeks and assignments became more formal over the next few months as she assessed her needs. Ms. Holmes testified that respondent griped to her about how onerous his chores were, and although she did not agree, she offered to talk to Mr. Macfie about switching assignments. Respondent declined. Ms. Holmes testified that she relies heavily on Mr. Kepich throughout the day and felt that he and the other custodians were quite busy.

Ms. Holmes testified that on April 30, 1997, sometime after 3:00 p.m., respondent came to her office in a rage. He yelled that he would file unfair labor practice charges and then yanked open his shirt in a fit of anger, popping off the buttons. Respondent then withdrew. Ms. Holmes testified that she was "scared to death," and began to experience chest pain. Soon thereafter Mr. McFadden came by and explained that he had just had an encounter with respondent in the hallway. Ms. Holmes testified that she had assigned three of the four custodians to set up chairs in the gymnasium for the evening's activities. She asked the fourth custodian, Mr. Kepich, to go

over to the Carteret War Veterans' Building and borrow a large coffeemaker. This, apparently, is what set respondent off. P-42.

Ms. Holmes testified that Mr. McFadden walked her to her car and she drove to her mother's house, which was nearby, to lie down. She did not feel well, but was obliged to participate in the awards ceremony. She did not see respondent that evening. Although Mr. McFadden had talked to her previously about unpleasant encounters with respondent, she had not realized how explosive respondent was.

S. Louis Panigrosso was the superintendent of schools when these tenure charges were filed. He became superintendent in July 1994 and was employed by the Board for thirty-four years before retiring recently. Mr. Panigrosso testified that he tried to make respondent feel like he was part of the team and met with him many times over the years to hear his accusations. Respondent was disgruntled wherever he was assigned, and constantly measured his work load against the duties of other custodians. The Board contemplated terminating respondent in the latter part of 1994, fearing that he was mentally imbalanced. Respondent agreed to a psychological evaluation, which indicated he was fit to continue working (P-23; P-24). The incident of April 30, 1997, was, however, the last straw. Mr. Panigrosso concluded that respondent had terrified Ms. Holmes and he had to recommend ouster.

Mr. Panigrosso had personal knowledge concerning the August 27, 1996 incident, when respondent appeared to talk with him on the evening of a Board meeting. Respondent was distressed about the impending shift in his schedule from days to nights. The Board was in closed session and Mr. Panigrosso and Mr. Torre were talking together in the meeting room. Respondent approached and became boisterous. To avoid a scene before the public, Mr. Panigrosso suggested they walk across the hall to Mr. Torre's office. Respondent was concerned that his transfer to the evening shift would curtail his ability to visit his children, and he thought this was the work of his mother-in-law, a district secretary. Mr. Panigrosso testified that there were a number of custodian reassignments at that time because they were opening a new middle school; respondent's was just one of these. The discussion lapsed into loud argument and Mr. Panigrosso feared that respondent and Mr. Torre would come to blows. He stepped outside and

called Mr. Packard in, at which point respondent began upbraiding Mr. Packard. A few Board members came by in response to all the noise and respondent departed.

Mr. Panigrosso testified that respondent's decision to file a civil rights complaint played no part in his decision to prefer tenure charges. Mr. Panigrosso did see a September 20, 1996 newspaper article reporting that respondent had filed such charges. Mr. Panigrosso testified that the manager of buildings and grounds oversees the maintenance men, groundskeepers and custodians. Building principals also have jurisdiction over the custodians in their building.

Drew Packard has been employed by the Board for twenty-four years and began as a custodian. In 1991 he became manager of buildings and grounds and was respondent's direct supervisor. He testified that respondent was too concerned with everyone else's assignments, and insufficiently attentive to his own work (P-40; P-48; P-50; P-56; P-60; P-71; R-25).

Mr. Packard testified that respondent was suspended in August 1992 after his fight with Bruce Elliot because an eyewitness, Robert Wilder, said that respondent was at fault. Mr. Wilder appeared before the Board. There was a second incident in April 1993, and Mr. Packard arrived at the scene before the police after hearing the call on his shortwave radio. Mr. Packard denied seeing Mr. Elliot. He was not aware that the municipal court later instructed Mr. Elliot to stay away from respondent for six months. He was in court on the trial date, but left before the case was heard.

Mr. Packard testified that on August 22, 1994, respondent stormed into his office while he was talking to Samuel Carrico, Jr., who serves with him on the local volunteer fire department. Respondent said that Mr. Packard had to do something about Scott Makwinski, another custodian, who was not doing his share. Respondent threatened, "If you don't do anything about it you will regret it." The following day, respondent came into Mr. Packard's office while he was conducting a meeting with George Wehrhahn and Edward Wawrzynski. He ranted again about Scott Makwinski and as he left the room, he threw a spray bottle he was holding out the door and then kicked it down the hallway. Mr. Packard and the other individuals present prepared statements regarding the incidents. P-14; P-15; P-17; P-18.

Mr. Packard testified that on June 6, 1995, respondent was asked to work an election. Respondent's shift then was 9:00 a.m. to 6:00 p.m., and he was given extra duty from 6:00 a.m. to 7:00 a.m. and then again from 6:00 p.m. to 9:00 p.m. He was paid for four additional hours. Chuck Martorelli worked the same 9:00-a.m.-to-6:00-p.m. shift that day, and received six extra hours for working for the Board of Elections. R-48; R-49. Mr. Packard could not say why; he did not recall what Mr. Martorelli's assignment for the Board of Elections was that day.

Mr. Packard testified that he did not learn that respondent had been hospitalized on April 10, 1996 (R-165; R-165A; R-165B) until a week later. Respondent was docked a day's pay, which was later returned to him.

Mr. Packard testified that on June 18, 1996, respondent changed his hours without permission. Normally he worked from 9:00 a.m. to 6:00 p.m., but he was allowed to work from 8:00 a.m. to 5:00 p.m. on days when he attended physical therapy sessions after a back injury. On this day he arrived one-half hour early and left one-half hour early (P-32; R-174).

Mr. Packard testified that in September 1996 he did not make the assignments at the Carteret Middle School; these were done by Ms. Holmes. He made the assignments for the custodians outside the building.

Mr. Packard testified that he knew respondent reinjured his back on December 18, 1996. The December 20, 1996, memo that he wrote to respondent complained about deficient effort prior to the injury (P-74).

Mr. Packard testified that there was some reluctance by Board members to grant respondent tenure in January 1994, but respondent had family responsibilities, so he provided a favorable recommendation. Mr. Packard testified that Ms. Teixeira is his wife's niece.

Robert Cowen has been employed by the Board for twenty-nine years as a social studies teacher, and has also served as president of the Carteret Education Association (CEA), the employee union. Mr. Cowen testified that respondent began complaining about mistreatment and

discrimination soon after he entered the Board's employ. Mr. Cowen discerned no merit in these claims. Respondent felt that cleaning toilets was beneath him, yet, this was part of his job. On separate occasions he referred respondent to two union lawyers, Steven Klausner, Esq., and Nancy Oxfeld, Esq.; both recommended against proceeding on his behalf. Eventually Mr. Cowen found that he could not work with respondent and a representative from another district was enlisted to interact with him.

Mr. Cowen testified that he interceded many times on respondent's behalf with Mr. Packard, and found Mr. Packard quite willing to smooth things over. At the time respondent was under consideration for tenure, there were Board members who were dissatisfied with his demeanor. Mr. Cowen testified that without Mr. Packard's recommendation, tenure would likely have been denied.

In 1996 respondent filed a complaint against the CEA with the Public Employment Relations Commission (PERC); these charges were dismissed (P-80). Mr. Cowen testified that Mike Kepich does a fine job and to his knowledge no complaint has ever been lodged against him.

Joyce Yeagle is a teacher who has been employed by the Board for nineteen years. She knows respondent and considers him a friend. On or about February 1, 1994, supplies from her home economics class were being transferred from one building to another. This included sewing machines, craft supplies and numerous cardboard boxes filled with paper. Ms. Yeagle testified that respondent carried the boxes from her classroom to the top of a stairwell, and there were three workers at the bottom of the steps. After taking a number of loads from the classroom to the stairwell, respondent threw a box down the steps and it broke open, almost hitting Brian Sosnowski.

Ms. Yeagle testified that on April 30, 1997, she was in Carteret Middle School tutoring a student after class. As she was signing out she noticed that Ms. Holmes was sitting in her office and appeared upset. Ms. Yeagle went in to see what was wrong and Ms. Holmes told her that respondent had just stormed in, yelled at her and ripped open his shirt, popping the buttons. Ms. Holmes is generally well collected, but she was completely frazzled at that moment.

Brian Sosnowski testified that he has been employed by the Board for fourteen years as a groundskeeper. On February 1, 1994, he was part of a group moving materials and equipment from the home economics class at Columbus School to Lincoln School. At one point he was at the bottom of the staircase with his back to the stairs. He heard rumbling and turned to see a few rolls of paper fly by. A few seconds later he was hit by a box in the right calf and almost went down with a ceramic oven he was carrying. Mr. Sosnowski yelled up to respondent, "What the hell are you doing?" and respondent replied, "This is because no one is helping me." He reported the incident (P-11), but at a subsequent meeting was persuaded by the union not to pursue the matter.

Mr. Sosnowski testified that on April 30, 1997, he was talking to Mr. McFadden and Mr. Kepich about a replacement lawnmower, when respondent approached yelling that Mr. Kepich was not setting up chairs in the auditorium. Mr. McFadden told him to calm down, but respondent continued his tirade and then tore his back brace off and threw it to the ground.

Antonio Rivera began employment with the Board in July 1996, doing odd jobs. In July 1997 he was appointed as a custodian and given the 1:00-p.m.-to-10:00-p.m. shift at Carteret Middle School. Mr. Rivera reviewed his assignment in detail and testified that he was generally able to complete his work with half an hour or so to spare.

Respondent testified in his own behalf. He sought to meet the Board's charges and also presented incidents that he believes establish discrimination and retaliation.

On August 11, 1992, at about 7:30 a.m. respondent got into an argument with Bruce Elliot. It was Bruce's turn to buy coffee, and Bruce called out to respondent, "Hey Egyptian, come here"; Bruce was holding a coffee cup. Respondent approached and said that he was upset that Bruce had reported him the day before for lateness, at which point Bruce said "Here's your coffee motherfucker," as he spilled it on the ground. Then Bruce, who weighs approximately 300 pounds, jumped respondent, who weighs 130 pounds. The police were called and cross-complaints were filed by the parties in municipal court, and later dropped (R-13). Bruce was seen

by a doctor, as was respondent (R-14). Nevertheless, respondent was suspended for six days and Bruce was not punished.

Respondent testified that at approximately 9:30 p.m. on April 1, 1993, he was ending his shift at the high school. As he was locking up he saw Bruce Elliot outside urinating on a wall. Bruce was drunk and began taunting him, saying "Come here motherfucker, I'll cut your heart out." Respondent closed the door and ran to the nurse's office, where he called the police. He testified that Bruce started banging at the door trying to get in. Mr. Packard arrived a few minutes later and told Mr. Elliot to drive off. Then the police arrived. Respondent filed a municipal court complaint (R-24), and Mr. Elliot was instructed to stay away from respondent for six months (R-26). Respondent testified that Mr. Packard was present for the proceedings, but Mr. Elliot was never punished.

Respondent testified that on February 1, 1994, he was assigned to help move Ms. Yeagle's classroom equipment to another building. In actuality, he did all the moving. He carried approximately fifty boxes, some quite heavy, from the classroom to the staircase, down the steps, and into a waiting truck. The other three men present were simply there to drive and offered no assistance. Moreover, Mr. Packard had ordered him to do the job quickly so that he could get back and set up for lunch. Respondent testified that he was just about running, and one time as he started down the stairway he slipped and a box fell. He yelled "Brian, watch out," and the box missed Mr. Sosnowski.

Respondent testified that on June 23, 1994, his son was graduating from kindergarten and he went to get two folding chairs for his wife and mother-in-law. He had just finished setting up the entire gymnasium. Scott Makwinski said "What are you doing, you think you own the place?" and Mr. Packard nodded approval. He sought review of this matter (R-30), but nothing was done.

Respondent denied threatening Mr. Packard on August 22 or 23, 1994. There were no incidents on these days.

Respondent denied that he refused to clean a girls' bathroom on October 3, 1994. He simply wanted Mr. Terebetsky to station someone outside the door to keep the girls out while he cleaned. When Ms. Kozimor agreed to stand outside, he did the job. He never said anything to Mr. Terebetsky about putting it in writing.

Respondent testified that on February 7, 1995, he was unloading a truck at Mr. Packard's request. Mr. Terebetsky approached and told him to remove water and ice from a set of outside steps. Respondent said he would do it after unloading the truck, and did. He really wasn't sure whose orders had priority.

Respondent testified that on April 3, 1995, he had to set up lunch by himself, which is difficult, and he later complained to Mr. Terebetsky (R-80). Nothing happened.

Respondent testified that on May 10, 1995, he was clearing tables after lunch, and threw numerous empty pizza boxes into the garbage. At one point Ms. Teixeira began making a ruckus, and initially he could not understand her. Then he realized that she was upset about some pizza slices that he may have thrown away, so he fished through the garbage and found a box with two slices of pizza. Respondent testified that he was "shocked" because there was no extra pizza that day; in fact, someone had to be sent out to buy a slice for one boy who had none. Ms. Teixeira is related to Mr. Packard, and it was she who acted unreasonably by cursing at him. Inexplicably, Mr. Terebetsky took her side. R-31.

Respondent testified that there was a meeting about the pizza incident on May 16, 1995, at which Mr. Terebetsky said to him, "You're lucky to have a job here, the job should go to an American, people like you should go back where you came from." Respondent then said "I don't have to take this" and got up to leave, but Mr. Torre told him to "shut up and sit down." At this point Mr. Panigrosso asked for calm and suggested a change in assignment and hours for respondent. Mr. Panigrosso said that respondent would work the 1:00-p.m.-to-10:00 p.m. shift, and when respondent protested that this would curtail his visitation rights with his children, Mr. Panigrosso retorted "If I transfer you, will you quit?"

Respondent testified that on June 6, 1995, he worked six hours for the Board of Elections, but was only paid for four hours. At this time his normal shift was 9:00 a.m. to 6:00 p.m. He worked for the Board of Elections from 6:00 a.m. until 9:00 a.m., and again from 6:00 p.m. to 9:00 p.m. Chuck Martorelli, another custodian at a different school, received six hours' pay for the day (R-48; R-49).

On June 12, 1995, respondent complained to Mr. Panigrosso that George Wehrhahn, in the presence of Mr. Packard, said to him "Work, you fucking slave," and Mr. Packard did nothing (R-32). He received no response to his complaint, although it appears there was some investigation (R-33).

In July 1995, when respondent was contemplating suing the CEA, he asked the New Jersey Education Association (NJEA) to provide a lawyer. The NJEA refused (R-155; R-155A R-155B). Respondent testified that the NJEA and the CEA, through Mr. Cowen, conspired against him with the Board. Respondent went forward *pro se* before a PERC hearing officer and prevailed (R-156). He had no idea that this decision was not final, and only learned at our hearing that the PERC reversed (P-80).

Respondent testified that on February 12, 1996, he was setting up for lunch when Mr. Donovan, a teacher, brought his eighth-grade class in. Mr. Donovan was supposed to wait until the room was ready and respondent told him so. They argued and respondent testified that he left to avoid further confrontation. Mr. Donovan followed him into the boiler room and a fight was about to ensue. Bradford Bradach, another teacher, intervened by holding Mr. Donovan back and was injured. Teacher Robert Molarz held on to respondent for his protection. Respondent prepared a statement (R-79); Mr. Donovan was not disciplined.

Respondent testified that on March 11, 1996, he injured his back at Columbus School folding a broken table. Mr. Terebetsky had told him in January to mark any broken tables with an "X" so that they could be repaired or removed. He did so (R-86; R-87; R-88), but the tables remained – this is how little Mr. Terebetsky was concerned for his welfare. Respondent testified that he was taken to Hadley Medical Center, where he was told that he had suffered a strain. He worked on and off for the next month, began physical therapy, and learned that his back problem

had a structural component (R-8). On April 10, 1996, he was hospitalized while at work because of back pain (R-165; R-165A); nevertheless, Mr. Packard wrote a memo rebuking him for failing to come to work that day (R-37A). The memo was typed by "m.c.," Maria Callegerio, his former mother-in-law. Respondent filed a grievance which was upheld (R-39), but he was not paid for the day until July 1996 (P-88). Respondent testified that when he returned to work in June 1996 (R-208F), the broken tables were still not fixed. When a custodian is out, coverage is always provided, but he returned to find his area filthy and infested with mice.

Respondent testified that he attended physical therapy, which included hydrotherapy, at the Comprehensive Rehabilitation Institute (CRI). There were no appointments after 5:00 p.m. This meant that he had to take sick time to go to his therapy sessions and this occurred at least ten times. Mr. Packard alleged that he changed his hours without permission on June 17 and 18, 1996 (P-32; P-33), but these were really days on which he had to leave by 4:30 p.m. to make a 5:00 p.m. therapy session. When Jose Perez, another custodian, changed his schedule during this same period (R-168; R-169; R-170 R-171; R-173), there were no repercussions.

Respondent testified that on the evening of August 27, 1996, he sought out Mr. Panigrosso after a Board meeting to talk about his impending shift change and transfer to Carteret Middle School. Mr. Torre interrupted loudly by saying "What the fuck do you want?" and grabbed his arm. They then went into Mr. Torre's office, where Mr. Torre pointed at respondent's chest and raised his hand to hit him. Mr. Panigrosso grabbed Mr. Torre's arm and said "Knock it off – What are you doing?" At that point Mr. Packard walked in and respondent departed. The police arrived, but they were there for another incident that had occurred during the Board's session. He chose not to file another report, and instead spoke to a newspaper reporter who was present. That reporter contacted him a few days later and the article published on September 20, 1996 (R-1) arose from the interview. Mr. Packard spoke to him about the article and said "You will not get anywhere – I'm going to get you out of here."

Respondent testified that when he began working at Carteret Middle School in September 1996, Ms. Holmes gave oral instructions daily as to what needed doing. Thereafter, the shift schedule was established in writing and amended, but his load kept increasing. By the time of the last change in late October, there was far more to do than he could accomplish efficiently.

Respondent testified that Ms. Holmes told him Mr. Packard was behind this and that it was out of her hands. Initially, Ms. Holmes was friendly toward him, but soon she began to toe the party line. Respondent complained to the central administration about these workload increases (R-7), but Mr. Torre investigated and respondent got no satisfaction.

Respondent testified that Mike Kepich did not sign in or out on numerous occasions (R-56 through R-62; R-64 through R-72) and was not around much in the afternoons. Respondent often cleaned Kepich's section, which was commonly dirty (R-94 through R-105).

Respondent testified that on December 18, 1996, he reinjured his back while raking leaves outside Carteret Middle School (R-136) and was out of work for a few weeks. He resumed hydrotherapy at the CRI (R-137). During this period Mr. Packard issued a memo complaining that he was not cleaning his section properly (P-74). Mr. Torre told him that since his schedule at that point was 1:00 p.m. to 10:00 p.m. he could go to therapy in the morning; respondent testified that hydrotherapy was not available in the morning. Respondent testified that Dr. Shalom Abboudi, the physician he was seeing, had the insurance company write him a letter emphasizing the need to attend physical therapy in an effort to prod the Board to let him go (R-138A).

Respondent testified that on April 30, 1997, he was required to set up some 250 chairs in the gymnasium for an awards assembly. He worked alone, and when the job was done he went to see Ms. Holmes. Respondent stood outside her office door and explained in a restrained voice that he had been given too much work and was ready to file an unfair labor practices complaint. At this, Ms. Holmes said "They want you out, don't you get it?" Respondent left without saying anything further. Respondent testified that he did not see Mr. McFadden at all that day, and he went home for lunch. After arriving home he thought that Ms. Holmes might have taken offense at the comment that he was contemplating litigation. He telephoned her to say that he was not planning to sue her, his problem was with Mr. Packard and the Board. He returned to work after lunch and continued his duties. The awards assembly ended at about 9:00 p.m., and when he finished cleaning he accompanied Ms. Holmes to her car, as he had done often in the past. She gave no indication of being upset with him.

Respondent testified that he is provided with uniforms each year, three pairs of pants and three shirts. He presented nine shirts, which he testified were given to him in the three years prior to his suspension. Photographs were later substituted for the shirts and placed in evidence (R-179A through R-179I). Respondent testified that none have missing buttons or show signs of repair.

Respondent testified that he received good evaluations, and his work was praised by supervisors throughout his career (R-25; R-28; R-29; R-78; R-109; R-109A; R-109B).

Marylou Campbell is a fifth-grade teacher and serves as the CEA representative for Columbus School. She was called by respondent, and she testified that respondent generally felt poorly treated, but that was not her impression. There was one time when he had to set up for lunch alone and she wrote to Mr. Panigrosso about it (R-81). Ms. Campbell testified that she is not too familiar with the grievance process, because respondent was the only employee to file a grievance during her tenure as building representative.

Edward Wawrzynski is the stock clerk for the Board. He recalled that respondent injured his back in December 1996, and Mr. Wawrzynski took him to the hospital (R-198). Mr. Wawrzynski testified that he supplies the custodians with uniforms, but could not say whether shirts shown to him at hearing were those he supplied.

Louis G. Mangieri has been a member of the Board, on and off, from 1984 forward. Mr. Mangieri testified that the Board was not entirely satisfied with the psychological evaluation it received in December 1994 indicating that respondent was fit, and some members wanted him watched. He did not recall which members said this. Mr. Mangieri testified that to his knowledge Mr. Packard has no ax to grind with respondent. Mr. Mangieri testified that he read the newspaper article indicating that respondent had filed a civil rights complaint; the Board had no reaction to it.

Bradford F. Bradach is a physical education teacher. On February 12, 1996, at about 11:20 a.m. he heard raised voices and found respondent and Mr. Donovan arguing; students were all about. He and Robert Molarz, another teacher, attempted to stop an impending scuffle. Mr.

Molarz grabbed respondent and Mr. Bradach grabbed Mr. Donovan. Mr. Bradach testified that he had a hernia operation some six weeks earlier, and when he grabbed Mr. Donovan he felt a pain. The incident lasted no more than thirty seconds and he suffered some muscle strain. He wrote a report (P-104).

Philip H. Witt is a psychologist in private practice who examined respondent on March 18, 1998 (R-195). Dr. Witt administered various psychological tests, interviewed respondent, and spoke to people who know him. Dr. Witt found no broad psychopathology in respondent. He is conscientious, somewhat compulsive, and without any history of paranoia. Respondent respects authority, likes to follow rules, and is unlikely to take the offensive with peers or supervisors. Respondent tends to minimize his symptoms; his loss of work has been disturbing to him. Dr. Witt conceded that he did not speak to anyone employed by the Board about respondent, and if he were to learn that respondent had acted aggressively on a number of occasions, his view might change. This is the substance of the record.

The Board must show by a preponderance of the credible evidence that respondent was insubordinate and/or failed to properly perform his duties such that he should be dismissed.[2] *N.J.S.A.* 18A:6-10; 18A:17-3. This has been done. The dispute poses a series of credibility questions. Generally, I found the Board's witnesses believable and respondent unconvincing.

I begin at the end, because the April 30, 1997, sequence of events triggered the tenure charges, arguably represents the worst conduct alleged, and places the credibility question in sharp relief. On that day a conversation took place at about 3:00 p.m. in a school hallway among Mr. McFadden, Mr. Kepich, Mr. Sosnowski and respondent. Mssrs. McFadden and Sosnowski say that they were talking when respondent approached and berated them. They say he was so angry that he tore off a back brace and threw it to the floor. Respondent denies that any such encounter took place.

Ms. Holmes testified that respondent frightened her when he arrived at her office door in a furious state and popped the buttons off his shirt. According to respondent, he simply told Ms.

[2] I have not recounted every incident raised by the parties. Some were *de minimis*; a few charges were dismissed at the end of the Board's case.

Holmes that he was working harder than the other janitors in the building and was ready to file unfair labor practice charges. He did not raise his voice and Ms. Holmes was sympathetic, but powerless to block Mr. Packard and the administration. He presented nine work shirts that show no apparent flaws, to prove that Ms. Holmes fabricated this incident. Ms. Yeagle offered that Ms. Holmes seemed rattled when she saw her shortly after 3:00 p.m., and Ms. Holmes related that respondent had frightened her by yelling and tearing his shirt open.

Respondent testified that Ms. Holmes was so at ease with him that night that he walked her to her car after the awards assembly. Ms. Holmes allowed that respondent had walked her to the car a few times in the past, but under no circumstances was she in his company that night, or ever again.

Ms. Holmes was a particularly persuasive witness who was not given to overstatement. She had no reason to spin a yarn. The vice principal, Mr. McFadden, also likely has more to do than imagine confrontations with respondent. His testimony is supported by Mr. Sosnowski, and I accept that the events occurred as these three witnesses related them.

Mr. Terebetsky testified to three incidents that occurred during the 1994-95 school year. He maintained that respondent refused his order to clear ice and water from some outside steps, and that eventually he did it himself. Respondent testified that he was stuck between Mr. Packard's instruction to unload a supply truck and Mr. Terebetsky's directive, but that he performed both jobs. Mr. Terebetsky testified that respondent refused his direction to wash a bathroom, unless the request was presented in writing. Respondent says he was willing to clean the girls' bathroom and did, after a monitor was posted outside to keep the girls out. Mr. Terebetsky testified that respondent took it upon himself to throw away two pizza slices belonging to Ms. Teixeira because he thought she wasn't entitled to these and a screaming match resulted. Respondent says he was throwing pizza boxes out and inadvertently disposed of a box with two slices in it. Mr. Terebetsky was a careful witness and there is nothing in this record to support respondent's suggestion that he harbored ethnic or religious bias. I specifically reject respondent's assertion that Mr. Terebetsky said at a meeting that if it were up to him, respondent's position would go to an American. Respondent's memo summarizing the incident

and meeting does not mention this comment. Respondent is given to attributing inflammatory quotes to his various adversaries.

Respondent is accused of intentionally throwing a box or boxes down a set of steps on February 1, 1994, that injured Brian Sosnowski. Ms. Yeagle testified that she saw respondent throw a box down the steps and "almost" hit Mr. Sosnowski. Mr. Sosnowski said that two boxes came down the stairs and that one of them did hit him. He yelled up to respondent and respondent answered that he threw the box down because no one was helping him. Respondent testified that he was doing all the work under strict time constraints, and that he slipped once at the top of the steps and a box fell. Although Ms. Yeagle and Mr. Sosnowski did not recall the details in exactly the same way, they both indicate that respondent threw a box or boxes down the stairs intentionally. I find this core of the story credible.

Mr. Packard asserted that there were two successive incidents of insubordination on August 22 and 23, 1994. Mr. Packard testified that respondent entered his office on both days and began yelling that Mr. Packard must do something about Scott Makwinski, or else. The record contains three corroborating statements as to these events. Respondent retorts that all of this testimony is fiction. I find that respondent shouted at and threatened his supervisor on these days.

Principals Bartley, Torre, Terebetsky and Holmes, supervisor Packard, vice principal McFadden, and superintendent Panigrosso were in accord that respondent failed to consistently maintain his assigned areas, at times refused direct orders, was defensive and hostile when corrected, and could not get along with coworkers. Respondent even ran afoul of his union. Mr. Cowen testified credibly that he could never detect the mistreatment that respondent reported and eventually stopped reacting to him. It should be noted that the Board needn't have worked so hard had its intentions toward respondent been malicious. He could have been denied tenure in January 1994. There was already reason for concern then, but Mr. Packard – a villain to respondent – recommended permanent appointment.

Respondent testified that his mistreatment at the hands of Board employees accelerated after September 20, 1996, when a newspaper article reported that he had filed a civil rights

complaint. Respondent said that his duties at Carteret Middle School were increased thereafter to the point where he could not do the job effectively. Ms. Holmes put the issue to rest when she testified that respondent rejected her offer to speak with Mr. Macfie, the other late-shift janitor, about trading places. Further, Mr. Rivera, who took over respondent's duties after he was suspended, testified credibly that he completes this assignment with time to spare.

Respondent pointed to other events that he thinks prove discrimination. When he fought with Bruce Elliot in August 1992, the Board suspended only him. In April 1993 respondent and Mr. Elliot argued again, but this time the matter was heard in municipal court and Mr. Elliot was found guilty, yet he was not disciplined. Mr. Packard cheated respondent out of two hours' time when he worked for the Board of Elections on June 6, 1995. On June 12, 1995, George Wehrhahn made an indecent remark to respondent in Mr. Packard's presence, without consequence. Respondent claims that his area went unattended while he was out in the spring of 1996, and he returned to find filth and mice. During this period, Mr. Packard and Mr. Torre impeded his efforts to attend physical therapy. On April 10, 1996, respondent was taken to the hospital from work, yet Mr. Packard wrote him up for being absent. He was not paid until after a grievance was filed. On December 18, 1996, he reinjured his back, and two days later Mr. Packard again wrote a memo reprimanding him. Respondent also testified that Mike Kepich was out frequently and that he had to clean Mr. Kepich's area, which was filthy.

Some of these assertions have a ready explanation, others pose credibility clashes which are precarious for respondent, and in some instances he seems correct. The police report about the August 11, 1992, incident reflects that the only witness to the fight between respondent and Mr. Elliot said that respondent started it. Mr. Packard testified credibly that he spoke with Mr. Wilder and got the same impression; Mr. Wilder appeared before the Board. Thus, the Board's decision to suspend respondent lends no support to a claim of disparate treatment. Mr. Elliot was not disciplined for the April 1, 1993, incident, though it appears he probably should have been.

Mr. Packard explained that respondent was not scheduled to work three hours for the Board of Elections on the morning of June 6, 1995; he was to set up from 6:00 a.m. to 7:00 a.m. After that voting begins and his role is finished. Mr. Packard explained that he heard Mr.

Wehrhahn's vulgarism on June 12, 1995, but it was not directed at respondent. Mr. Wehrhan was actually saying that he didn't want to be respondent's slave.

Respondent's claim that his section went unattended while he was injured in the spring of 1996 was denied by Mr. Terebetsky and is greatly strained. It assumes that Mr. Terebetsky would jeopardize the health and safety of students and staff, just to antagonize respondent. Respondent seemed fixated on Mr. Kepich, but both Ms. Holmes and Mr. Cowen testified that there were no problems with Mr. Kepich's work or attendance. He did fail to sign in and out as he should have.

Mr. Packard docked respondent on April 10, 1996, though respondent was taken to the hospital from work. He was paid after filing a grievance. Mr. Packard wrote a December 20, 1996 memo stating that he had received complaints about respondent's work. The memo addresses events that occurred prior to December 18, 1996, when respondent reinjured his back. Mr. Packard simply issued the memo while respondent was out. Respondent maintains that the Board hampered his ability to attend physical therapy, because Mssrs. Packard and Torre would not adjust his hours to let him leave before 5:00 p.m. Karen Lopez, office administrative assistant at CRI, submitted an affidavit indicating that physical therapy, including hydrotherapy, was available on various days during the week from 8:00 a.m. to 8:00 p.m., and on Saturday morning (P-105). Respondent concocted this issue.

To the extent that it appears Mr. Packard watched respondent's time and activities more carefully than he may have the time and activities of some others, it is more likely explained by respondent's belligerence than by discrimination. Mr. Packard neither said nor did anything to suggest religious or ethnic intolerance. Respondent cannot behave badly toward supervisors and coworkers, and then complain that he was singled out.

Based on the foregoing it is my conclusion that petitioner has established by a preponderance of the credible evidence that respondent was insubordinate and failed to properly perform his duties. It is **ORDERED** that respondent be removed from his position as a custodian.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

11/25/98
DATE

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

12/1/98
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 2 1998
DATE

OFFICE OF ADMINISTRATIVE LAW

/caa

LIST OF WITNESSES

For Petitioner:

S. Louis Panigrosso
Charles J. Bartley
Joseph A. Torre
John G. Terebetsky
Antonio Rivera
James McFadden
Joyce Yeagle
Brian Sosnowski
Patricia Holmes
Robert Cowen
Drew Packard

For Respondent:

Saad Radwad
Catherine Burns
Marylou Campbell
Edward Wawrzynski
Louis G. Mangieri
Bradford F. Bradach
Philip H. Witt

LIST OF EXHIBITS

For Petitioner:

P-1	Job Description for Custodian
P-2	CBOE Special Meeting minutes, dated December 12, 1990
P-3	Letter from Mark Resnick to Saad Radwan, dated August 11, 1992
P-4	Memo from Mark Resnick to Dr. Robert M. Hausner, dated August 11, 1992
P-5	Carteret Police Department Report, dated August 11, 1992
P-6	Letter from Mark Resnick to Saad Radwan, dated August 19, 1992
P-7	Letter from Mark Resnick to Saad Radwan, dated September 9, 1992
P-8	Letter from Robert M. Hausner, Ph.D., to Saad Radwan, dated September 17, 1992
P-9	Memo from Drew Packard to Saad Radwan, dated August 27, 1993
P-10	Memo from Drew Packard to Saad Radwan, dated November 1, 1991
P-11	Memo from Drew Packard to Mark Resnick, dated February 3, 1994
P-12	Memo from Drew Packard to Saad Radwan, dated August 23, 1994
P-13	Memo from Drew Packard to Mark Resnick, dated August 23, 1994
P-14	Memo from George Wehrhahn to Edward Wawrzynski, dated August 24, 1994

P-15	Statement of Edward Wawrzynski, dated October 20, 1994
P-16	Statement of George Wehrhahn, dated October 20, 1994
P-17	Statement of Samuel Carrico, dated October 20, 1994
P-18	Statement of Drew Packard, dated October 20, 1994
P-19	CBOE Regular Meeting minutes, dated August 31, 1994
P-20	Memo from Drew Packard to Lawrence Aleksandrich, dated September 2, 1994
P-21	Memo from J. G. Terebetsky to Mark Resnick, dated October 2, 1994
P-22	Memo from Mark Resnick to Saad Radwan, dated October 21, 1994
P-23	Agreement between the Carteret Board of Education and Saad Radwan, dated December 12, 1994
P-24	Psychiatric Evaluation of Saad Radwan by Dr. Roy D. Waldman, dated December 14, 1994
P-25	Memo from J. G. Terebetsky to S. L. Panigrosso, dated February 7, 1995
P-26	Memo from John Terebetsky to Saad Radwan, dated May 10, 1995
P-27	Letter from John and Patricia Teixeira to S. L. Panigrosso, dated May 10, 1995
P-28	Handwritten Letter from Saad Radwan to Mr. Panigrosso, dated May 10, 1995
P-29	Letter from S. Louis Panigrosso to Saad Radwan, dated May 12, 1995
P-30	Letter from S. Louis Panigrosso to Saad Radwan, dated May 16, 1995
P-31	Not Admitted
P-32	Memo from Drew Packard to Saad Radwan, dated June 18, 1996
P-33	Memo from Drew Packard to Saad Radwan, dated June 18, 1996
P-34	Memo from Drew Packard to Saad Radwan, dated October 15, 1996
P-35	Incident Report, dated August 27, 1996
P-36	Custodial Assignments, school year 1996-97
P-37	Note from Drew Packard to Lincoln School Custodians, dated October 10, 1996
P-38A	Identification Only
P-38B	Identification Only
P-38B.1	Revised Enlargement, First Floor, Lincoln School
P-38C	Identification only
P-38C.1	Revised Enlargement, Second Floor, Lincoln School
P-39	Memo from James J. McFadden to L. Panigrosso, dated October 15, 1996
P-40	Memo from Drew Packard to Saad Radwan, dated November 8, 1996
P-41	Memo from James McFadden to S. Louis Panigrosso, dated May 5, 1997
P-42	Memo from Patricia Holmes to Mr. Panigrosso, dated May 5, 1997
P-43	Letter from S. Louis Panigrosso to Saad Radwan, dated May 6, 1997
P-44	CBOE Executive Session – minutes with Resolution, dated June 25, 1997
P-44A	Statement of Tenure Charges
P-45	Board Resolution, dated July 2, 1997
P-46	Identification Only
P-47	Memo from Joseph Torre to Saad Radwan, May 26, 1992
P-48	Memo from Drew Packard to Saad Radwan, dated August 4, 1992
P-49	Notes of October 18, 1996 Meeting
P-50	Statement of John G. Terebetsky, dated October 20, 1994
P-51	Identification Only
P-52	Memo from Nancy A. Kozimor to John Terebetsky, dated March 28, 1995
P-53	Memo from Edward Hill to Mark Resnick, dated February 4, 1991
P-54	Memo from Drew Packard to Saad Radwan, dated October 7, 1991

P-55 Identification Only
P-56 Memo from Drew Packard to Saad Radwan, dated March 4, 1992
P-57 Identification Only
P-58 Identification Only
P-59 Identification Only
P-60 Memo from Drew Packard to William Szymanski and Saad Radwan, dated April 23, 1993
P-61 Letter of George Wehrhahn to J. Yeager, dated February 1, 1994
P-62 Memo from Drew Packard to Mark Resnick, dated September 12, 1994
P-63 Memo from Drew Packard to Saad Radwan, dated Septemebr 24, 1994
P-64 Identification Only
P-65 Memo from J. Terebetsky to Drew Packard, with attachments, dated October 4, 1994
P-66 Identification Only
P-67 Memo from Drew Packard to S. Louis Panigrosso, Joseph Torre and Mark Resnick, dated October 5, 1994
P-68 Memo from Drew Packard to Saad Radwan, dated October 5, 1994
P-69 Statement of Corrado de Candia, dated October 20, 1994
P-70 Statement of Bobby Dean Heck, dated October 20, 1994
P-71 Memo from Drew Packard to Scott Makwinski, Saad Radwan and Jose Perez, dated October 24, 1994
P-72 Memo from Drew Packard to Middle School Custodians, dated March 21, 1997
P-73 Identification Only
P-74 Memo of Drew Packard to Saad Radwan, December 20, 1996
P-75 No Exhibit
P-76 No Exhibit
P-77 Letter to Joseph Torre from George Wehrhahn, dated July 7, 1995
P-78 Letter to Mr. Torre from Edward Wawrzynski, undated
P-79 Identification Only
P-80 Decision and Order, *In the Matter of Carteret Education Association and Saad Radwan*
P-81 Sign-In/Sign-Out Sheet for March 26, 1997
P-82 No Exhibit
P-83 No Exhibit
P-84 No Exhibit
P-85 Identification Only
P-86 Ed Greiss's Custodial Extra Service slip for overtime
P-87 Memo to Robert M. Hausner from Drew Packard, dated December 14, 1993
P-88 Memo to Cathy Burns from Joseph A. Torre, dated July 3, 1996
P-89 Employee Absence Certification Form for Michael Kepich, dated March 28, 1997
P-90 Photograph
P-91 Photograph
P-92 Photograph
P-93 Photograph
P-94 Letter to Middlesex County Election Board from Mark Resnick, dated February 17, 1993
P-95 Identification Only
P-96 Identification Only

P-97	Identification Only
P-98	Identification Only
P-99	Personnel Master File of Michael Kepich
P-100A	Identification Only
P-100B	Signature of Saad Radwan indicating he has reviewed his personnel file
P-100C	Identification Only
P-101	Physician's Note for Bruce Elliot, dated August 11, 1992
P-102	Carteret Police Department Report
P-103	Identification Only
P-104	Memo from B. F. Bradach, dated February 12, 1996
P-105	Affidavit of Karen Lopez

LIST OF EXHIBITS

For Respondent:

R-1	Newspaper article
R-2	Custodial Assignments 1996-97
R-2A	Custodial Assignments 1996-97
R-3	Not Admitted
R-3A	Diagram
R-4	Carteret Board of Education Executive Session - May 22, 1997
R-5	Memorandum to Patricia Holmes from Drew Packard
R-6	Speed Letter from Drew Packard, dated October 31, 1996
R-7	Memorandum to Assistant Superintendent/Business Administrator from Saad Radwan
R-8	Letter from Ajax E. George, M.D., to Arvind Patel, M.D., dated April 29, 1996
R-9	Letter from Laurie A. Lawhon to Saad Radwan, dated August 26, 1996
R-10	Memorandum to Saad Radwan from Drew Packard, dated December 20, 1996
R-11	Physician Note
R-12	Police Report, dated August 11, 1992
R-13	Complaint
R-14	Physician Note
R-15	Letter from Saad Radwan to Mr. Resnick, dated December 7, 1992
R-16	Memorandum to Saad Radwan from Mark Resnick, dated January 19, 1993
R-17	Not Admitted
R-18	Not Admitted
R-19	Not Admitted
R-20	Not Admitted
R-21	Not Admitted
R-22	Not Admitted
R-23	Not Admitted
R-24	Complaint
R-25	Evaluation Appraisal for Saad Radwan
R-26	Borough of Carteret Municipal Court records
R-27	Letter from Saad Radwan to Mr. Resnick, dated April 30, 1993

R-28	Custodial Evaluation for Saad Radwan, dated April 27, 1994
R-29	Custodial Evaluation for Saad Radwan, dated May 2, 1994
R-30	Memorandum from Saad Radwan to Mr. Resnick, dated June 23, 1994
R-31	Memorandum to Mr. Panigrosso from Saad Radwan, dated June 5, 1995
R-32	Memorandum to Mr. Panigrosso from Saad Radwan, dated June 13, 1995
R-33	Memorandum to Joseph Torre from Drew Packard, dated July 7, 1995
R-34	Memorandum to Mr. Torre from Saad Radwan, dated July 25, 1995
R-35	Memorandum to Mr. Torre from Saad Radwan, dated September 19, 1995
R-36	Memorandum to Saad Radwan from Joseph Torre, dated September 27, 1995
R-36A	Memorandum to Mr. Torre from Saad Radwan, dated October 6, 1995
R-37	Memorandum to Drew Packard from Saad Radwan, dated April 24, 1996
R-37A	Memorandum to Saad Radwan from Drew Packard, dated April 12, 1996
R-38	Memorandum to Saad Radwan from Drew Packard, dated April 30, 1996
R-39	Grievance Form, dated May 6, 1996
R-40	Letter from Saad Radwan to Mr. Torre, dated June 17, 1996
R-41	Memorandum from Saad Radwan to Grievance Committee, dated June 17, 1996
R-42	Grievance Form - Case No. Col 96-1, dated June 21, 1996
R-42A	Grievance Form - Case No. Col 96-2, dated June 21, 1996
R-43	Memorandum to Mr. Panigrosso from James J. McFadden, dated October 1, 1996
R-44	Job Description, Manager of Buildings and Grounds
R-45	Job Description, Principal
R-46	Custodial Extra Service
R-47	Fax letter to Tony Jones from Val Nichols
R-48	Memorandum to All Custodians from Drew Packard, dated October 31, 1994
R-49	Overtime records
R-50	Grievance Form, dated May 6, 1996
R-51	Memorandum to Grievance Committee from Saad Radwan, dated June 17, 1996
R-52	Memorandum to Dennis Bedford from Drew Packard, dated April 14, 1992
R-53	Memorandum to Wesley Kaskiw and Saad Radwan from Drew Packard, dated January 7, 1993
R-54	Letter from Joseph Torre to Saad Radwan, dated December 9, 1996
R-55	Letter from Saad Radwan to Mr. Torre, dated December 12, 1996
R-56	Sign-In Sheet, dated October 8, 1996
R-57	Sign-In Sheet, dated October 9, 1996
R-58	Sign-In Sheet, dated October 10, 1996
R-59	Sign-In Sheet, dated December 3, 1996
R-60	Sign-In Sheet, dated December 4, 1996
R-61	Sign-In Sheet, dated December 17, 1996
R-62	Sign-In Sheet, dated December 20, 1996
R-63	Sign-In Sheet, dated January 16, 1997
R-64	Sign-In Sheet, dated January 17, 1997
R-65	Sign-In Sheet, dated January 23, 1997
R-66	Sign-In Sheet, dated January 28, 1997
R-67	Sign-In Sheet, dated January 29, 1997
R-68	Sign-In Sheet, dated January 30, 1997
R-69	Sign-In Sheet, dated February 13, 1997
R-70	Sign-In Sheet, dated February 18, 1997

R-71	Sign-In Sheet, dated March 10, 1997
R-72	Sign-In Sheet, dated March 12, 1997
R-73	Sign-In Sheet, dated March 13, 1997
R-74	Sign-In Sheet, dated March 20, 1997
R-75	Sign-In Sheet, dated March 6, 1997
R-76	Employee Absence Certification Form for Saad Radwan, dated March 18, 1997
R-77	Personal Business Request Form, dated April 15, 1997
R-78	Custodial Evaluation for Saad Radwan, dated September 28, 1995
R-79	Statement of Saad Radwan, dated February 12, 1996
R-80	Memorandum to Mr. Terebetsky from Saad Radwan, dated April 3, 1995
R-81	Letter from Marylou Campbell to Mr. Panigrosso, undated
R-82	Custodial Summer Clean-up 1994 List from Drew Packard
R-83	Memorandum to Mr. Terebetsky from Saad Radwan, dated May 10, 1995
R-84	Letter from Mr. Panigrosso to Mr. Radwan, dated May 12, 1995
R-84A	Letter from Mr. Panigrosso to Mr. Radwan, dated May 16, 1995
R-85	Release of Keys from Saad Radwan, dated May 11, 1995
R-85A	Transfer Between Worksites, undated
R-86	Photograph
R-87	Photograph
R-88	Photograph
R-89	Not Admitted
R-90	Photograph
R-91	Photograph
R-92	Photograph
R-93	Photograph
R-94	Photograph
R-95	Photograph
R-96	Photograph
R-97	No Exhibit
R-98	Photograph
R-99	Photograph
R-100	No Exhibit
R-101	Photograph
R-102	Photograph
R-103	Photograph
R-104	Photograph
R-105	Photograph
R-106	No Exhibit
R-107	Newspaper op. ed. piece
R-108	No Exhibit
R-109	Memorandum to Ed Hill from Charles J. Bartley, dated March 8, 1991
R-109A	Letter to Drew Packard from S. Louis Panigrosso, dated November 16, 1992
R-109B	Letter to Saad Radwan from S. Louis Panigrosso, dated October 26, 1993
R-110	Meeting notes of October 18, 1996
R-111	Withdrawn - In as "P" Exhibit
R-112	Withdrawn - In as "P" Exhibit
R-113	Sign-In Sheet, dated March 10, 1997

R-114	Sign-In Sheet, dated March 12, 1997
R-115	Sign-In Sheet, dated March 13, 1997
R-116	Sign-In Sheet, dated March 18, 1997
R-117	Sign-In Sheet, dated March 19, 1997
R-118	Sign-In Sheet, dated March 20, 1997
R-119	Sign-In Sheet, dated March 26, 1997
R-120	Sign-In Sheet, dated April 15, 1997
R-121	Sign-In Sheet, dated April 16, 1997
R-122	Sign-In Sheet, dated January 14, 1997
R-123	Sign-In Sheet, dated January 24, 1997
R-124	Sign-In Sheet, dated January 27, 1997
R-125	Sign-In Sheet, dated February 5, 1997
R-126	Sign-In Sheet, dated February 10, 1997
R-127	Sign-In Sheet, dated February 24, 1997
R-128	Sign-In Sheet, dated March 6, 1997
R-129	Sign-In Sheet, dated December 12, 1996
R-130	Sign-In Sheet, dated February 19, 1997
R-131	Sign-In Sheet, dated December 16, 1996
R-132	Memorandum to Mrs. Holmes from Saad Radwan, undated
R-133	Handwritten note from Pat
R-134	Diagram
R-135	No Exhibit
R-136	Physician Note
R-137	Physician Note
R-138	Appointment Card
R-138A	Letter from Laurie A. Lawhon to Saad Radwan, dated January 6, 1997
R-139	Custodial Extra Service form
R-140	Memorandum to Kenneth Weinheimer from Saad Radwan, dated March 21, 1997
R-141	Memorandum to K. Weinheimer from Saad Radwan, dated April 28, 1997
R-142	Schedule
R-143	Memorandum to Saad Radwan from Drew Packard, dated October 13, 1993
R-144	Memorandum from S. Louis Panigrosso to Bartley, Holmes, Salvatoriello, Siddons and Terebetsky, dated May 31, 1996
R-145	No Exhibit
R-146	No Exhibit
R-147	Memorandum to Saad Radwan from Drew Packard, dated April 3, 1997
R-148	Letter from Saad Radwan to Mr. R. Cowen, dated October 11, 1994
R-149	Memorandum to Saad Radwan from Drew Packard, dated October 5, 1994
R-150	Memorandum to Mr. Terebetsky from Saad Radwan, dated October 4, 1994
R-151	Carteret Police Department Report
R-152	No Exhibit
R-153	Memorandum to R. Cowen from Saad Radwan, dated April 10, 1997
R-154	No Exhibit
R-155	Letter from John V. Warms to Saad Radwan, dated July 12, 1995
R-155A	Memorandum to Professional Right and Responsibilities Committee from Saad Radwan, dated July 16, 1995
R-155B	Letter from Saad Radwan, dated July 7, 1995

R-156	Hearing Examiner's Report and Recommended Decision, dated March 5, 1996
R-157	No Exhibit
R-158	No Exhibit
R-159	Custodial Assignments
R-160	No Exhibit
R-161	No Exhibit
R-162	No Exhibit
R-163	Custodial Extra Service form
R-163A	Memorandum to Saad Radwan from Drew Packard, dated April 18, 1997
R-164	Memorandum from Drew Packard to Panigrosso, Torre and Resnick, dated March 7, 1995
R-164A	Letter from Joseph Torre and Mark Resnick to Saad Radwan, dated March 14, 1995
R-164B	Memorandum from Mark Resnick to Saad Radwan, dated March 23, 1995
R-165	Handwritten Physician Note (not legible), dated April 10, 1996
R-165A	Physician Note
R-165B	Physician Note
R-166	No Exhibit
R-167	No Exhibit
R-168	Sign-In Sheet, dated June 10, 1996
R-169	Sign-In Sheet, dated June 11, 1996
R-170	Sign-In Sheet, dated June 12, 1996
R-171	Sign-In Sheet, dated June 13, 1996
R-172	Sign-In Sheet, dated June 14, 1996
R-173	Sign-In Sheet, dated June 17, 1996
R-174	Sign-In Sheet, dated June 18, 1996
R-174A	Memorandum to S. Louis Panigrosso and Joseph Torre from Drew Packard, dated June 18, 1996
R-175	Sign-In Sheet, dated June 19, 1996
R-176	Sign-In Sheet, dated June 20, 1996
R-177	Sign-In Sheet, dated June 21, 1996
R-178	Memorandum to Mark Resnick from Drew Packard, dated September 30, 1994
R-178A	Memorandum to Saad Radwan from Drew Packard, dated September 29, 1994
R-179A	Photograph
R-179B	Photograph
R-179C	Photograph
R-179D	Photograph
R-179E	Photograph
R-179F	Photograph
R-179G	Photograph
R-179H	Photograph
R-179I	Photograph
R-180	No Exhibit
R-181	No Exhibit
R-182	No Exhibit
R-183	No Exhibit
R-184	Memorandum to Saad Radwan from Mark Resnick, dated October 14, 1994
R-185	No Exhibit

R-186	Carteret Police Department Report
R-187	Complaint
R-188	No Exhibit
R-189	No Exhibit
R-190	No Exhibit
R-191	No Exhibit
R-192	No Exhibit
R-193	No Exhibit
R-194	Curriculum Vitae for Philip H. Witt, Ph.D.
R-195	Psychological Report from Philip Witt, Ph.D., dated March 19, 1998
R-196	Not Admitted
R-196A	Not Admitted
R-196B	Not Admitted
R-196C	Not Admitted
R-196D	Payroll Authorization
R-196E	Not Admitted
R-197	Employer's First Report of Accidental Injury or Occupational Illness
R-197A	Letter from Ajax E. George, M.D., to Arvind Patel, M.D., dated April 29, 1996
R-197B	WCA Case Progress Report
R-197C	WCA Case Progress Report
R-197D	WCA Case Progress Report
R-197E	WCA Case Progress Report
R-197F	WCA Case Progress Report
R-197G	WCA Case Progress Report
R-197H	WCA Case Progress Report
R-197I	WCA Case Progress Report
R-197J	WCA Case Progress Report
R-197K	Physician's Office Notes
R-197L	Physician's Notes
R-197M	WCA Case Progress Report
R-197N	WCA Case Progress Report
R-197O	WCA Case Progress Report
R-197P	Physician's Office Notes
R-197Q	Employee's Claim Petition
R-197R	Proof of Service
R-197S	WCA Case Progress Report
R-197T	WCA Case Progress Report
R-197U	EMG Report
R-197V	Motor Nerve Conduction Study report
R-197W	Needle EMG report
R-197X	WCA Case Progress Report
R-197Y	WCA Case Progress Report
R-197Z	Physician's Employee Physical Performance Rating
R-197-A	Physician's Notes
R-197-B	WCA Case Progress Report
R-197-C	Fax Cover Sheet with message
R-198	Employer's First Report of Accidental Injury or Occupational Illness

R-198A	Physician's Note
R-198B	Physician's Note
R-198C	Workers Comp Advantage
R-198D	WCA Case Progress Report
R-198E	Appointment Cards
R-198F	WCA Case Progress Report
R-198G	WCA Case Progress Report
R-198H	Workers Comp Advantage
R-198I	WCA Case Progress Report
R-199	Physician's Office Notes
R-199A	Physician's Note
R-199B	Physician's Note
R-199C	Physician's Note
R-199D	Letter from Paul I. Abend to Shalom Abboudi, M.D., dated May 8, 1996
R-199E	Letter from Amal Azer, M.D., to Shalom Abboudi, M.D., dated June 3, 1996
R-199F	Physical Therapy Initial Evaluation, dated May 6, 1996
R-199G	Attendance Record for CRI for patient Saad Radwan
R-200	Physician's Office Notes
R-200A	Physician's Note
R-201	No Exhibit
R-202	No Exhibit
R-203	No Exhibit
R-204	No Exhibit
R-205	No Exhibit
R-206	No Exhibit
R-207	No Exhibit
R-208A	Employee Accident Report, dated March 11, 1996
R-208B	Return-to-Work Confirmation
R-208C	Letter from Dorothy Beerhalter to Carteret BOE, dated March 20, 1996
R-208D	Physician Note
R-208E	Physician Note
R-208F	Physician Note
R-208J	Letter from Laurie A. Lawhon to Saad Radwan, dated January 6, 1997
R-209	Agreement p. 27, Personnel Records
R-210	Agreement p. 6, Procedure
R-210A	Agreement p. 7
R-210B	Agreement p. 8

OAL DKT. NO. EDU 6259-97
AGENCY DKT. NO. 233-7/97

IN THE MATTER OF THE TENURE	:	
HEARING OF SAAD RADWAN,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF CARTERET,	:	DECISION
MIDDLESEX COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and the Board's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in rendering the within decision.

Upon careful and independent review of the record in this matter, the Commissioner finds no cause to disturb the credibility determinations and factual findings rendered by the Administrative Law Judge (ALJ).[1] To the extent respondent objects to the findings rendered by the ALJ based on the testimony of the witnesses and the credence he ascribed to such testimony, the Commissioner notes that the record before him does not include transcripts of the hearing conducted at the OAL in this matter. Challenges to the factual findings predicated upon credibility determinations made by an administrative law judge require the party

[1] To the extent respondent objects to the ALJ's reliance on Exhibit P-105, the affidavit of Ms. Karen Lopez (initial decision at p. 23), on the grounds that Ms. Lopez did not appear as a witness and her statement is, according to respondent, contradicted by the record, the Commissioner notes that, even if Exhibit P-105, and the conclusions derived therefrom, were stricken from the record, the Board has nevertheless proven by a preponderance of evidence that respondent is guilty of unbecoming conduct.

to supply the agency head with the relevant and necessary portion of the transcript. See *In re Morrison*, 216 *N.J. Super.* 143, 158 (App. Div. 1987). In the absence of transcripts from the hearing, due regard should be given to the person who heard the live testimony and assessed the witnesses' behavior at the hearing. *Close v. Kordulak Bros.*, 44 *N.J.* 589, 599 (1965).

Thus, the Commissioner concurs that the Board has demonstrated by a preponderance of credible evidence that respondent is guilty of conduct unbecoming a tenured custodian by virtue of respondent's hostile and inappropriate behavior toward his coworkers, his supervisors and other staff in the District, as well as his repeated insubordination. (See also *In the Matter of the Tenure Hearing of John DeMaio, School District of the Borough of Elmwood Park, Bergen County*, decided June 3, 1998, aff'd State Board November 4, 1998, where the Commissioner dismissed a tenured custodian who exhibited a pattern of inappropriate language and conduct toward his supervisor.)

Accordingly, the initial decision in this matter is adopted for the reasons expressed therein. Respondent is deemed dismissed from his position as a tenured custodian as of the date of this decision.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 14, 1999
Date of Mailing, January 14, 1999

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

8-99

EDU #6259-97
C # 8-99
SB # 10-99

IN THE MATTER OF THE TENURE :
HEARING OF SAAD RADWAN, SCHOOL :
DISTRICT OF THE BOROUGH OF :
CARTERET, MIDDLESEX COUNTY. :

STATE BOARD OF EDUCATION

DECISION ON MOTION

Decided by the Commissioner of Education, January 14, 1999

For the Petitioner-Respondent, Wilentz, Goldman & Spitzer (Viola S. Lordi, Esq., of Counsel)

For the Respondent-Appellant, Ashton E. Thomas, Esq.

On February 9, 1999, Saad Radwan (hereinafter "appellant") filed an appeal to the State Board of Education from a decision of the Commissioner of Education dismissing him from his tenured employment as a custodian for unbecoming conduct, insubordination and failure to properly perform his duties. By letter dated February 25, counsel for the appellant requested that the briefing schedule be placed in abeyance pending receipt of the transcripts from the hearing held in the Office of Administrative Law ("OAL"). By letter dated March 3, the Director of the State Board Appeals Office ("Director") informed counsel for the appellant that the briefing schedule was being placed in abeyance pursuant to his request.

On June 21, the Director requested that counsel for the appellant advise her of the status of his efforts to obtain transcripts. In response, counsel for the appellant informed the Director in a letter dated June 25 that he had "a partial transcript because

JAN. 5, 2000

several tapes of the proceeding were blank. The missing portions involved the cross examination of a central witness, Drew Packard. Pursuant to rule 2:5-3F, the OAL must supervise the reconstruction of the record. I cannot estimate the time necessary for the reconstruction of the record." Counsel attached a copy of a letter dated April 15 from Audio Transcription Service indicating that "the third tape [of the hearing on May 15, 1998] ends during the cross of Drew Packard and the fourth tape is blank. We have contacted the office of Administrative law and they have advised us that there are no other tapes available."

On November 12, the Board filed a motion to dismiss the appeal, observing that the appellant had still failed to file a brief in support of his appeal or to provide the State Board with a complete copy of the transcript.[1]

After a careful review of the record, including the papers submitted by the parties, we deny the Board's motion to the extent that it seeks dismissal of the appeal. However, under the circumstances, we reestablish the briefing schedule at this time. As previously indicated, the briefing schedule was placed in abeyance over ten months ago, and counsel for the appellant has known for more than eight months that a portion of the hearing tape was blank. Yet, there is no indication in the papers before us that he has made a request to the Office of Administrative Law for reconstruction of the record or otherwise taken the necessary steps to facilitate such action. The papers before us indicate only that counsel for the appellant sent a copy of his June 25th letter, in which he advised the Director of the State Board Appeals Office that several tapes from the hearing were blank, to the ALJ who presided over the hearing. Nor has counsel

[1] The hearing in this matter lasted 15 days, and counsel for the appellant provided this agency with a copy of the transcripts, except for the missing portion, on July 30, 1999.

provided us with any indication that proceedings designed to reconstruct that portion of the record are scheduled or pending in OAL.

In view of the amount of time that has transpired since this appeal was placed in abeyance and the fact that counsel for the appellant has failed to take the necessary steps to facilitate reconstruction of the record, we direct that the appellant file a brief in support of his appeal within 20 days from the date of this decision.

January 5, 2000

Date of mailing JAN - 7 2000

8-99

EDU #6259-97
C # 8-99
SB # 10-99

IN THE MATTER OF THE TENURE	:	
HEARING OF SAAD RADWAN,	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
BOROUGH OF CARTERET,	:	
MIDDLESEX COUNTY.	:	

Decided by the Commissioner of Education, January 14, 1999

For the Petitioner-Respondent, Wilentz, Goldman & Spitzer (Viola S. Lordi, Esq., of Counsel)

For the Respondent-Appellant, Ashton E. Thomas, Esq.

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

May 3, 2000

Date of mailing MAY 05 2000

9-99

JOSEPH AMARA, MARTIN BENDIAN, ANDREW CHIURAZZI, ANTHONY CORBISIERO, THOMAS GRABOWSKI, WILLIAM KENNEDY, RICHARD LOSCHIAVO, DONNA MIRABELLI, ARMANDO RIVEROL, BARBARA SANTILLO AND JOSE SUAREZ,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

January 14, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NOS. EDU 7605-97, EDU 7610-97
EDU 7613-97, EDU 7615-97, EDU 7617-97
EDU 7619-97, EDU 7606-97, EDU 7611-97
EDU 7614-97, EDU 7616-97, EDU 7618-97

JOSEPH AMARA, MARTIN BENDIAN
ANDREW CHIURAZZI, ANTHONY
CORBISIERO, THOMAS GRABOWSKI
WILLIAM KENNEDY, RICHARD LOSCHIAVO,
DONNA MIRABELLI, ARMANDO RIVEROL,
BARBARA SANTILLO, JOSE SUAREZ,

Petitioners,

v.

WEST NEW YORK BOARD OF EDUCATION,

Respondent.

Gail Oxfeld Kanef, Esq., for petitioners
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Allan C. Roth, Esq., for respondent (Scarinci & Hollenbeck, attorneys)

Record Closed: November 20, 1998 Decided: November 24, 1998

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on August 7, 1997, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A hearing was scheduled for December 17, 1998 at the OAL, 185 Washington Street, Newark, New Jersey. Prior to the hearing, settlement discussions were held and a settlement was reached.

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

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

November 24, 1998
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

Dec. 1, 1998
DATE

D. M. Antanaitis/jc
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 3 1998
DATE

Barbara R Hernel
OFFICE OF ADMINISTRATIVE LAW

jb

BALK, OXFELD, MANDELL & COHEN, P.A.
50 Commerce Street
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(201) 642-0161
Attorneys for Petitioners

JOSEPH AMARA, MARTIN BENDIAN, ANDREW CHIURAZZI, ANTHONY CORBISIERO, THOMAS GRABOWSKI, WILLIAM KENNEDY, RICHARD LOSCHIAVO, DONNA MIRABELLI, ARMANDO RIVEROL, BARBARA SANTILLO, JOSE SUAREZ,	:	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
Petitioners,	:	O.A.L. DOCKET NOS. EDU 7605-97 EDU 7610-97 EDU 7613-97 EDU 7615-97
vs.	:	EDU 7617-97 EDU 7619-97
WEST NEW YORK BOARD OF EDUCATION,	:	EDU 7606-97 EDU 7611-97
Respondent.	:	EDU 7614-97 EDU 7616-97 EDU 7618-97
	:	
	:	SETTLEMENT AGREEMENT

This matter having come before this agency on petition of the above named individuals by their counsel Balk, Oxfeld, Mandell & Cohen, P.A., and the Respondent having timely filed answers to the above consolidated petitions and the parties having amicably settled the issues between them as set forth in the pleadings, it is hereby agreed as follows:

WHEREAS, the Respondent recognizes that each and every Petitioner holds a valid Supervisory/Administrative Certificate with supervisory endorsement;

WHEREAS, the parties acknowledge that prior to June 30, 1997, the Petitioners each held positions with the Respondent in which they each had acquired tenure and seniority under the Supervisory/Administrative Certificate with supervisory endorsement;

WHEREAS, the parties acknowledge that effective July 1, 1997, Respondent assigned each Petitioner to a position in which each Petitioner performs duties substantially similar to those duties the Petitioner performed in his/her position held immediately prior to July 1, 1997;.

WHEREAS, the parties acknowledge that the Petitioners continue to serve under their Supervisory/Administrative Certificates with supervisory endorsement;

WHEREAS, the Petitioners through their collective bargaining representative and the Respondent have settled on the terms of a collective bargaining agreement which includes provisions for salary and benefits:

1. The Respondent herein agrees and acknowledges that each Petitioner maintains tenure and seniority rights to the position he/she now holds.

2. The Respondent herein agrees and acknowledges that each Petitioner shall continue to accrue supervisory seniority in the position he/she currently holds.

3. In exchange for the above, the Petitioners hereby agree to withdraw their consolidated Petitions filed with the Commissioner of Education and transmitted to this tribunal.

ALLAN C. ROTH, ESQ.
Attorney for Respondent

DATED: 11/10/98

GAIL OXFELD KANEF, ESQ.
Attorneys for Petitioners

DATED: 10-27-98

Representative for the Board of Education

DATED:

JOSEPH AMARA

DATED:

MARTIN BENDIAN

DATED: 9-4-98

ANDREW CHIURAZZI

DATED: 9-4-98

ANTHONY CORBISIERO

DATED: 10-8-98

Retired 6/98

THOMAS GRABOWSKI

DATED: 9/4/98

WILLIAM KENNEDY

DATED: 9/4/98

RICHARD LOSCHIAVO

DATED: 9/4/98

DONNA MIRABELLI

DATED:

ARMANDO RIVEROL

DATED: 9/10/98

BARBARA SANTILLO

DATED: 9-4-98

JOSE SUAREZ

Retired 6/98

DATED: 10/2/98

OAL DKT. NOS. EDU 7605-97, 7610-97, 7613-97, 7615-97
7617-97, 7619-97, 7606-97, 7611-97,
7614-97, 7616-97, 7618-97
AGENCY DKT. NOS. 241-251-7/97

JOSEPH AMARA, MARTIN BENDIAN, ANDREW CHIURAZZI, ANTHONY CORBISIERO, THOMAS GRABOWSKI, WILLIAM KENNEDY, RICHARD LOSCHIAVO, DONNA MIRABELLI, ARMANDO RIVEROL, BARBARA SANTILLO AND JOSE SUAREZ,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

January 14, 1999
Date of Mailing, January 14, 1999

9-99

EDU #10697-97S
C# 11-99
SB# 9-99

ARLENE MILLER, :

PETITIONER-APPELLANT, :

V. :

THE BURLINGTON COUNTY SPECIAL SERVICES SCHOOL DISTRICT, BURLINGTON COUNTY, :

RESPONDENT-RESPONDENT. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, January 19, 1999

For the Petitioner-Appellant, Zazzali, Fagella, Nowak, Kleinbaum & Friedman (Richard A. Friedman, Esq. and Kathleen A. Naprstek, Esq., of Counsel)

For the Respondent-Respondent, Parker, McKay & Criscuolo (Frank P. Cavallo, Jr., Esq., of Counsel)

Arlene Miller (hereinafter "petitioner") is a tenured school psychologist who was employed by the Board of Education of the Township of New Hanover (hereinafter "Board" or "New Hanover Board") until June 30, 1996, when her position was abolished and the Board contracted with a private vendor to provide all basic child study team services for 1996-97.[1] Thereafter, in July 1997, the Board determined that it would

[1] In May 2000, the State Board of Education invalidated the waiver upon which the Board had relied in contracting with a private vendor, finding that the clear and unambiguous language of the applicable statutes precluded a district from providing basic child study team services solely by contracting with a private vendor. Arlene Miller v. Leo F. Klagholz, Commissioner, Department of Education, and Board of Education of the Township of New Hanover, decided by the State Board of Education, May 3, 2000.

provide basic child study team services for subsequent years by contracting with the "Burlington County Educational Services Unit" ("ESU").

On November 6, 1997, petitioner filed a petition of appeal with the Commissioner of Education, claiming that the "ESU" had violated her tenure rights under N.J.S.A. 18A:28-16 and N.J.S.A. 18A:6-31.3 by not recognizing her rights to preferred employment when it "succeeded" to the provision of child study team services to the district.

The Administrative Law Judge ("ALJ") concluded that neither statute afforded any protection to petitioner and recommended that the Commissioner grant the "ESU's" motion for summary decision. On the basis of the stipulated record, the ALJ found that "the agreement [between the Board and the 'ESU'] does not appear to have contemplated that the ESU would take over or in any way replace the operation of any program of special education operated by New Hanover, nor that the programs then in operation in New Hanover to provide such education would be abolished." Initial Decision, slip op. at 4. In that the protections afforded by N.J.S.A. 18A:28-16 and N.J.S.A. 18A:6-31.3 are available only when the operation of any "school" previously operated by a school district is undertaken by other specified entities or when a new school district is formed, the ALJ concluded that neither statute afforded any protection to petitioner. In so concluding, the ALJ found that the term "school" as defined by the case law encompasses programs providing direct educational services to students, rather than the evaluative function involved in supplying child study team evaluations, as was the case before him.

The Commissioner adopted the ALJ's recommended decision with clarification and expansion. Finding that the agreement between the Board and the "ESU" had been amended in December 1997 to include the provision of child study team services, rather than just child study team evaluations, the Commissioner stressed that joint contractual agreements for the provision of child study team services are permitted by N.J.S.A. 18A:46-5.1 and that the Board retains the legal responsibility under that statute to provide child study team services, albeit through a joint agreement with another public entity. In the Commissioner's judgment, the agreement involved in this case did not constitute a "takeover" of a school or educational program "even when giving deference to the broader applicability of the statute enunciated by the New Jersey Supreme Court in its 1984 Shelko decision." Commissioner's Decision, slip op. at 11.

Petitioner appealed to the State Board, contending that the "ESU" was obligated to recognize her tenure rights pursuant to N.J.S.A. 18A:28-16 and "other similar statutes." She argued that although tenure earned in one school district cannot generally be transferred to another district, the Legislature has created numerous exceptions to encompass those situations in which schools in a district are discontinued, when the operation of schools or school programs are assumed by other public entities, when new school districts are created, and when regional school districts are established or dissolved. She maintained that the Commissioner's decision in Stuermer v. Bergen County Special Services School District, decided by the Commissioner of Education, 1978 S.L.D. 628, and the New Jersey Supreme Court's decision in Shelko v. Mercer County Special Services School District, 97 N.J. 414 (1984), demonstrate that neither N.J.S.A. 18A:28-16 nor N.J.S.A. 18A:28-6.1 were

intended to be restricted to situations in which entire schools or grades were discontinued, but were intended to apply when a class or program for special education students is eliminated and replaced with one that is operated by the county, even though the balance of the school program continues to be operated by the local district. Since the facts clearly demonstrated that the "ESU" was performing the same services for the same students previously served by the Board, she argued that the situation in this case conformed with the type of takeover envisioned by N.J.S.A. 18A:28-16. Accordingly, petitioner urged the State Board to reverse the Commssioner's decision and to direct the "ESU" to recognize her tenure and seniority rights as a school psychologist.

Respondent countered that petitioner could not claim relief under N.J.S.A. 18A:28-16 because that statute affords protection only when the operation of a school is taken over by a jointure commission or an educational services commission. Since the "ESU" was neither, respondent asserted that the statute did not apply. Respondent further contended that even if the statute did apply, petitioner would be entitled to relief only if the "ESU" assumed control over the entire special education program.

Initial review of this matter by the Legal Committee of the State Board revealed that although the parties had jointly stipulated that the respondent in this action was the "Burlington County Educational Services Unit," nothing in the record established the authority upon which the creation of such entity was based. Further, our review of the education statutes revealed that N.J.S.A. 18A:46-29 et seq. prescribed with specificity the requirements for the establishment, organization, management and control of county special services school districts and their programs. In that the "Burlington

County Educational Services Unit" is a part of the Burlington County Special Services School District, it appeared to us that N.J.S.A. 18A:46-29 et seq. was controlling of the existence and operation of such unit. Because the statutes make no provision for the establishment or operation of such an entity independent of the special services school district, the Legal Committee requested that the parties submit briefs with regard to which specific corporate entity properly should be named as respondent in this case pursuant to the applicable statutes.

In response to our request, petitioner submitted a letter brief indicating that she did not dispute that the "ESU" is controlled by the statutes governing the establishment and operation of county special services school districts. She further stated that she had no objection to the substitution of the Burlington County Special Services School District as the proper corporate entity to be named as respondent in that the Burlington County Special Services School District is the public entity legally responsible for the actions of the Burlington County Educational Services Unit.

In its letter brief, respondent acknowledged that the "ESU" is an "arm" of the Burlington County Special Services School District, but asserted that the identity of the respondent was not a critical factor, nor one that required reversal of the Commissioner's decision.

Based on the foregoing and as set forth above, we conclude that the proper respondent in this matter is the Burlington County Special Services School District. We further conclude that the proper identification of the respondent in this case is not an insignificant matter given the statutory framework that governs the provision of special education services in New Jersey. Specifically, under that framework, there is no

authorization for the establishment by a county special services school district of subsidiary entities to contract with other public school districts for the provision of special education services. That being the case, the only entity with the legal authority to enter into the agreements involved in this case was the Burlington County Special Services School District.

Having disposed of that issue, we turn now to the question of whether under the circumstances presented here, the Burlington County Special Services School District had an obligation under N.J.S.A. 18A:28-16 or N.J.S.A. 18A:6-31.3 to recognize the tenure rights acquired by petitioner by virtue of her service in the New Hanover school district when the Special Services School District undertook to provide the special education services previously provided by the district.

Initially, we find that N.J.S.A. 18A:6-31.3 did not impose any requirement on the Burlington County Special Services School District to recognize petitioner's tenure rights when it undertook the provision of special education services to the New Hanover school district. That statute defines "new school district" for purposes of providing a continuation of specified employment rights, including tenure rights, when a new school district is created. See N.J.S.A. 18A:6-31.4 through N.J.S.A. 18A:6-31.6. N.J.S.A. 18A:6-31.3 provides that:

> As used in this act, "new school district" means a local school district, a regional school district, a county vocational school district, a jointure commission, a county special services school district, or an educational services commission....

N.J.S.A. 18A:6-31.4 through N.J.S.A. 18A:6-31.6 provide for the continuation of employment rights "whenever a new school district is created."

The terms of these statutes are clear: they apply only when a new school district is created. When an existing special services school district contracts with a district board to provide special education services, no new school district is created. Hence, while N.J.S.A. 18A:6-31.3 includes special services school districts for purposes of ensuring the continuation of the employment rights specified in N.J.S.A. 18A:6-31.4 through N.J.S.A. 18A:6-31.6, those statutory provisions do not apply in this case.

Nor did N.J.S.A. 18A:28-16 require the Burlington County Special Services School District to recognize petitioner's tenure rights when it undertook to provide special education services to the New Hanover school district. That statute provides for the continuation of tenure and other specified employment rights:

> [w]henever an Educational Services Commission, a Jointure Commission, the Commissioner of Education, the State Board of Education, the board of trustees of any State college, or any officer, board or commission under his, its or their authority shall undertake the operation of any school previously operated by a school district in this state....

We reject respondent's argument that the statute does not apply to county special services school districts because they are not specifically listed. Clearly, the board of a special services school district is under the authority of the Commissioner and the State Board. See, e.g., N.J.S.A. 18A:46-30 (State Board of Education shall prescribe rules for the organization, management and control of special services school districts); N.J.S.A. 18A:47-32 (programs and courses and any change therein shall be approved by the Commissioner with the advice and consent of the State Board). However, for the reasons that follow, we find that petitioner is not entitled to the protection afforded by this statute.

Under a literal reading of the statute, the result is clear. Because the special education services previously provided by the New Hanover school district were not a "school," N.J.S.A. 18A:28-16 does not apply to this situation. Petitioner, however, argues that the Commissioner's decision in Stuermer, supra, and the New Jersey Supreme Court's decision in Shelko, supra, demonstrate that this statute, as well as N.J.S.A. 18A:28-6.1, "were, in fact, also intended to apply to situations where a class or program for special needs students is eliminated and replaced by one operated by the County, even though the balance of the school program continued to be operated by the local district." Petitioner's brief, at 10. We do not agree.

Stuermer involved the application of N.J.S.A. 18A:28-6.1, which provides for continuation of tenure and other rights when:

> any board of education in any school district in this state shall discontinue any high school, junior high school, elementary school or any one or more of the grades from kindergarten through grade 12 in the district and shall, by agreement with another board of education, send the pupils in such schools or grades to such other district....

In Stuermer, the Hackensack Board of Education operated a program for the deaf to which it admitted students from other districts pursuant to individual agreements with the sending boards based on the need of each classified student to receive an appropriate education. In 1973, the Hackensack Board discontinued this program and the newly created Special Services School District of Bergen County assumed responsibility for it. Petitioner had been a tenured employee of the Hackensack Board who was employed by the Special Services School District after it assumed responsibility for the program for the deaf. When the Special Services School District

terminated her employment, she challenged its action claiming that it was in violation of her tenure rights.

The Commissioner agreed that petitioner was entitled to the protection of N.J.S.A. 18A:28-6.1. In reaching this conclusion, the Commissioner looked to N.J.S.A. 18A:28-16 to determine the meaning of "school." In determining the meaning of "school" under N.J.S.A. 18A:28-16, the Commissioner reasoned that since jointure commissions were created only for the purpose of special education classes, "school" as referenced in N.J.S.A. 18A:28-16 "must mean special education classes." 1978 S.L.D. 631. Then, finding that a harmonious interpretation of the statutes necessitated interpreting "schools or grades" in N.J.S.A. 18A:28-6.1 in the same manner as for N.J.S.A. 18A:28-16 and 18A:28-17, the Commissioner concluded that petitioner's tenure rights had been violated by her termination.

We agree that "school" as referenced in N.J.S.A. 18A:28-16 includes special education classes. However, no special education classes were transferred to the Burlington County Special Services School District. Rather, as embodied in the contract with the New Hanover Board, the Burlington County Special Services School District was to provide child study team services. In contrast, the responsibility undertaken by the Bergen County Special Services School District in Stuermer was for the education of the students who had previously been educated by the school district. Hence, Stuermer does not entitle petitioner to the rights conferred by N.J.S.A. 18A:28-16.

Nor does the New Jersey Supreme Court's decision in Shelko entitle her to such rights. The petitioner in Shelko had been a teacher in a program run by the Ewing Township Board of Education which provided instruction to multiply-handicapped

infants, pre-schoolers and kindergarteners. Ewing had served as the local education agency for the purposes of obtaining the state and federal grants that funded the program, and the program served the needs of the "educationally-handicapped young" on a county-wide basis. 97 N.J. at 416. Upon the creation of the Mercer County Special Services School District, the entire program was transferred from Ewing to the Special Services School District.

The central issue in Shelko was whether a teacher employed by the Mercer County Special Services School District achieved tenure based on her years of employment by the local school district combined with her years of service with the Mercer County Special Services School District. In resolving this issue, the Court considered the argument that petitioner was not entitled to the protection of N.J.S.A. 18A:28-16 because the program in which she taught was not a school within the meaning of the statute. The Court rejected this argument, finding that to accept it "would read all practical meaning out of the statute, because by definition the special services school districts never take over the entire operation of a school but are limited to providing educational services for the disabled." 97 N.J. at 422-23. The Court then quoted the Commissioner's decision in Stuermer, finding that the Commissioner's straightforward analysis was based on the realities of the statute and avoided "engaging in the esoteric quest of defining 'what is a school.'" Id. at 423. The Court, however, observed that there was ample precedent that a program for the disadvantaged would meet the definition of a "school," pointing to the fact that a residential institution for the treatment and education of emotionally disturbed children had been held to be a "school" under a municipal zoning ordinance. Id.

As in Stuermer, the Court in Shelko was confronted with the transfer of an entire education program, including the instructional component, from a district board to a county special services school district. Because the only educational programs that a special services school district is authorized to provide under the statutory framework are educational programs for classified special education students, programs such as those involved in Stuermer and Shelko represent the full extent of any program that can be transferred from a school district to a special services school district. Further, as the Court in Shelko observed, N.J.S.A. 18A:28-16 and similar statutes were enacted in response to changes in the forms of governance resulting from the provisions made by the Legislature for the regional delivery of educational services. Shelko, supra, at 418. Review of N.J.S.A. 18A:28-16 in conjunction with N.J.S.A. 18A:46-29 through 18A:46-46 as originally enacted, L.1971 c. 271, indicates that the Legislature's intent as to county special services school districts when it enacted N.J.S.A. 18A:28-16 was to preserve the rights of teaching staff members affected when the educational programs for handicapped students, including the instructional component, were transferred from local school districts once the creation of county special services school districts was authorized. Id. Quite simply, there is no indication that the Legislature intended to preserve the rights of staff members when a local district determines to provide for child study team services as required by N.J.S.A. 18A:46-5.1 by contracting with a county special services school district as permitted by N.J.S.A. 18A:46-6.1. Given the distinction between "programs" and "services" that is reflected in the statutes, we decline to construe the word "school" in N.J.S.A. 18A:28-16 so as to extend the protection afforded by that statute to staff members affected by a district's determination

to contract for child study team services when it is only the provider of the services that changes.

Therefore, for the reasons set forth herein, we affirm the decision of the Commissioner in this matter.

Attorney exceptions are noted.

November 7, 2001

Date of mailing NOV 09 2001

10-99

THOMASINA E. BROWN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

January 14, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1267-98
AGENCY DKT. NO. 458-11/97

THOMASINA E. BROWN,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Camelia M. Saviñon, Esq., for petitioner

Louis M. Flora, Esq. for respondent
(Gregory G. Johnson, Esq., attorney)

Record Closed: November 19, 1998 Decided: November 25, 1998

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

Statement of Facts

This matter was transmitted to the Office of Administrative Law (OAL) on January 22, 1998, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

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

Nov. 25, 1998
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

12/1/98
DATE

D. N. Antanaitis/fe
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 3 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

Gregory G. Johnson, Esq.
17 Academy Street, Suite 208
Newark, New Jersey 07102
973-642-0001
Attorney for the Newark Public Schools

THOMASINA E. BROWN *Petitioner,* *-vs-* STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK *Respondent.*	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY Docket No.: EDUOR 01267-98N **STIPULATION OF SETTLEMENT**

This Agreement made on September ___, 1998, by and between the parties, State-Operated School District of the City of Newark ("District"), and employee, Thomasina Brown ("Ms. Brown"), residing at 127 Jewett Avenue, Jersey City, New Jersey 07304.

WHEREAS, Ms. Brown is a non-tenured teacher hired by the District on or about September 5, 1995; and

WHEREAS, on or about May 1, 1997, Ms. Brown received a *pro forma* contract, which was not approved by the State District Superintendent; and

WHEREAS, The petitioner was non-renewed and on or about May 15, 1997, the Superintendent signed the petitioner's Notice of Non-renewal; and

WHEREAS, Ms. Brown had disputed the non-renewal and filed a Petition before the Commissioner of Education, and the District had disputed the contentions made; and

WHEREAS, the parties have agreed that it is in their best interests to resolve the issues by way of settlement,

NOW THEREFORE BE IT RESOLVED, the parties hereby stipulate and agree as follows:

1. Ms. Brown agrees to withdraw her Petition. Ms. Brown agrees not to seek employment with the District in the future.

2. Ms. Brown was on Step 12, with a salary of $52,618.00 per annum, $249.3744 p diem. The District agrees to pay Ms. Brown two weeks salary: $2,493.74.

3. The parties respectively acknowledge that each has had ample opportunity to seek independent legal counsel, financial or other advice regarding this Agreement, and that each is signing this Agreement freely and voluntarily, without coercion, duress or pressure from the other party.

4. This Agreement constitutes the full Agreement between the parties.

5. By entering this Agreement, each party releases and discharges the other with respect to all claims or rights that either party may have against the other. This includes all claims, including those of which either party is not aware and those not mentioned herein. The releases by each party apply to all claims resulting from anything which has happened up to now. It specifically includes, without limitation, all claims which Ms. Brown may have respecting tenure, discrimination on a basis, rights under any collective bargaining agreement, disability payments, sick leave, salary or any other matter pertaining to her employment.

6. This Agreement shall not constitute an admission as to any of the allegations of the Petition by the District.

7. This Agreement is subject to approval by the State District Superintendent, which she will indicate by signing this Agreement.

FOR THE PETITIONER

Thomasina Brown

Thomasina Brown

Dated: October 16, 1998

Camelia M. Savinon, Esq.
Attorney for Thomasina Brown

Dated: October 16, 1998

FOR THE RESPONDENT, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK

Dr. Beverly L. Hall
State District Superintendent

Dated: _____

Louis M. Flora, Esq.

Dated: October 20, 1998

OAL DKT. NO. EDU 1267-98
AGENCY DKT. NO. 458-11/97

THOMASINA E. BROWN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

January 14, 1999
Date of Mailing, January 14, 1999

11-99

ARLENE MILLER, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BURLINGTON COUNTY EDUCATIONAL SERVICES UNIT, BURLINGTON COUNTY, : DECISION

RESPONDENT. :

:

SYNOPSIS

Petitioning school psychologist alleged respondent Educational Services Unit (ESU) violated her tenure rights when it failed to employ her as a school psychologist when the ESU took over the provision of child study team services to the New Hanover District. Petitioner had been riffed in 1996 when the District had contracted her duties to an outside contractor. Petitioner contended that pursuant to *N.J.S.A.* 18A:28-12, she had a right to be placed on a preferred eligibility list for reemployment in the District in the event the position of school psychologist became available in the District.

ALJ determined that the record indicated that the New Hanover Board and the ESU agreed that the ESU "would supply child study team evaluations to the New Hanover School District on a case-by-case basis" and that the agreement did not appear to have contemplated that the ESU would take over or in any way replace the operation of any program of special education operated by the District, nor that the programs then in operation in the District to provide such education would be abolished. Therefore, since the protection afforded by the statutes are accorded to employees of a "school" previously operated, and since it can hardly be said that the District or any of its educational programs were "abolished," the ALJ concluded that neither *N.J.S.A.* 18A:28-16 nor *N.J.S.A.* 18A:6-31.3 afforded any protection to petitioner. Motion for summary decision on behalf of ESU was granted and petitioner's motion was denied. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own with clarification.

January 19, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10697-97S
AGENCY DKT. NO. 444-11/97

ARLENE MILLER,
Petitioner,
v.
BURLINGTON COUNTY EDUCATIONAL SERVICES UNIT, BURLINGTON COUNTY,
Respondent.

Richard A. Friedman, Esq., and **Kathleen A. Naprstek**, Esq., for petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Frank P. Cavallo, Jr., Esq., for respondent (Parker, McCay & Criscuolo, attorneys)

Record Closed: November 5, 1998 Decided: December 2, 1998

BEFORE **JEFF S. MASIN**, ALJ:

Arlene Miller, a school psychologist formerly employed by the New Hanover School District ("New Hanover"), contends that the respondent Burlington County Educational Services Unit ("ESU") violated her tenure rights when it failed to employ her as a school psychologist when the ESU took over the provision of child study team services to the New Hanover District. Ms. Miller had been laid off from her position with New Hanover as a result of a reduction in force ("RIF") on June 30, 1996. New Hanover contracted for school psychological services with Therapeutic Alternatives, a private agency, from July 1, 1996, through June 30, 1997, and thereafter it entered into an agreement with the ESU for the provision of child study team services for the period beginning July 1, 1997. Ms. Miller contends that as she had a right under *N.J.S.A.* 18A:28-12 to be placed on a preferred eligibility list for reemployment in New Hanover in the

event that the position of school psychologist became available in the district, she also had a right to be preferred for employment with the ESU when it succeeded to the provision of such services within the New Hanover District. The ESU disputes her claim.

Ms. Miller filed a petition seeking relief from the Commissioner of Education on November 6, 1997. The ESU filed an answer on December 3, 1997. The contested case was transferred to the Office of Administrative Law ("OAL") on December 18, 1997. A prehearing conference was held on February 5, 1998. Following discovery the parties entered into a joint stipulation of facts and filed cross-motions for summary decision. The last brief was received on November 5, 1998.

Ms. Miller contends that she is entitled to employment by the ESU because it has undertaken the operation of the New Hanover child study team program and must therefore recognize the tenure and recall rights guaranteed by *N.J.S.A.* 18A:28-16 and *N.J.S.A.* 18A:6-31.3 *et seq.* *N.J.S.A.* 18A:28-16 provides

> Whenever an Educational Services Commission, a Jointure Commission, the Commissioner of Education, the State Board of Education . . . under his, its or their authority shall undertake the operation of any school previously operated by a school district in this State, all accumulated sick leave, tenure and pension rights of all teaching staff members in said school shall be recognized and preserved by the agency assuming operational control of the school, and any periods of prior employment in such school district shall count toward the acquisition of tenure to the same extent as if all such employment had been under the Educational Services Commission, Jointure Commission, the Commissioner of Education, the State Board of Education, . . . as the case may be.

N.J.S.A. 18A:6-31.3 reads

> As used in this act, "new school district" means a local school district, regional school district, a county vocational school district, a jointure commission, a county special services school district, or an educational services commission. . . .
> In the event that the school district of a municipality or districts in a group of municipalities are abolished and a subsequent district

> formed, the district subsequently formed shall constitute a new school district under this act . . . .

N.J.S.A. 18A:6-31.5 provide that when a "new school district" is created, the tenure and seniority rights of the employees of the replaced district "shall be recognized and preserved by the new school district" and "all statutory and contractual rights to tenure . . . which have been acquired through employment in any of the districts shall be recognized by the new school district."

In support of her position, the petitioner relies upon *Stuermer v. Bergen County Special Services School District*, 1978 *S.L.D.* 628 and *Shelko v. Mercer County Special Services District*, 97 *N.J.* 414 (1984). In *Stuermer*, the petitioner was a tenured speech therapist who had been employed by the Hackensack Board of Education ("Hackensack"). Hackensack determined to terminate its program for deaf students for reasons of economy and a lack of proper facilities. The County Special Services District took over responsibility for the program for deaf students. Stuermer worked for the Special Services District for three years and was then discharged. She contended that the discharge was in violation of her tenure rights as they were transferred by operation of law from Hackensack to the Special Services District, as the termination of the Hackensack program for the deaf and the Special Services District's undertaking of the program was exactly the situation addressed in *N.J.S.A.* 18A:28-6.1. The County argued that the program which it undertook did not constitute a "school" and was therefore not addressed by the statute. However, the Commissioner held that the meaning of the term "school" in this legislation could be determined from the fact that a jointure commission was by law established solely for the purpose of carrying out a special education program. Despite the fact that such a program might not ordinarily be identified as a "school," nevertheless, in the context of this statute, "school" included special education programs or programs such as the program for deaf children previously conducted by Hackensack.

In *Shelko, supra.*, the Ewing Board of Education had operated a program for handicapped students for the county for two school years. Mercer County then created the special service district to provide the educational program for handicapped students in the county. Shelko was hired and served as a teacher in the county's program for two years, but the Board decided not to rehire her for a third year. She claimed that her combined service with Ewing and the Special

Services District gave her tenure which the Special Services District was required to honor. The Special Services District argued that she had not fulfilled the requirement of three years in the Special Services District. The State Board and the Appellate Division sided with the County Board, as they believed that the program she had taught in was not a "school" and therefore *N.J.S.A.* 18A:28-16 was inapplicable to her situation. A sharply divided Supreme Court reversed, finding that the Legislature had specifically passed *N.J.S.A.* 18A:28-16 to address the tenure rights of teaching staff members where a program such as Ewing's was taken over. The three dissenting justices agreed with the Appellate Division that the program was not a "school." Indeed, they disagreed with the Commissioner's determination in *Stuermer* that the Hackensack program for the deaf was a "school." *Shelko, supra.*, at 426-428.

In the present matter, the stipulated record indicates that the New Hanover Board and the ESU agreed that the ESU "would supply child study team evaluations to the New Hanover School District on a case-by-case basis." The agreement does not appear to have contemplated that the ESU would take over or in any way replace the operation of any program of special education operated by New Hanover, nor that the programs then in operation in New Hanover to provide such education would be abolished. The agreement provided only for the performance of child study team evaluations formerly carried out by employees of the New Hanover Board and then contracted out. If the tenure rights guaranteed to employees in the context of *N.J.S.A.* 18A:28-16 and *N.J.S.A.* 18A:6-31.5 are to apply to protect Ms. Miller in the present instance, then the term "school" used therein must be stretched far beyond the meaning which the Commissioner in *Stuermer* and the Supreme Court majority in *Shelko* have already accepted. In each of those cases, the program taken over by the County Special Services District was a program providing direct education to a particular group of students, the deaf in *Stuermer* and the handicapped in *Shelko*. In the case of the child study team in New Hanover, or its replacement team from the ESU, the work of these teams does not generally involve teaching or providing direct educational services to the students, but instead provides an evaluative function seeking to determine the students in need of special education and related service and designing the program, or Individualized Educational Program ("IEP"), for those found eligible for special education. If the programs in *Stuermer* and *Shelko* were deemed to be "schools" because they were providing the same sort of function for students as the broader "school" did for the broader group of students, such an analysis hardly applies here. Admittedly there may be some direct "educational"

function carried on at some times by the members of a child study team functioning in their individual roles within the school, but the "team" as a group is not employed to teach students. Therefore, since the protection afforded by the statutes are accorded to employees of a "school" previously operated, and since it can hardly be said that the New Hanover District or any of its educational programs were "abolished," I **CONCLUDE** that neither *N.J.S.A.* 18A:28-16 nor *N.J.S.A.* 18A:6-31.3 affords any protection to Ms. Miller. The **motion for summary decision on behalf of the ESU is therefore GRANTED and the motion for summary decision filed by Ms. Miller is DENIED and her petition is DISMISSED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 2, 1998
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

12/3/98
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 7 1998
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

JOINT EXHIBITS:

Stipulation of Facts dated 7/30/98 and 8/5/98 with attached Educational Services Unit of Burlington County Mission Statement; Burlington County Educational Services Unit Purpose and Objectives; Agreement Between Burlington County Educational Services Unit and New Hanover Board of Education for Child Study Team Evaluations for the 1997-98 school year, dated 7/17/97 and 7/21/97; Agreement Between Burlington County Educational Services Unit and New Hanover Board of Education for a Basic Skills Coordinator for the period of 9/1/97 to 6/30/98, dated 7/17/97 and 7/21/97; Contract Addendum Between the Educational Services Unit and the New Hanover Township School District, dated 12/17/97 and 12/16/97

OAL DKT. NO. EDU 10697-97
AGENCY DKT. NO. 444-11/97

ARLENE MILLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BURLINGTON COUNTY EDUCATIONAL SERVICES UNIT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and respondent's reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Petitioner's exceptions essentially reiterate the arguments considered by the Administrative Law Judge (ALJ) in the initial decision and set forth in petitioner's brief in support of summary decision. Petitioner's exceptions contend that the ALJ clearly misinterpreted the law on the issues presented in this matter. Petitioner avers, *inter alia,* that, while the ALJ acknowledged that the Courts have determined that the definition of " school" in the context of *N.J.S.A.* 18A:28-16 and 18A:6-31.3 includes programs for the handicapped, he misinterpreted the rulings as limiting tenure and seniority protection mandated by these statutes to teaching staff members who work in a direct teaching setting. (Petitioner's Exceptions at p. 1) Petitioner further contends that the ALJ erroneously presumed that the child study team performs only evaluative functions, a presumption which petitioner maintains is neither supported by facts

nor the plain language of *N.J.S.A.* 18A:46-5 which identifies numerous functions and duties related to the development, supervision and coordination of educational programs for students the child study team evaluates, as well as the provision of psychological and other services to those students. Moreover, petitioner avers that even if one were to conclude her duties were primarily evaluative, the ALJ's determination in this matter is still incorrect because the aforementioned statutes apply to all teaching staff members, not just teachers, and the applicable case law (*Stuermer, supra,* and *Shelko, supra)* provides absolutely no basis in law for the distinction which the ALJ chose to make between petitioner's position of employment and those in the aforementioned decisions. (*Id.* at pp. 2-3)

Respondent's reply exceptions urge that the Commissioner affirm the initial decision rendered by the ALJ, reiterating that petitioner's reliance on *Stuermer* and *Shelko* is misplaced because in both those matters, a special services school district assumed operation of an entire special education program, whereas in the instant matter, the Burlington County Educational Services Unit (BCESU) is supplying child study team evaluation services to the New Hanover School District on a contractual basis. It has, therefore, neither supplanted nor taken over the operation of the special education program in New Hanover. Respondent further argues that

> The legislation under which the Petitioner claims entitlement to*** employment and ancillary rights with the BCESU is silent with respect to the assumption by an Educational Services Unit of the CST services previously provided by a Board of Education. Similarly, the provisions of *N.J.A.C.* 6A:14-5.1, which authorize a school district to contract with an Educational Services Unit to provide CST services is silent with respect to the continuation of the employment rights of CST members. (Respondent's Reply Exceptions at p. 2)

Upon careful and independent review of the initial decision and record in this matter, the Commissioner determines to adopt the recommended decision of the OAL, as he agrees with the ALJ's conclusion that "***if the tenure rights guaranteed to employees in the context of *N.J.S.A.* 18A:28-16 and *N.J.S.A.* 18A:6-31.5 are to apply to protect [petitioner] in the present instance, then the term 'school' used therein *must be stretched far beyond* the meaning which the Commissioner in *Stuermer* and the Supreme Court majority in *Shelko* have already accepted.***" (emphasis supplied) (Initial Decision at p. 4)

The record establishes that the New Hanover Board of Education entered into a contractual agreement in July 1997 with BCESU to provide child study team evaluation services. This agreement was amended in December 1997 to contract provision of child study team services, not just for child study team evaluations. Such joint contractual agreements for provision of child study team services are permitted by *N.J.S.A.* 18A:46-5.1 and such agreements are distinguishable from the circumstances in *Stuermer* and *Shelko* wherein the educational programs under dispute in each case were taken over in their entirety by the county special services school district. The local boards of education who had operated the educational programs in each of these matters *ceased to operate or have any continuing responsibility for, or governance over*, those particular programs, hence the operation of those programs was taken over/assumed by a county special services district in each case.

In the instant matter, however, the New Hanover Board of Education at all times retains legal responsibility under *N.J.S.A.* 18A:46-5.1 to provide child study team services, albeit that it may provide those services either separately/independently as it did prior to 1996 or through a joint agreement with another public entity, as it has with the BCESU since the 1997-1998 school year. In the Commissioner's judgment, such a joint agreement between the

New Hanover Board of Education and the BCESU does not constitute a "takeover" or assumption of operation of a school or educational program, even when giving deference to the broader applicability of the statute enunciated by the New Jersey Supreme Court in its 1984 *Shelko* decision. At any given point in time, the New Hanover Board of Education could determine to resume the provision of child study team services through its own employees, in which case the employment of the child study team would be subject to the provisions of *N.J.S.A.* 18A:28-12, or it could determine to enter into a joint agreement with another public board of education.

As pointed out by the ALJ, the Supreme Court in the *Shelko* matter was sharply divided as to the tenure rights of teaching staff members where a special education program previously operated by the Ewing school district was taken over by the Mercer County Special Services School District. As determined by the Supreme Court, the provisions for tenure protection of teaching staff members set forth in *N.J.S.A.* 18A:46-5.1 did extend to the circumstances present in that matter because it determined, *inter alia,* that

> ***Our overwhelming sense of the reality of the situation is that this is precisely the kind of takeover the Legislature contemplated. It is conceded that before and after the transition we are essentially looking at the same teachers, the same students, the same curriculum, and the same classroom. When a transition from local to [County Special Services School District] control of such a program looks, sounds, and acts like a takeover, we should treat it as a takeover. (*Shelko, supra* at 420)

Such is not the case in the instant matter, even when fully agreeing with petitioner's position that tenure protection under the statutes being construed herein extends to all *teaching staff members*, not just to teachers who provide direct instruction to students.

Accordingly, for the reasons expressed therein as clarified and expanded above, the recommendation of the ALJ to dismiss the Petition of Appeal is adopted as the final decision in this matter.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

January 19, 1999
Date of Mailing, January 19, 1999

SB/11-99

SBE #463-02/98-168
SB # 11- 99

IN THE MATTER OF THE CERTIFICATES: STATE BOARD OF EDUCATION

OF ROBERT H. KINZEL. : DECISION

Decided by the State Board of Examiners, November 5, 1998

For the Petitioner-Respondent, Terri Cutrera, Deputy Attorney General
(John J. Farmer, Jr., Attorney General of New Jersey)

For the Respondent-Appellant, Robert H. Kinzel, pro se

The decision of the State Board of Examiners is affirmed for the reasons expressed therein.

July 7, 1999

Date of mailing JUL 09 1999

SB/12-99

SB #12-99

IN THE MATTER OF THE ISSUANCE :

OF A TEACHING CERTIFICATE TO : STATE BOARD OF EDUCATION

ANTHONY J. POLIZZI, JR. : DECISION

Decided by the State Board of Examiners, January 25, 1999

For the Petitioner-Appellant, Budd, Larner, Gross, Rosenbaum, Greenberg & Sade (Terri J. Harrison, Esq., of Counsel)

For the Respondent-Respondent, Howard McCoach, Deputy Attorney General (John J. Farmer, Jr., Attorney General of New Jersey)

On January 25, 1999, the State Board of Examiners voted to deny the issuance of a Substance Awareness Coordinator certification to Anthony J. Polizzi, Jr. (hereinafter "appellant"), finding that, pursuant to the terms of N.J.S.A. 18A:6-7.1, the appellant's conviction for a drug offense permanently disqualified him from school employment. The Board of Examiners added, however, that "[i]f you are able to have this conviction expunged, you may then reapply for certification." On February 16, 1999, the appellant filed a notice of appeal from that decision to the State Board of Education.

On March 2, 1999, the counsel for the appellant requested that the briefing schedule be placed in abeyance pending proceedings to expunge the appellant's criminal record. By letter dated March 11, 1999, the Director of the State Board

FEB. 7, 2001

Appeals Office (hereinafter "Director") advised counsel for the appellant that such request had been granted.

By letter dated October 2, 2000, the Director requested that the counsel for the appellant advise the State Board of Education of the status of the expungement proceedings. On November 2, 2000, having received no response from counsel for the appellant, the Director advised her that this matter was being referred to the Legal Committee of the State Board for consideration of the appellant's failure to perfect the appeal.

By letter dated November 8, 2000, counsel for the appellant advised that an order expunging the appellant's record had been entered on August 6, 1999. In light of this letter, the Director notified counsel for the appellant that the briefing schedule was being reestablished and that a brief in support of the appeal was due by December 6, 2000.

By letter dated December 6, 2000, counsel for the appellant indicated that based upon the expungement of the appellant's record, "it would appear that the State Board of Examiners reversed their position and the appeal is moot. No brief would therefore be required." By letter dated December 8, 2000, the Director requested that counsel for the appellant "confirm by letter if your intent is to withdraw your appeal. Otherwise, it may be dismissed by the State Board of Education for failure to perfect."

The counsel for the appellant has failed to respond to the Director's letter of December 8 or to file a brief in support of the appeal. Given these circumstances, we dismiss the appeal in this matter for failure to perfect. N.J.A.C. 6A:4-1.12(a). See

Paszamant v. Board of Education of the Borough of Highland Park, decided by the State Board, April 1, 1992, aff'd, Docket #A-4812-91-3 (App. Div. 1993).

February 7, 2001

Date of mailing FEB 09 2001

12-99

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT R. THOMAS,	:	
PASSAIC COUNTY TECHNICAL	:	COMMISSIONER OF EDUCATION
VOCATIONAL HIGH SCHOOL	:	DECISION
DISTRICT, PASSAIC COUNTY.	:	
	:	

January 19, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5328-98

AGENCY DKT. NO. 125-5/98

IN THE MATTER OF THE TENURE HEARING OF ROBERT R. THOMAS, PASSAIC COUNTY TECHNICAL VOCATIONAL HIGH SCHOOL DISTRICT

Gerald S. Keegan, Esq., for Board of Education of the Passaic County Technical Vocational High School District

Raymond R. Wiss, Esq., for respondent, Robert R. Thomas (Wiss, Cooke & Santomauro, attorneys)

Record Closed: December 1, 1998 Decided: December 2, 1998

BEFORE **SEBASTIAN GAETA, JR.**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Board of Education of the Passaic County Technical Vocational High School District (Board) brought charges against respondent, a tenured teacher, for unbecoming conduct and conduct threatening the well-being of students.

It was alleged that, on December 5, 1995, respondent made racially and ethnically based insulting remarks to a fellow teacher in a lunchroom filled with students. Following an investigation, the Board found probable cause that the incident occurred as alleged. The superintendent immediately suspended respondent. That suspension continued until February 8, 1996 when the Board received the reports of two psychiatrists who had evaluated respondent. An agreement was reached which permitted respondent to return to his teaching duties on February 12, 1996, upon certain conditions, including that he would provide a written apology to the teacher, Rosa Astacio-Borja. The letter was addressed by respondent to "Rosa Anatasio-Borgia."

On April 18, 1996, the Board concluded that the December 5, 1995 incident had been verified but were not serious enough to certify tenure charges. On May 9, 1996, Ms. Astacio-Borja filed a Verified Petition before the Commissioner of Education to direct that the Board certify tenure charges against respondent.

The Commissioner of Education transmitted the matter to the Office of Administrative Law, as a contested matter, to determine whether the Board abused its discretion by failing to certify the tenure charges to the Commissioner in accordance with *N.J.S.A.* 18A:6-11.

The matter was heard before the Honorable Jeffrey A. Gerson, who issued an Initial Decision ordering that the December 5, 1995 incidents be certified and forwarded to the Commissioner of Education. The Commissioner of Education concurred with Judge Gerson's Initial Decision and ordered that the Board certify the December 5, 1995 incident in accordance with *N.J.S.A.* 18A:6-11. *Rosa Astacio Borja v. Board of Education of the Passaic County Technical-Vocational High School District, Passaic County, OAL Dkt. EDU* 5963-98 (February 13, 1998), *adopted* Commissioner of Education (March 30, 1998).

Pursuant to the Order of the Commissioner of Education, on April 28, 1998, the Board, On April 28, 1998, considered the several tenure charges filed against

respondent. The Board determined that the December 5, 1995 incidents warranted dismissal or reduction in salary and voted to suspend respondent without salary. The other charges, contained in the statement of Tenure Charges, were found to be unsupported by sufficient evidence. Respondent took a timely appeal to the Commissioner of Education, who transmitted the matter to the Office of Administrative Law for a contested hearing pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14B-1 to 13. No person sought leave to intervene, as permitted by *N.J.A.C.* 1:1-16.1.

The matter was scheduled for plenary hearings on December 1, 2, 9 and 10, 1998. On October 21 1998, counsel for the parties and the undersigned Administrative Law Judge met in an in person prehearing conference.

On December 1, 1998, the parties stated that the matter had been amicably resolved and requested that the settlement terms be placed upon the record:

1. If the Commissioner of Education shall approve the settlement in this matter, respondent shall submit his resignation to the Board and request retirement, within 10 days of the final decision approving the settlement.

2. Respondent shall not request future employment with the Board.

3. Respondent waives all claims related to the 120-day suspension without pay imposed by the Board on April 28, 1998, including any claim for the withholding of any increment of salary.

4. There will be no claims for counsel fees for this or related matters.

5. Upon fulfillment of all the above terms of the agreement, the Board shall dismiss all tenure charges.

Respondent stated his complete understanding of the terms of the agreement, that he voluntarily entered into the agreement and understood that should the settlement be approved, the matter would be concluded.

Counsel for respondent stated that the Board had previously agreed to the terms.

The November 23, 1998 memorandum of counsel for respondent in support of this settlement was made part of the record as Exhibit A.

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

The parties have voluntarily agreed to the settlement.

That under all the circumstances, the terms of settlement serve the best interests of the Board, its teachers, staff and students.

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

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 2, 1998
DATE

Sebastian Gaeta
SEBASTIAN GAETA, JR., ALJ

Receipt Acknowledged:

Dec. 4, 1998
DATE

D. M. Antanaitis/jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 7 1998
DATE

Barbara A. Harnett
OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

Exhibit A

OAL DKT. NO. EDU 5328-98
AGENCY DKT. NO. 125-5/98

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT R. THOMAS,	:	
PASSAIC COUNTY TECHNICAL	:	COMMISSIONER OF EDUCATION
VOCATIONAL HIGH SCHOOL	:	DECISION
DISTRICT, PASSAIC COUNTY.	:	
	:	

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

Upon careful and independent review of the full record of this matter and the terms of the proposed settlement agreement, the Commissioner is compelled to reject such agreement as it is currently structured since he cannot be satisfied by the present record that the proposed settlement meets the *Cardonick* standards for settlement of tenure matters. (*In re Cardonick*, decided by the Commissioner April 7, 1982, affirmed State Board of Education April 6, 1983, 1990 *S.L.D.* 842, 846.) Specifically, the Commissioner notes there is no indication that the within teaching staff member was advised of the Commissioner's duty, pursuant to *N.J.A.C.* 6:11-3.6, to refer tenure determinations for possible revocation of certificate.

Accordingly, the proposed settlement is rejected and this matter is hereby remanded to the OAL for revision of the documents, consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to a hearing on the merits.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 19, 1999
Date of Mailing, January 19, 1999

13-99

S.G., on behalf of minor child, A.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF VERNON, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

January 19, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11138-98

AGENCY DKT. NO. 500-11/98

S.G. ON BEHALF OF MINOR CHILD, A.G.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF VERNON, SUSSEX COUNTY,

Respondent

James D. Opfer, Jr., Esq., for petitioner

Gary A. Kraemer, Esq., for respondent (Daggett, Kraemer & Eliades, attorneys)

Record Closed: November 30, 1998 Decided: December 1, 1998

BEFORE **EDITH KLINGER**, ALJ:

On November 17, 1998, this matter was transmitted as an emergent appeal to the Office of Administrative Law for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13. A hearing was scheduled for November 19, 1998.

On the date of hearing, the parties resolved this matter. On November 30, 1998, the parties submitted the attached Consent Order indicating the terms of agreement which are incorporated herein by reference.

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

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

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

I **CONCLUDE** that the agreement meets the safeguard requirements of *N.J.A.C.* 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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

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

December 1, 1998
DATE

Edith Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged:

Dec. 4, 1998
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC - 7 1998
DATE

Barbara A Harnick
OFFICE OF ADMINISTRATIVE LAW

md

DAGGETT, KRAEMER & ELIADES, ESQS.
328 D SPARTA AVENUE
SPARTA, NEW JERSEY 07871
(973) 729-2117
ATTORNEYS FOR Respondent

	OFFICE OF ADMINISTRATIVE LAW
SHARON GRENELL, Individually and a Guardian ad litem for A.G., a minor,	DOCKET NO. EDU 11138-98N
Petitioner	
vs.	CONSENT ORDER
VERNON TOWNSHIP BOARD OF EDUCATION,	
Respondent	

THIS MATTER having come before the Court on an application for emergent relief on behalf of the petitioner, represented by James Opfer, Esq., and the respondent appearing and being represented by Gary Kraemer, Esq., and the parties having resolved the immediate issue in this matter giving rise to the application for emergent relief, and good cause appearing,

IT IS on this _____ day of _____, 1998,

ORDERED as follows:

1. The out-of-school suspension of the petitioner A.G.

shall continue pending an immediate evaluation by the Vernon Township School District Child Study Team to determine whether A.G. should be classified and eligible for special education and related services pursuant to N.J.A.C. 6A:14-1.1 et seq.

2. The Child Study Team evaluation of A.G. must be completed within thirty days of November 19, 1998. Upon completion of the Child Study Team evaluation, an eligibility meeting pursuant to N.J.A.C. 6A:14-3.5 shall be convened immediately.

3. The respondent shall immediately commence and continue homebound instruction for A.G. during his out-of-school suspension in all subjects where appropriate.

4. The petitioners shall cooperate with the respondent's Child Study Team in furnishing consent and release forms to obtain data and information from professionals who have treated or are currently treating A.G., including his substance abuse rehabilitation program.

5. The parties shall review the issue of A.G.'s continued out-of-school suspension upon the completion of the Child Study Team evaluation and eligibility meeting.

EDITH KLINGER, A.L.J.

We consent to the form and entry hereof.

JAMES D. OPFER, JR.
Attorney for Petitioners

GARY A. KRAEMER
Attorney for Respondent

OAL DKT. NO. EDU 11138-98
AGENCY DKT. NO. 500-11/98

S.G., on behalf of minor child, A.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF VERNON, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

January 19, 1999
Date of Mailing, January 19, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

SB/13-99

SB #13-99

IN THE MATTER OF THE DENIAL OF	:	
THE CHARTER SCHOOL APPLICATION	:	STATE BOARD OF EDUCATION
OF THE GALLOWAY EDUCATIONAL	:	DECISION
MERIDIAN CHARTER SCHOOL,	:	
ATLANTIC COUNTY.	:	

Decided by the Commissioner of Education, January 28, 1999

For the Appellant, Cooper, Perskie, April, Niedelman, Wagenheim & Levenson (Don A. Beskrone, Esq., of Counsel)

For the Respondent, William S. Cappuccio, Esq.

For the Participant Commissioner of Education, John Worthington, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

The Galloway Educational Meridian Charter School (hereinafter "appellant") filed an appeal to the State Board of Education from a letter decision of the Commissioner of Education dated January 28, 1999 denying its application to establish a charter school in the 1999-2000 academic year.[1] The Commissioner indicated that the application needed to be strengthened in the following areas: "seeks to dissolve existing charter upon approval of new charter; and does not clearly address how the New Jersey Core

[1] We note that the appellant was granted a charter in 1997 to operate a charter school for kindergarten students only. That school, the Galloway Kindergarten Charter School, opened in September 1997 and remains in operation. Appellant subsequently sought to amend its charter in order to expand the grade levels offered. That request was denied by the Commissioner on the grounds that such an amendment would change the mission and goals of the school. The appellant's instant application, filed in August 1998, sought a charter to operate with grades K-2 in 1999-2000 expanding to K-8 by the 2002-2003 school year.

Apr. 7, 1999

Curriculum Content Standards will be met." Commissioner's Decision, slip op. at 1. The Commissioner also indicated with regard to the appellant's financial plan that "various expenditure line items are improperly classified; and the cash flow statement does not sum properly." Id.

We have considered the arguments made by appellant in light of the record provided to us on behalf of the Commissioner. Based upon that review, and given the significance of the deficiencies identified in the appellant's application by the Department's reviewers, we conclude that the appellant has failed to demonstrate an entitlement to establish a charter school pursuant to N.J.S.A. 18A:36A-1 et seq. We therefore affirm the Commissioner's decision to deny appellant the grant of a charter for 1999-2000.

In so doing, however, we reject that portion of the Commissioner's determination which indicated that the appellant's application was insufficient in that it proposed to dissolve its existing kindergarten charter school upon approval of its application to expand to K-8. We can find nothing in the statutes or regulations governing charter schools that would preclude an existing charter school from applying to the Commissioner for a new charter with expanded grade levels.[2]

We deny the motions to supplement the record filed by the appellant and the Commissioner. The revisions to appellant's application were not before the Commissioner at the time he determined this matter, and we find that information

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[2] Indeed, we note that in this instance, see, supra, n.1, the Commissioner's ruling is tantamount to declaring that regardless of the quality of its application, the charter school could never expand the grade levels served during the period of the charter unless it created an entirely separate entity to serve those grades.

regarding the appellant's previous attempts to amend its existing kindergarten charter is not material to a determination on the merits of its instant application.

April 7, 1999

Date of mailing APR 09 1999

14-99

KAREN NATAPOFF, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

STATE-OPERATED SCHOOL DISTRICT : DECISION
OF THE CITY OF JERSEY CITY,
HUDSON COUNTY, :

RESPONDENT. :

_____:

SYNOPSIS

Petitioning special education teacher alleged the Board improperly withheld her salary increment for the 1996-97 school year.

In light of the testimony of two qualified educational experts, the ALJ determined that petitioner failed to show that the District's decision to withhold her salary increment was arbitrary, capricious or unreasonable. District proved that petitioner's performance was "less than satisfactory." Thus, the ALJ concluded that the District's discretionary exercise of its statutory authority to withhold petitioner's salary increment should not be overturned. (*Kopera*) ALJ ordered the relief requested by petitioner be denied.

Commissioner adopted findings and determination in initial decision as his own. Petition was dismissed.

January 25, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5140-97
AGENCY DKT. NO. 414-9/96

KAREN NATAPOFF,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY,
Respondent.

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

Charlotte Kitler, General Counsel, for respondent

Record Closed: June 3, 1998 Decided: December 10, 1998

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

Statement of the Case

This is an appeal by a teacher from the decision of the State-Operated School District of Jersey City ("District") to withhold her salary increment for the 1996-97 academic year under *N.J.S.A.* 18A:29-14.

Procedural History

Initially this matter was one of fifteen consolidated cases filed with the Commissioner of Education ("Commissioner") on September 13, 1996. Count Eleven of the multi-count petition alleged the wrongful withholding of the increment of petitioner Karen Natapoff ("Natapoff"). On October 2, 1996, the District filed its answer. Subsequently, on October 23, 1996, the Commissioner forwarded all fifteen cases to the Office of Administrative Law ("OAL") for hearing as a contested case under OAL Dkt. No. EDU 11161-96. Since each petitioner's situation involved different factual circumstances and different witnesses, the OAL divided them into separate cases for convenience of hearing.[1] The OAL held a hearing in the *Natapoff* case, designated OAL Dkt. No. EDU 5140-97, on June 3, 1998. Witnesses and exhibits are listed in the appendix.

Findings of Fact

Background Information

Most of the relevant background information is undisputed. While she is no longer employed by the District, Karen Natapoff had been a special-education teacher in the Jersey City public school system for eight years. She holds an instructional certificate which authorizes her to serve as a teacher of the handicapped. Prior to the 1995-96 school year, she taught a self-contained special education class at Public School No. 9. In September 1995, she was transferred to a class for children with perceptual impairments at the Academy School.[2] Occupying the former Snyder High School building, the newly opened Academy School offered diverse programs,

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[1] Uniform Administrative Procedural Rules permit consolidation of separate cases only where a single proceeding will promote savings of time and expense and avoidance of duplication and inconsistency. *N.J.A.C.* 1:1-17.3.

[2] At the time of her transfer, "perceptually impaired" was defined as "a specific learning disability manifested by a severe discrepancy between the pupil's current achievement and intellectual ability" in one or more of several skill areas. *N.J.A.C.* 6:28-3.5(d)(8)(ii).

including special education, an alternative school, and a gifted-and-talented program,. Natapoff's class in 1995-96 was comprised of fifteen or sixteen students, ranging in age from twelve to fourteen years old. Because her class was nondepartmentalized, Natapoff taught all the academic subjects.

During the 1995-96 school year, Natapoff was formally observed on two separate occasions, once by a central-office supervisor and once by an administrator from her building. Thomas Van Note, the supervisor of special education, visited Natapoff's classroom for forty-five minutes on April 4, 1996. Ellen Ruane, an assistant principal serving as the chief building administrator of the Academy School, spent forty-five minutes in her classroom on May 27, 1996. As a result of these observations and other less formal contacts throughout the year, the District determined to withhold Natapoff's 1996-97 employment and adjustment increments for "less than satisfactory performance."

Reasons for Denial of Salary Increment

School administrators were critical of Natapoff's classroom management, her instructional techniques and her assessment of student needs. These perceived deficiencies will be discussed under separate headings.

(1) Lack of Classroom Control

Thomas Van Note has taught special education for more than seventeen years and holds a master's degree in that field. When Van Note entered Natapoff's room, several students were "misbehaving" and the class was "in disarray." Natapoff was teaching a lesson about bar graphs to four students seated at a table, an aide in the rear of the classroom was teaching another student how to tell time, while a sixth student was painting holiday decorations on the windows. None of the students with whom Natapoff was working paid attention to their task. Students who had been given rulers and construction paper to draw bar graphs "used them as weapons." Indeed, the

only student in the class who appeared to be learning was the one being taught by the aide.

One student in particular was greatly distracted by the student painting the window and constantly complained because he too wanted to paint. However, Natapoff did not administer any adverse consequences to the disruptive student for his inappropriate behavior. Rather than isolating him from the group or administering some other form of discipline, Natapoff engaged in "a prolonged dialogue," which interrupted the lesson she was attempting to deliver. Summarizing Natapoff's classroom management skills, Van Note commented that, "At times Ms. Natapoff succumbs to her student's manipulations" and that such display of irresoluteness "severely effects Ms. Natapoff's behavioral control."

Assistant Principal Ellen Ruane, who herself has taught sixth, seventh and eighth grades and is familiar with this age group, observed during her visit that "students shouted out their responses [to questions] and were recognized by Ms. Natapoff without raising their hand and waiting to be called." Undoubtedly this disorganized approach contributed to the chaotic atmosphere of the classroom. Throughout the lesson, Natapoff "never had all six [children] sitting and looking at what the teacher was doing." Most of the boys weren't listening to the teacher and "demands were not made of them to listen." By the end of the lesson, students were "taking to each other and not actively engaged in the learning task." During the course of the school year, "it was not uncommon to have children run out of her classroom and slam the door."

Natapoff pointed out that the date of Van Note's visit was not an opportune time for classroom observation because it was a half day before the start of spring break and the children were excited about leaving school early. Nonetheless, Van Note insisted, some learning should take place even though the school day was abbreviated. With respect to the child painting the windows, Natapoff explained that the girl had been sent to her class from another math class, where she had been crying all morning, and that painting the windows "had a calming effect on her." However,

Natapoff failed to offer a convincing reason why she failed to discipline the child in her group who, in her own words, "made excessive demands for attention." Instead, she tried unsuccessfully to gain his cooperation by promising him that he would be allowed to paint if he finished his lesson. Similarly, Natapoff did not adequately justify her decision to let one child paint windows while the rest of the class was engaged in a mathematics lesson. Her testimony that she was under an administrative directive to complete the painting of the windows did not explain why the task was not structured as a class activity. Although Natapoff acknowledged that she allowed students to talk without raising their hands, she defended this unruly practice as a "free-flowing discussion within a small informal-group setting."

I FIND that Natapoff demonstrated an inability to motivate her students or encourage them to participate in instruction. Even when she attempted to teach in a small-group setting, her students failed to pay attention to their teacher, talked to each other, and shouted out answers without raising their hands. Natapoff made two poor choices which caused her to lose control of the classroom. She favored one child by letting her paint while everyone else in the room was trying to do academic work. Additionally, she failed to put an immediate stop to misbehavior by a disgruntled child in her group, allowing him to continue disrupting her lesson.

(2) Inadequate Instructional Techniques

To illustrate the use of graphs, Natapoff had her students make bar graphs out of construction paper. In addition to this one approach, Van Note thought that an experienced teacher should be using a variety of sensory modalities and learning devices, including graph paper, felt or magnetic boards and an overhead projector. Use of more than one method of conveying information is especially important in the case of children with perceptual impairments, who might benefit from techniques geared toward different styles of learning styles. Without disagreeing with Van Note's observation, Natapoff blamed her inability to employ different techniques on the District's alleged failure to supply her with the necessary materials. In particular, she

complained that the graph paper furnished by the District was the wrong size for her students to use. Both administrators, however, maintained that Natapoff could have obtained whatever supplies were needed. Van Note said that there is a math specialist in each building who has special materials available. Ruane agreed that there is a procedure in place for teachers to obtain supplies.

Ruane noted several deficiencies in Natapoff's instructional technique during her formal evaluation. First of all, Natapoff was unprepared to start the lesson on time. She wasted time gathering together various materials "while the students were sitting there." Moreover, the physical arrangement of the room was inadequate. Natapoff had six students sitting at a table in the upper corner of the room, far away from the blackboard located in the middle of the room. During the lesson itself, Natapoff made poor eye contact with her students and often failed to give clear and direct answers to her students' questions. Although the lesson was on expanded notation and the place value of numbers, Natapoff failed to use the vocabulary of mathematics, words such as "thousands, hundreds, tens and ones." Occasionally, she lapsed into incorrect grammar, using improper constructions such as "You have to speak loud" and "What do you got there?" Despite Natapoff's denial that she used poor grammar, Ruane wrote down exactly what she heard and "absolutely" stood by her testimony.

In general, Natapoff did not have sufficiently high expectations for her students. Although Natapoff's plan book had listed three or four objectives for the lesson, she managed to cover only a single objective, a pace which Ruane described as "not reasonable" for a full period. Furthermore, Natapoff used only one technique (questions and answers) to determine whether or not her students were acquiring the skill being taught. Since Natapoff neglected to correct students when they gave wrong answers, the students did not receive feedback on concepts which they misunderstood. Likewise, Natapoff "failed to reinforce correct answers by students." More fundamentally, Natapoff did not always treat her students in a courteous and respectful manner. In one egregious incident, Natapoff told a student who was trying to answer her question, "I can't hear you and *I know how loudly you talk*." (Emphasis Added).

While Natapoff claimed that she was only trying "to coax the child to speak up," Ruane reported that the remark was made in a sarcastic tone of voice.

I FIND that Natapoff failed to exhibit effective instructional techniques expected from an experienced teacher. To the extent that the proofs are in conflict, the objective reports of qualified supervisors are more credible than Natapoff's excuses and self-serving statements. Specifically, Natapoff was unprepared to start her lesson on time, used improper grammar and failed to correct wrong answers by her students. She did not adjust her teaching methods to address each child's unique needs, failing to utilize available teaching materials and employing only one measure to test her students' knowledge. In the presence of the assistant principal, Natapoff spoke sarcastically to a student who was trying to cooperate. At the end of one lesson, Natapoff had accomplished only one of the multiple teaching objectives she had set for herself.

3) Assessment of Student Needs

Lastly, Van Note found fault with Natapoff's grade book, which he described as lacking entries revealing the details of her homework assignments. More than a month afterwards, Ruane again criticized the grade book because it was "hard to read" and still did not designate the sufficient identifying information of home-work assignments. Notwithstanding Natapoff's assertion that Ruane had reviewed and approved her grade book when report cards were issued, she never explained her failure to comply with Van Note's explicit instructions on what a grade book should contain. Instead, Natapoff claimed that her grade book was "correlated" to homework assignments in her plan book, but never produced her plan book to prove her point.

I FIND that Natapoff failed to record sufficient information about her homework assignments in her grade book, even after Van Note had given her guidance on the proper format of a grade book.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that the Board's discretionary exercise of its statutory authority to withhold Natapoff's salary increment should not be overturned.

N.J.S.A. 18A:29-14 provides that a board of education may withhold a teacher's salary increment "for inefficiency or other good cause." Courts recognize that salary increments are "a reward for meritorious service." *Probst v. Haddonfield Bd. of Educ.*, 127 *N.J.* 518, 527 (1992). Section 14 is clearly meant to vest local school districts with the ability to withhold increments from teachers who have not performed well during the previous year. *Probst*, at 526. Appeals from such action may be taken to the Commissioner, who may either affirm or direct that an increment be paid.[3] A decision to withhold an increment is a matter of essential managerial prerogative, which has been delegated by the Legislature to the local school board. *North Plainfield Educ. Ass'n v. North Plainfield Bd. of Educ.*, 96 *N.J.* 587 (1984); *Bernards Twp. Bd. of Educ.* v. *Bernards Twp. Educ. Ass'n*, 79 *N.J.* 336 (App. Div. 1975). When reviewing such determinations, the Commissioner is prohibited from substituting his own judgment for that of the local board. His scope of review is limited to assuring that there exists a reasonable basis for the decision.

Exercise of the discretionary powers of the local board may not be upset unless patently arbitrary, or without reasonable basis, or induced by improper motives. *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 288 (App. Div. 1960). The burden

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[3] As the result of legislation effective January 4, 1990, an increment withholding "for predominately disciplinary reasons" is subject to grievance procedures. *N.J.S.A.* 34:13A-26. The withholding of a teaching-staff member's increment based on actual teaching performance is still appealable to the Commissioner of Education. *Assembly Labor Committee Statement to Assembly Bill No. 4706* (1989). *See River Dell Bd. of Educ. v. Canal*, 93 *N.J.A.R.* 2d (EDU) 784 (Comm'r of Educ.). Because the withholding in this case arose out of petitioner's teaching performance, the Commissioner has jurisdiction over the appeal.

of providing unreasonableness rests upon the party challenging the board's action. *Kopera*, at 297. Accordingly, the Commissioner's scope of review is limited to determining: (1) whether the underlying facts were as those who made the evaluation claimed; and (2) whether it was reasonable for them to conclude as they did upon those facts, bearing in mind that they are experts.

Here the underlying facts were substantiated by the testimony of two qualified educational experts. Natapoff failed to meet District standards in three important measures of teaching performance: classroom management, instructional techniques and assessment of student needs. Under the circumstances, petitioner has not succeeded in showing that the Board's decision to withhold her salary increment was arbitrary, capricious or unreasonable.

Order

It is **ORDERED** that the relief requested by petitioner is denied..

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Dec. 10, 1998
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

12/15/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 17 1998
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

1. Thomas Van Note, supervisor of special education,
   State-Operated School District of Jersey City

2. Ellen Ruane, principal,
   State-Operated School District of Jersey City

3. Karen Natapoff, special education teacher,
   State-Operated School District of Jersey City

List of Exhibits

No.	Description
J-1	Copy of instructional observation report, dated April 4, 1996
J-2	Copy of evaluation rebuttal, dated April 29, 1996
J-3	Copy of instructional evaluation report, dated May 22, 1996
J-4	Copy of evaluation rebuttal, dated June 14, 1996
J-5	Copy of annual written performance report, dated May 20, 1996
J-6	Copy of letter to Ms. Natapoff from Judi Granick, dated June 18, 1996
P-1	Copy of guidelines for special education teachers' observations, undated

P-2 Copy of explanation of evaluation performance factors for teachers, undated

OAL DKT. NO. EDU 5140-97
AGENCY DKT. NO. 414-9/96

KAREN NATAPOFF,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions.

Upon careful and independent review, and accepting the factual findings and credibility determinations of the Administrative Law Judge (ALJ), the Commissioner determines to affirm the initial decision. As noted, it is petitioner's burden to prove, by a preponderance of credible evidence, that the District's decision to withhold her increment was unreasonable, based on the facts. *Kopera, supra.* The Commissioner finds that petitioner has failed to meet her burden.

Accordingly, the initial decision of the ALJ is affirmed for the reasons expressed therein, and the Petition of Appeal is hereby dismissed.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

January 25, 1999
Date of Mailing, January 26, 1999

15-99

JACINTA KAY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD SCHOOL DISTRICT, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

January 25, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5558-97
AGENCY DKT. NO. 144-5/97

JACINTA KAY,
Petitioner,
v.
SCOTCH PLAINS-FANWOOD BOARD OF EDUCATION,
Respondent.

Gail Oxfeld-Kanef, Esq., for petitioner
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Casper P. Boehm, Jr., Esq. for respondent

Record Closed: December 8, 1998 Decided: December 10, 1998

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

Statement of Facts

This matter was transmitted to the Office of Administrative Law (OAL) on June 2, 1997, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

Dec. 10, 1998
DATE

Ken R Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

12/15/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 17 1998
DATE

Barbara A Harnek
OFFICE OF ADMINISTRATIVE LAW

al

BALK, OXFELD, MANDELL & COHEN, P.A.
50 Commerce Street
Newark, New Jersey 07102
(973) 642-0161
Attorneys for Petitioner

JACINTA KAY,	: BEFORE THE COMMISSIONER OF EDUCATION
Petitioner,	:
	AGENCY DOCKET NO. 144-5/97
vs.	:
SCOTCH PLAINS-FANWOOD BOARD OF EDUCATION,	: SETTLEMENT AGREEMENT
	:
Respondent.	

WHEREAS, **JACINTA KAY**, hereinafter referred to as Petitioner, has filed an action against the **SCOTCH PLAINS-FANWOOD BOARD OF EDUCATION**, hereinafter referred to as Respondent, for alleged failure to grant appropriate military credit to the Petitioner; and

WHEREAS, Respondent denies the allegations; and

WHEREAS, the parties wish to resolve their differences and have agreed to the terms of this settlement;

NOW THEREFORE, in consideration of the terms hereinafter set forth, the parties have agreed as follows:

1. Respondent shall pay the Petitioner the gross sum of $1,454.00 less deductions for taxes and social security. No other deductions shall be made.

2. Petitioner shall dismiss her petition with prejudice.

3. Respondent shall prospectively credit Petitioner with the military service credit she has sought through this litigation.

4. The settlement shall not be precedent setting and shall not be cited by Petitioner or the Scotch Plains-Fanwood Education Association (who joins this Agreement for said purpose) in any subsequent proceeding brought by any member of said Association against the Respondent.

Jacinta Kay
JACINTA KAY

Dated: 10-13-98

ATTEST:

SCOTCH PLAINS-FANWOOD BOARD OF EDUCATION

MATTHEW A. CLARKE,
SECRETARY

By: August Ruggiero
AUGUST RUGGIERO, PRESIDENT

Dated:

Dated: 11/12/98

ATTEST:

SCOTCH PLAINS-FANWOOD EDUCATION ASSOCIATION

Susan Marchalonis
SECRETARY

By: Barbara McGuane
PRESIDENT

OAL DKT. NO. EDU 5558-97
AGENCY DKT. NO. 144-5/97

JACINTA KAY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD SCHOOL DISTRICT, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

January 25, 1999
Date of Mailing, January 26, 1999

16-99

IN THE MATTER OF THE TENURE	:	
HEARING OF MICHAEL MC KENTY,	:	
SCHOOL DISTRICT OF THE CITY	:	COMMISSIONER OF EDUCATION
OF ATLANTIC CITY, ATLANTIC	:	DECISION
COUNTY.	:	
_____	:	

January 25, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4794-98

AGENCY DKT. 104-4/98

IN THE MATTER OF THE TENURE HEARING OF MICHAEL McKENTY, BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY.

George G. Frino, Esq., for petitioner

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

Record Closed: December 15, 1998 Decided: December 16, 1998

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

This matter was transmitted to the Office of Administrative Law on June 17, 1998, for a hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14-F-1 to -13.

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

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

16 December 1998
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 22 1998
DATE

Barbara A Kennedy
OFFICE OF ADMINISTRATIVE LAW

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FILED

DEC 15 8 48 PM '98

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

IN THE MATTER OF THE TENURE HEARING OF MICHAEL MCKENTY, BOARD OF EDUCATION OF ATLANTIC CITY, ATLANTIC COUNTY.

OAL DKT NO. EDUTH 04794-98S
AGENCY REF. NO. 104-4/98

JOINT REQUEST FOR APPROVAL OF SETTLEMENT PROVIDING FOR DISMISSAL OF TENURE CHARGES

INTRODUCTION

Counsel for the Board of Education of Atlantic City ("Board") and counsel for its tenured employee ("McKenty") join in moving for an order finding that the Settlement Agreement between the parties, attached hereto as Exhibit A, meets the requirements of N.J.A.C. 1:1-19.1, recommending that the Settlement Agreement be adopted by the Commissioner of Education, and ordering on condition that the Commissioner approves the Settlement Agreement without modification, that the Settlement Agreement be implemented and the tenure charges filed by the Board be dismissed with prejudice.

PROCEDURAL STATEMENT

This matter arises out of tenure charges against a tenured teaching staff member on grounds of unbecoming conduct. The tenure charges and petition were transmitted to the Office of Administrative Law (OAL) on or about August 10, 1998.

A telephone prehearing concerning the Board's tenure charges was conducted by the Honorable Lillard E. Law, A.L.J. on September 28, 1998, at which time a settlement was discussed which would result in McKenty's reinstatement as a teacher. The parties therefore agreed to present Judge Law with a Settlement Agreement under which, subject to approval by the Commissioner of Education, the tenure charges would be dismissed.

The parties have agreed under the terms of the Settlement Agreement attached hereto as Exhibit A that McKenty will be reinstated to a position consistent with his certification as a physical education teacher at the salary step to which he would have been assigned had the tenure charges never been brought against him, and that he will attend seminars and workshops pertaining to the issue of student discipline as had been recommended by the Board's administration prior to the certification of the tenure charges.

The parties have further agreed under the terms of the Settlement Agreement attached hereto as Exhibit A that McKenty is entitled to full backpay and restoration of benefits excluding any sums withheld during the period of his suspension without pay for 120 days, and less any amounts paid to him after his 120 day suspension without pay expired.

The parties have further agreed under the terms of the Settlement Agreement attached hereto as Exhibit A that conditioned upon the Commissioner's approval of the Settlement Agreement without modification, the tenure charges against McKenty shall be dismissed with prejudice. Furthermore, should the Commissioner fail to approve the Settlement Agreement attached hereto as Exhibit A without modification, the parties have agreed to make every reasonable effort to reform their Settlement Agreement to meet his objections.

THE BOARD'S REASONS FOR SEEKING DISMISSAL OF TENURE CHARGES

The Board makes the following representations:

On March 30, 1998 the Atlantic City Board of Education certified three charges of unbecoming conduct against Michael McKenty, a teaching staff member in its employ, all allegedly occurring at Albany Avenue School during the 1997-98 school year.

A review of McKenty's personnel records subsequent to the filing of tenure charges disclosed that he had not incurred problems of the nature alleged at Albany Avenue School during the three month period between September and November, 1997, when he was assigned to other schools during the course of his tenure in the Atlantic City School District from 1991 through September, 1997, and after he was reassigned to Ohio Avenue School from Albany Avenue School. Additionally, it was discovered that the Atlantic City School Administration had recommended and McKenty was slated to attend certain seminars and workshops pertaining to the proper handling of student discipline which did not take place because of the certification of the tenure charges. Moreover, sustaining these charges was dependent upon testimony of the students referred to in the aforementioned charges. After interviewing the students referenced in the charges, it was determined that the students' testimony may not sustain the allegations contained in the charges.

Under the circumstances, the Board of Education has directed its counsel to dismiss the charges and request that the Commissioner of Education approve the dismissal.

CONCLUSION

The Settlement Agreement was negotiated between counse. based upon all the attendant facts and circumstances, some of which did not come to light until the tenure charges had been certified to the Commissioner of Education. Counsel, as well as McKenty and the Board which approved it, are satisfied with the Settlement Agreement and believe that it fulfills the public interest with respect to these matters. For the reasons outlined above, and for good cause shown, this tribunal should conclude that the Settlement Agreement meets the requirements of N.J.A.C. 1:1-19.1, recommend that the Settlement Agreement be adopted without modification by the Commissioner of Education, order that the Settlement Agreement be implemented on condition that it is so approved, and therefore upon such approval dismiss with prejudice the tenure charges and petition of appeal in this consolidated matter.

Respectfully submitted,

GEORGE FRINO
Attorney for Board of
Education of Atlantic City

BY: _____
GEORGE FRINO

SELIKOFF & COHEN, P.A.
Attorneys for Michael McKenty

BY: Steven R. Cohen
STEVEN R. COHEN

SETTLEMENT AGREEMENT REGARDING TENURE CHARGES
PENDING BEFORE THE COMMISSIONER OF EDUCATION

This Settlement Agreement is entered into by and between the Board of Education of Atlantic City ("Board") and its tenured employee Michael McKenty ("McKenty").

WHEREAS, McKenty has been continuously employed by the Board as a teaching staff member since September 1, 1991; and

WHEREAS, on March 30, 1998 the Board certified tenure charges against McKenty to the Commissioner of Education under the Tenure Employees Hearing Law, which charges were captioned:

> **IN THE MATTER OF THE TENURE HEARING OF MICHAEL MCKENTY, BOARD OF EDUCATION OF ATLANTIC CITY, ATLANTIC COUNTY.**
>
> OAL DKT NO. EDUTH 04794-98S
> AGENCY REF. NO. 104-4/98

AND, WHEREAS McKenty filed an answer contesting the tenure charges; and

WHEREAS, the aforesaid tenure charges were assigned for hearing before Administrative Law Judge Lillard E. Law; and

WHEREAS, a telephone prehearing conference of counsel was conducted by Judge Law on September 28, 1998; and

WHEREAS, during the course of the continued investigation into the allegations made against McKenty following the certification of the tenure charges to the Commissioner of Education, the Board concluded that in light of McKenty's employment history other than the three month period he was assigned to Albany Avenue School, and the witnesses' expected

testimony, it could not have sustained the allegations contained in its tenure charges, and it would be in the best interest of the Board and the students of the district for which it is responsible to reinstate McKenty to his position as an active member of the teaching staff, and compensate him for any lost salary and benefits he sustained as result of the charges being filed excluding any salary to which he may have been entitled during the 120 day period of his suspension;

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

1. The Board will seek the Commissioner's approval for this Settlement Agreement, and if the Commissioner approves the Settlement Agreement without modification, ask the Commissioner to allow the tenure charges against McKenty to be dismissed, with prejudice;

2. McKenty will cooperate with the Board in seeking the Commissioner's approval for this Settlement Agreement;

3. Should the Commissioner fail to approve this Settlement Agreement attached hereto as Exhibit A without modification, the parties have agreed to make every reasonable effort to reform this Settlement Agreement to meet any objections;

4. The Board shall reinstate McKenty to a position consistent with his certification as a physical education teacher at the salary step to which he would have been assigned had the tenure charges never been brought;

5. The Board shall pay McKenty full backpay and restoration of benefits from the date he was suspended without pay through the date of his reinstatement, excluding backpay for the period of his suspension for 120 days, and less any amounts paid to him after his 120 day suspension without pay expired.

6. McKenty shall attend the seminars and/or workshops in the area of student discipline contemplated by the Board's administration and referenced in the report of Assistant Superintendent Melvin A. Clarke dated October 1, 1997.

7. In consideration of the mutual covenants contained herein, including the sum of money described in paragraph 5 hereof, paid to McKenty by the Board, the sufficiency of which is hereby acknowledged by McKenty, each party (the releasing party) hereby remises, releases, acquits, satisfies, and forever discharges the other party (the released party) and its heirs, personal representatives, successors, assigns, employees, agents and attorneys of all and from all actions, suits, debts, dues, sums of money, accounts, covenants, attorneys fees, expenses, controversies, agreements, promises, damages, judgments, claims and demands whatsoever, in law or in equity, which the releasing party ever had, now has, or may have, or which any personal representative, successor, heir or assign of the releasing party, hereafter can, shall or may have, against the released party or its heirs, personal representatives, successors, assigns, employees, agents or attorneys, for, upon or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the date of this Settlement Agreement.

8. The parties certify that they have had the opportunity to discuss this Settlement Agreement with counsel. They are fully satisfied with the services of their counsel with respect to both this Settlement Agreement and all other aspects of this case and they enter into this Settlement Agreement knowingly, willingly and without any coercion or improper inducements.

9. By signing this Settlement Agreement, each signatory represents that she or he is a party or has been duly authorized by a party to sign on that party's behalf.

10. The parties agree that this Settlement Agreement may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

Intending to be legally bound hereby, McKenty and the Board execute the foregoing Settlement Agreement this 16th day of December, 1998.

WITNESS:

MICHAEL McKENTY

WITNESS:

ATLANTIC CITY BOARD OF EDUCATION, COUNTY OF ATLANTIC

BOARD SECRETARY

BOARD PRESIDENT

EXHIBIT "A"

Selikoff & Cohen, P.A.
Counselors at Law

Suite #314
307 Fellowship Road
Mount Laurel, New Jersey 08054-1233
(609) 778-6055
Telefax: 609-778-6056
selicohn@bellatlantic.net

FILED
DEC 15 8 48 PM '98
STATE OF NEW JERSEY

Joel S. Selikoff
Member of NJ and DC Bars

Steven R. Cohen
Member of NJ, PA and DC Bars

Carol H. Alling
* Michael C. Damm
* Keith Waldman

* Members of NJ and PA Bars

December 10, 1998

HONORABLE LILLARD E. LAW, A.L.J.
Office of Administrative Law
1201 Bacharach Boulevard
Atlantic City, New Jersey 08401

RE: IN THE MATTER OF THE TENURE HEARING OF MICHAEL MCKENTY, SCHOOL DISTRICT OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY
AGENCY REF. NO. 104-4/98 OAL DOCKET NO. EDUTH 04794-98S
Our File No. 3987

Dear Judge Law:

Enclosed for your review and consideration in the above captioned matter please find an original and one copy of:

1. Joint Request for Approval of Settlement Providing for Dismissal of Tenure Charges; and

2. Settlement Agreement Regarding Tenure Charges Pending Before The Commissioner Of Education.

These documents have been executed by the parties and their respective counsel. I am also enclosing a copy of a letter received from George Frino, Esq., to this effect.

We respectfully submit that the settlement reached by the parties in this matter is well within the public interest standards enunciated by the Commissioner of Education in Cardonick, and accordingly, request that you issue an initial decision recommending that it be approved by the Commissioner of Education.

Thank you for your kind consideration in this regard.

Respectfully,
SELIKOFF & COHEN, P.A.

BY: Steven R. Cohen
STEVEN R. COHEN

SRC:kaz
Enclosures
c :George C. Frino, Esq. (w/out encl.)
Michael McKenty (w/encl.)
Eugene Sharp, NJEA Reg. #2 (w/encl.)

OAL DKT. NO. EDU 4794-98
AGENCY DKT. NO. 104-4/98

IN THE MATTER OF THE TENURE	:	
HEARING OF MICHAEL MC KENTY,	:	
SCHOOL DISTRICT OF THE CITY	:	COMMISSIONER OF EDUCATION
OF ATLANTIC CITY, ATLANTIC	:	DECISION
COUNTY.	:	
	:	

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

In light of the Board's statement of the circumstances herein, and noting that the settlement terms comport with the *Cardonick* standards for review of settlements in tenure matters, the Commissioner adopts the settlement as the final decision in this matter. (*In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846.) However, in that the charges brought by the Board asserted inappropriate interactions with students, the Commissioner determines to refer a copy of this decision to the State Board of Examiners for action, if any, as it deems appropriate. In so doing, the Commissioner clarifies that no term of the within Stipulation shall be interpreted so as to preclude the Board from cooperating in any proceeding undertaken by the State Board of Examiners.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

January 25, 1999
Date of Mailing, January 26, 1999

18-99

CHERRY HILL ORGANIZED FOR INTEGRATION CHOICE AND EQUITY, INC., a non-profit corporation of the State of New Jersey; BARCLAY AREA CIVIC ASSOCIATION, a non-profit corporation of the State of New Jersey; and RICHARD A. BURKE AND YOLANDA C. BURKE h/w,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

January 27, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6925-98
AGENCY DKT. NO. 219-7/98

CHERRY HILL ORGANIZED FOR INTEGRATION CHOICE AND EQUITY, INC., A NON-PROFIT CORPORATION OF THE STATE OF NEW JERSEY; BARCLAY AREA CIVIC ASSOCIATION, A NON-PROFIT CORPORATION OF THE STATE OF NEW JERSEY; AND RICHARD A. BURKE AND YOLANDA C. BURKE h/w,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL,

Respondent.

Richard S. Hyland, Esq., for petitioner (Montgomery, McCracken, Walker & Rhodes, attorneys)

Nicholas Celso, III, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: December 28, 1998 Decided: January 8, 1999

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

This matter was transmitted to the Office of Administrative Law on August 27, 1998, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

JAN 0 8 1999
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

Jan. 12, 1999
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 1 3 1999
DATE

Barbara A Hernek
OFFICE OF ADMINISTRATIVE LAW

ph

RECEIVED
NEW JERSEY
1998 DEC 28 P 3:16

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER
10 James Street
Florham Park, New Jersey 07932
(973) 301-0001
Attorneys for Respondent

CHERRY HILL ORGANIZED FOR INTEGRATION, CHOICE AND EQUITY, INC., a Non-Profit Corporation of the State of New Jersey; BARCLAY AREA CIVIC ASSOCIATION, a Non-Profit Corporation of the State of New Jersey; and RICHARD A. BURKE and YOLANDA C. BURKE,h/w, Petitioners, vs. Cherry Hill Board of Education, Camden County, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION STATE OF NEW JERSEY AND THE OFFICE OF ADMINISTRATIVE LAW DOCKET NO. EDU 219 7/98 ADMINISTRATIVE ACTION **STIPULATION OF WITHDRAWAL OR DISMISSAL WITHOUT PREJUDICE**

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the Petition filed in this matter be and hereby is withdrawn, or alternatively that the matter is dismissed without prejudice and without costs against either party, subject to the terms and conditions hereinafter set forth:

1. The petitioners hereby request withdrawal (without prejudice) of their action, subject to the terms and conditions set forth hereinafter. In the event the Office of Administrative Law and the Commissioner of Education permit withdrawal of the within action, the parties agree to abide by the terms of this Agreement.

2. In the event that the Commissioner will not permit withdrawal (without prejudice), then the parties hereby stipulate dismissal, subject to the terms and conditions set forth hereinafter.

3. It is the intention of the present Board, to the extent permitted by law, to abide by the within agreement from the date of approval through June 30, 2002. On July 1, 2002 the terms of the settlement shall lapse. At that point, the Board shall no longer be bound by the terms of the agreement and expressly reserves the right to take any action whatsoever, as it deems necessary and in the best interests of the community.

4. In the event that the Commissioner shall modify or require the parties to modify this settlement agreement, then the Board may elect to withdraw from it and the agreement shall be deemed to be null and void; the Board's obligations thereunder shall be then terminated.

5. Effective in September of 1999, there shall be implemented in good faith by the Board a program of open enrollment at the high school level for students then enrolled in grades 9 and 10, inclusive of any new residents in grades 9 and 10, which shall permit the students freely to choose to attend either High School, West or East.

6. Effective in September of 2000, there shall be implemented in good faith by the Board a program of open enrollment at the high school level for students then enrolled in grade 9 only, inclusive of any new residents in grades 9, 10 and 11, which shall permit the students freely to choose to attend either High School, West or East.

7. Continuing in September of 2001, there shall be implemented in good faith by the Board a program of open enrollment at the high school level for students then enrolled in grade 9 only, inclusive of any new residents in grades 9 - 12, which shall permit the students freely to choose to attend either High School, West or East.

8. The above described program of open enrollment shall be implemented without regard to the geographic location of students.

9. The above described program of open enrollment shall be continued during the prescribed periods of time without restriction due to staff and facilities.

10. Once a choice has been made in accordance with the procedures for same (which shall be administratively determined), it shall be final and binding, except that requests for subsequent modification shall be considered on a case-by-case basis taking into account any factors deemed to be relevant by the Administration.

11. In accordance with Board policy and law requiring transportation of remote high school students, transportation shall be provided to all high school students, regardless of their school of attendance.

12. The existing high school profiles shall be revised to include a more common format and language, although a single, common profile is not required. Every effort shall be made to complete the revisions in time for utilization by present seniors.

13. As soon as practicable, the Board shall organize and conduct a reception/seminar for local realtors in order to inform them of the open enrollment plan. Appropriate, descriptive literature also shall be developed and provided by the Board.

14. There shall be established, within a five-year time frame, common standards and benchmarks for achievement in both High Schools, West and East.

15. The Board shall make reasonable efforts to ensure a program of balanced media coverage for both High Schools, West and East.

16. The Board shall continue its present efforts to realign the distribution of special education students among the secondary schools.

17. One designated representative of CHOICE and of the Barclay Civic Association, respectively, shall receive Board agenda and meeting notices.

18. The parties and their counsel shall agree to abandon any and all claims against one another for counsel fees and the costs of suit, or otherwise.

19. No part of this agreement shall be construed as an admission of any kind by either party. Without making any admission, the parties recognize the existence of socioeconomic differences between the East and West sides of Cherry Hill Township.

Dated: 12/22/98

SCHWARTZ SIMON EDELSTEIN CELSO & KESSLER
Attorneys for Respondent

By: _____
Nicholas Celso, III

MONTGOMERY, MCCRACKEN, WALKER & RHOADS
Attorneys for Petitioners

By: _____
Richard S. Hyland

LARIO & SALDUTTI

By: _____
Robert L. Saldutti

OAL DKT. NO. EDU 6925-98
AGENCY DKT. NO. 219-7/98

CHERRY HILL ORGANIZED FOR INTEGRATION CHOICE AND EQUITY, INC., a non-profit corporation of the State of New Jersey; BARCLAY AREA CIVIC ASSOCIATION, a non-profit corporation of the State of New Jersey; and RICHARD A. BURKE AND YOLANDA C. BURKE h/w,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and notice of withdrawal/settlement transmitted to the Commissioner from the Office of Administrative Law have been reviewed. The Commissioner determines to accept the withdrawal, without prejudice, based upon the present Board's stated intention to pursue and implement the policies set forth in the attached document. In so doing, however, the Commissioner stresses that such document may in no way serve to bind successor boards of education in pursuing their statutory duties pursuant to *N.J.S.A.* 18A:11-1 *et seq.*[*]

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

[*] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

January 27, 1999
Date of Mailing, January 27, 1999

19-99

SARA ANN EDMONDSON,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY, DONALD D'AMICO, SUPERINTENDENT AND VICTOR GILSON, ASSISTANT SUPERINTENDENT,	:	
RESPONDENTS.	:	
	:	COMMISSIONER OF EDUCATION
IN THE MATTER OF THE TENURE	:	DECISION
HEARING OF SARA ANN EDMONDSON,	:	
SCHOOL DISTRICT OF THE CITY OF	:	
BRIDGETON, CUMBERLAND COUNTY.	:	

January 21, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

SARA ANN EDMONDSON,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY, DONALD D'AMICO, SUPERINTENDENT AND VICTOR GILSON, ASSISTANT SUPERINTENDENT,

Respondents,

OAL DKT. NO. EDU 06948-98S

AGENCY DKT. NO. 3331-7/98

AND

IN THE MATTER OF THE TENURE HEARING OF SARA EDMONDSON, BRIDGETON SCHOOL DISTRICT, CUMBERLAND COUNTY,

OAL DKT. NO. EDU 08394-98S

AGENCY DKT. NO. 412-9/98

CONSOLIDATED

Gregory G. Johnson, Esq., and **Arnold M. Mellk**, Esq, for petitioner Sara Edmondson (Wills, O'Neill & Mellk, attorneys)

A. Paul Kienzle, Jr., Esq., for respondents Board of Education of the City of Bridgeton, Cumberland County, Donald D'Amico, Superintendent and Victor Gilson, Assistant Superintendent

Record Closed: January 14, 1999

Decided: January 15, 1999

BEFORE **JEFF S. MASIN**, ALJ:

These matters were brought for hearing before this judge on January 8, 1999. Prior to hearing counsel entered into an agreement to settle the matters in dispute. The terms and conditions of the settlement as set forth in the attached settlement agreement, which has been signed by counsel for the Board and for the two counsel representing Ms. Edmondson in each of the consolidated cases. The Board of Education has formally approved the settlement.

This matter involves an inappropriate remark made by a teacher to students. The remark involved the use of an inappropriate racial designation made by a teacher of and to students of the same racial group to whom the inappropriate term is unfortunately applied. The incident appears to be a single inappropriate comment made by a teacher of long-standing service. In its initial response to this incident, the Board of Education imposed a suspension without pay which the Board concedes is not supportable under the Tenure Act. The settlement provides for the teacher to receive pay for the five days of suspension for which she was not paid and to be suspended for a period of 120 days. No admissions of any sort have been made by any of the parties.

After lengthy consultations with counsel and a consideration of the circumstances and the concerns of all parties, I find that the settlement, which was placed on the record and which is incorporated herein, serves as a reasonable resolution of the issues in dispute and adequately addresses the interests of the Commissioner of the Department of Education ("Commissioner"). It appears to be in the best interests of everyone that this matter be resolved without the necessity of a hearing.

The settlement preserves an existing Superior Court action which is an outgrowth of the suspension without pay and which the parties have agreed will not be affected by the terms of this settlement.

After being placed under oath, Ms. Edmondson stated that she fully understood and consented to all of the terms and conditions of this settlement.

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

1. The parties have voluntarily agreed to the settlement on the record.
2. The settlement fully disposes of all issues in controversy in this administrative forum and is consistent with the law.

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

Based upon the above, I recommend that the Commissioner approve this settlement. It is further requested by all parties that the Commissioner expedite review of this settlement.

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

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

January 15, 1999
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

Jan. 15, 1999
DATE

D.M. Cantanautis/fc
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 15 1999
DATE

Barbara A Hennel
OFFICE OF ADMINISTRATIVE LAW

mjm
Attachment

881 P03 JAN 15 '99 15:24

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
PO Box 049
Trenton, New Jersey 08625-0049
(609) 588-6582

JEFF S. MASIN
DEPUTY DIRECTOR
ADMINISTRATIVE LAW JUDGE

Fax. No. (609) 588-3730

January 11, 1999

BY FACSIMILE TRANSMISSION AND REGULAR MAIL

A. Paul Kienzle, Jr., Esq.
Casarow, Kienzle & Raczenbek
32 North Pearl St., PO Box 337
Bridgeton, NJ 08302

Arnold M. Mellk, Esq.
Wills, O'Neill & Mellk
10 Nassau St., PO Box 614
Princeton, NJ 08542

Gregory G. Johnson, Esq.
17 Academy Street, Suite 208
Newark, NJ 07102

Re: Sara Ann Edmondson v. Bd. of Ed. of the City of Bridgeton, Cumberland Co., Donald D'Amico, Superintendent & Victor Gilson, Assistant Superintendent
OAL DKT. NO. EDU 06948-98
AGENCY DKT. NO. 331-7/98
In the Matter of the Tenure Hearing of Sara Edmondson, Bridgeton School District, Cumberland County
OAL DKT. NO. EDU 08394-98
AGENCY DKT. NO. 412-9/98 **CONSOLIDATED**

Dear Counsel:

Enclosed is the Settlement Agreement in the above matter for your signatures. Please return it to me when fully executed.

Yours very truly,

Jeff S. Masin

mjm
c Joanne Restivo, Deputy Clerk

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

SETTLEMENT AGREEMENT

SARA ANN EDMONDSON,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY, DONALD D'AMICO, SUPERINTENDENT AND VICTOR GILSON, ASSISTANT SUPERINTENDENT,
Respondents,

OAL DKT. NO. EDU 06948-98S
AGENCY DKT. NO. 3331-7/98

AND

IN THE MATTER OF THE TENURE HEARING OF SARA EDMONDSON, BRIDGETON SCHOOL DISTRICT, CUMBERLAND COUNTY,

OAL DKT. NO. EDU 08394-98S
AGENCY DKT. NO. 412-9/98
CONSOLIDATED

These matters having come before the Office of Administrative Law, and the parties having determined to resolve the issues in dispute between them and having entered into settlement on the record on January 8, 1999, and Sara Ann Edmondson having agreed to the terms and conditions of the settlement under oath and having acknowledged that she had consulted with counsel Arnold M. Mellk and Gregory G. Johnson, and had sufficient opportunity to consult with them and consider the terms of the settlement, that she understood the terms of the settlement, that she understood that settlement, if approved by the Board and by the Commissioner would resolve the administrative issues in dispute, the matters are settled upon the following terms:

1. Ms. Edmondson will forfeit 120 days pay as a result of the tenure charge brought against her by the Board.
2. The Board of Education will pay Ms. Edmondson for five days for which she was suspended without pay at a total of $594.60 for the first two days thereof and $919.54 for the remaining three days thereof for a total of $1,510.14.
3. Ms. Edmondson will withdraw with prejudice the petition docketed under EDU 06948-98.
4. Neither party has made any admissions of any kind in connection with this settlement.
5. This settlement shall in no way be deemed to affect or be intended to affect a pending superior court action pending in Superior Court, Cumberland County, Dkt. No. L-000835-98.
6. This settlement is entered into by the parties subject to approval by the Board of Education which is expected to review the matter on January 12, 1999. Counsel for the Board shall fax written confirmation of the approval by the Board to counsel and to Judge Masin as soon as possible after the Board's meeting. Further, the settlement is understood to be subject to the Commissioner's *Cardonick* authority to review the terms and conditions of settlements in tenure matters. It is understood that if either the Board or the Commissioner determines to reject the settlement that the entire settlement with respect to both matters will

be deemed void and both matters will be scheduled for hearing on an expeditious basis and shall proceed as if no settlement had ever occurred.

For Sara Ann Edmondson:

DATE

GREGORY G. JOHNSON, ESQ.

Co-counsel for Sara Ann Edmondson:

1/11/99
DATE

ARNOLD M. MELLK, ESQ.
Wills, O'Neill & Mellk

For the Board of Education of the City of Bridgeton, Cumberland County, Donald D'Amico, Superintendent and Victor Gilson, Assistant Superintendent:

1/13/99
DATE

A. PAUL KIENZLE, JR., ESQ.
Casarow, Kienzle & Raczenbek

OAL DKT. NOS. EDU 06948-98S & EDU 08394-98S

be deemed void and both matters will be scheduled for hearing on an expeditious basis and shall proceed as if no settlement had ever occurred.

For Sara Ann Edmondson:

JAN. 13, 1999
DATE

Gregory G. Johnson
GREGORY G. JOHNSON, ESQ.

Co-counsel for Sara Ann Edmondson.

DATE

ARNOLD M. MELLK, ESQ.
Wills, O'Neill & Mellk

For the Board of Education of the City of Bridgeton, Cumberland County, Donald D'Amico, Superintendent and Victor Gilson, Assistant Superintendent:

DATE

A. PAUL KIENZLE, JR., ESQ.
Casarow, Kienzle & Raczenbek

Post-it® Fax Note 7671	Date 1/14/99	# of pages ▶
To Judge Jeff Mason	From Gregory Johnson	
Co./Dept.	Co	
Phone #	Phone #	
Fax # 609-588-3730	Fax #	

OAL DKT. NOS. EDU 6948-98 and EDU 8394-98
AGENCY DKT. NOS. 331-7/98 and 412-9/98 (CONSOLIDATED)

SARA ANN EDMONDSON,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY, DONALD D'AMICO, SUPERINTENDENT AND VICTOR GILSON, ASSISTANT SUPERINTENDENT,	:	
RESPONDENTS.	:	
	:	COMMISSIONER OF EDUCATION
IN THE MATTER OF THE TENURE	:	DECISION
HEARING OF SARA ANN EDMONDSON,	:	
SCHOOL DISTRICT OF THE CITY OF	:	
BRIDGETON, CUMBERLAND COUNTY.	:	

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

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd

State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement.* A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

January 21, 1999
Date of Mailing, January 22, 1999

19-99

SARA ANN EDMONDSON,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY, DONALD D'AMICO, SUPERINTENDENT AND VICTOR GILSON, ASSISTANT SUPERINTENDENT,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

IN THE MATTER OF THE TENURE HEARING OF SARA ANN EDMONDSON, SCHOOL DISTRICT OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY.

January 21, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

SARA ANN EDMONDSON,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY, DONALD D'AMICO, SUPERINTENDENT AND VICTOR GILSON, ASSISTANT SUPERINTENDENT,

Respondents,

OAL DKT. NO. EDU 06948-98S

AGENCY DKT. NO. 3331-7/98

AND

IN THE MATTER OF THE TENURE HEARING OF SARA EDMONDSON, BRIDGETON SCHOOL DISTRICT, CUMBERLAND COUNTY,

OAL DKT. NO. EDU 08394-98S

AGENCY DKT. NO. 412-9/98

CONSOLIDATED

Gregory G. Johnson, Esq., and **Arnold M. Mellk**, Esq, for petitioner Sara Edmondson (Wills, O'Neill & Mellk, attorneys)

A. Paul Kienzle, Jr., Esq., for respondents Board of Education of the City of Bridgeton, Cumberland County, Donald D'Amico, Superintendent and Victor Gilson, Assistant Superintendent

Record Closed: January 14, 1999

Decided: January 15, 1999

BEFORE **JEFF S. MASIN**, ALJ:

These matters were brought for hearing before this judge on January 8, 1999. Prior to hearing counsel entered into an agreement to settle the matters in dispute. The terms and conditions of the settlement as set forth in the attached settlement agreement, which has been signed by counsel for the Board and for the two counsel representing Ms. Edmondson in each of the consolidated cases. The Board of Education has formally approved the settlement.

This matter involves an inappropriate remark made by a teacher to students. The remark involved the use of an inappropriate racial designation made by a teacher of and to students of the same racial group to whom the inappropriate term is unfortunately applied. The incident appears to be a single inappropriate comment made by a teacher of long-standing service. In its initial response to this incident, the Board of Education imposed a suspension without pay which the Board concedes is not supportable under the Tenure Act. The settlement provides for the teacher to receive pay for the five days of suspension for which she was not paid and to be suspended for a period of 120 days. No admissions of any sort have been made by any of the parties.

After lengthy consultations with counsel and a consideration of the circumstances and the concerns of all parties, I find that the settlement, which was placed on the record and which is incorporated herein, serves as a reasonable resolution of the issues in dispute and adequately addresses the interests of the Commissioner of the Department of Education ("Commissioner"). It appears to be in the best interests of everyone that this matter be resolved without the necessity of a hearing.

The settlement preserves an existing Superior Court action which is an outgrowth of the suspension without pay and which the parties have agreed will not be affected by the terms of this settlement.

After being placed under oath, Ms. Edmondson stated that she fully understood and consented to all of the terms and conditions of this settlement.

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

1. The parties have voluntarily agreed to the settlement on the record.
2. The settlement fully disposes of all issues in controversy in this administrative forum and is consistent with the law.

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

Based upon the above, I recommend that the Commissioner approve this settlement. It is further requested by all parties that the Commissioner expedite review of this settlement.

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

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

January 15, 1999
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

Jan. 15, 1999
DATE

D.M. Cantanucci/fc
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 15 1999
DATE

Barbara A Kennel
OFFICE OF ADMINISTRATIVE LAW

mjm
Attachment

881 P03 JAN 15 '99 15:24

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
PO Box 049
Trenton, New Jersey 08625-0049
(609) 588-6582

JEFF S. MASIN
DEPUTY DIRECTOR
ADMINISTRATIVE LAW JUDGE

Fax. No. (609) 588-3730

January 11, 1999

BY FACSIMILE TRANSMISSION AND REGULAR MAIL

A. Paul Kienzle, Jr., Esq.
Casarow, Kienzle & Raczenbek
32 North Pearl St., PO Box 337
Bridgeton, NJ 08302

Gregory G. Johnson, Esq.
17 Academy Street, Suite 208
Newark, NJ 07102

Arnold M. Mellk, Esq.
Wills, O'Neill & Mellk
10 Nassau St., PO Box 614
Princeton, NJ 08542

Re: Sara Ann Edmondson v. Bd. of Ed. of the City of Bridgeton, Cumberland Co., Donald D'Amico, Superintendent & Victor Gilson, Assistant Superintendent
OAL DKT. NO. EDU 06948-98
AGENCY DKT. NO. 331-7/98
In the Matter of the Tenure Hearing of Sara Edmondson, Bridgeton School District, Cumberland County
OAL DKT. NO. EDU 08394-98
AGENCY DKT. NO. 412-9/98 **CONSOLIDATED**

Dear Counsel:

Enclosed is the Settlement Agreement in the above matter for your signatures. Please return it to me when fully executed.

Yours very truly,

Jeff S. Masin

mjm
c Joanne Restivo, Deputy Clerk

4a

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

SETTLEMENT AGREEMENT

SARA ANN EDMONDSON,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY, DONALD D'AMICO, SUPERINTENDENT AND VICTOR GILSON, ASSISTANT SUPERINTENDENT,
Respondents,

OAL DKT. NO. EDU 06948-98S
AGENCY DKT. NO. 3331-7/98

AND

IN THE MATTER OF THE TENURE HEARING OF SARA EDMONDSON, BRIDGETON SCHOOL DISTRICT, CUMBERLAND COUNTY,

OAL DKT. NO. EDU 08394-98S
AGENCY DKT. NO. 412-9/98
CONSOLIDATED

These matters having come before the Office of Administrative Law, and the parties having determined to resolve the issues in dispute between them and having entered into settlement on the record on January 8, 1999, and Sara Ann Edmondson having agreed to the terms and conditions of the settlement under oath and having acknowledged that she had consulted with counsel Arnold M. Mellk and Gregory G. Johnson, and had sufficient opportunity to consult with them and consider the terms of the settlement, that she understood the terms of the settlement, that she understood that settlement, if approved by the Board and by the Commissioner would resolve the administrative issues in dispute, the matters are settled upon the following terms:

1. Ms. Edmondson will forfeit 120 days pay as a result of the tenure charge brought against her by the Board.
2. The Board of Education will pay Ms. Edmondson for five days for which she was suspended without pay at a total of $594.60 for the first two days thereof and $919.54 for the remaining three days thereof for a total of $1,510.14.
3. Ms. Edmondson will withdraw with prejudice the petition docketed under EDU 06948-98.
4. Neither party has made any admissions of any kind in connection with this settlement.
5. This settlement shall in no way be deemed to affect or be intended to affect a pending superior court action pending in Superior Court, Cumberland County, Dkt. No. L-000835-98.
6. This settlement is entered into by the parties subject to approval by the Board of Education which is expected to review the matter on January 12, 1999. Counsel for the Board shall fax written confirmation of the approval by the Board to counsel and to Judge Masin as soon as possible after the Board's meeting. Further, the settlement is understood to be subject to the Commissioner's *Cardonick* authority to review the terms and conditions of settlements in tenure matters. It is understood that if either the Board or the Commissioner determines to reject the settlement that the entire settlement with respect to both matters will

be deemed void and both matters will be scheduled for hearing on an expeditious basis and shall proceed as if no settlement had ever occurred.

For Sara Ann Edmondson:

DATE

GREGORY G. JOHNSON, ESQ.

Co-counsel for Sara Ann Edmondson:

1/11/99
DATE

ARNOLD M. MELLK, ESQ.
Wills, O'Neill & Mellk

For the Board of Education of the City of Bridgeton, Cumberland County, Donald D'Amico, Superintendent and Victor Gilson, Assistant Superintendent:

1/13/99
DATE

A. PAUL KIENZLE, JR., ESQ.
Casarow, Kienzle & Raczenbek

be deemed void and both matters will be scheduled for hearing on an expeditious basis and shall proceed as if no settlement had ever occurred.

For Sara Ann Edmondson:

JAN. 13, 1999
DATE

Gregory G. Johnson
GREGORY G. JOHNSON, ESQ.

Co-counsel for Sara Ann Edmondson:

DATE

ARNOLD M. MELLK, ESQ.
Wills, O'Neill & Mellk

For the Board of Education of the City of Bridgeton, Cumberland County, Donald D'Amico, Superintendent and Victor Gilson, Assistant Superintendent:

DATE

A. PAUL KIENZLE, JR., ESQ.
Casarow, Kienzle & Raczenbek

Post-it® Fax Note 7671	Date 1/14/99	# of pages ▶
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OAL DKT. NOS. EDU 6948-98 and EDU 8394-98
AGENCY DKT. NOS. 331-7/98 and 412-9/98 (CONSOLIDATED)

SARA ANN EDMONDSON,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY, DONALD D'AMICO, SUPERINTENDENT AND VICTOR GILSON, ASSISTANT SUPERINTENDENT,	:	
RESPONDENTS.	:	
	:	COMMISSIONER OF EDUCATION
IN THE MATTER OF THE TENURE HEARING OF SARA ANN EDMONDSON, SCHOOL DISTRICT OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY.	:	DECISION

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

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd

State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement.* A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

January 21, 1999
Date of Mailing, January 22, 1999

21-99

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON AND THE PATERSON EASTSIDE HIGH SCHOOL, PASSAIC COUNTY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning District sought reversal of the NJSIAA Executive Committee's decision affirming the decision of the Controversies Committee placing the Paterson Eastside High School basketball team on probation for two years and suspending the team from participation in the 1999 NJSIAA Basketball Tournament due to unsportsmanlike conduct at a March 5, 1998 Group IV semi-final NJSIAA championship game against Teaneck High School. Petitioner sought punishment of only the individual players, not the whole team.

Having reviewed the record, including transcripts from the Controversies Committee and the Executive Committee and the videotape of the incident, the Commissioner affirmed the determination of NJSIAA. Commissioner determined that the Sportsmanship Rule does not prevent NJSIAA from levying a penalty against a team, even in circumstances where individual perpetrators are able to be identified and are punished. Commissioner concurred with NJSIAA's decision to punish individual players who participated in and/or instigated the melee **and**, given the magnitude of the unsportsmanlike behavior by the Eastside team members, he also concurred with NJSIAA's conclusion that the Eastside team itself should be held accountable for the flagrantly unsportsmanlike actions of a number of players on the team. Commissioner determined that such conclusion was supported in the record and, therefore, the penalties levied in the instant matter were not deemed to be a violation of NJSIAA's rules, nor were they deemed to be patently arbitrary, capricious, or unreasonable or a violation of petitioners' due process rights.

January 29, 1999

AGENCY DKT. NO. 548-12/98

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON AND THE PATERSON EASTSIDE HIGH SCHOOL, PASSAIC COUNTY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

For Petitioners: Nathaniel M. Davis, Esq. (State-Operated School District of Paterson)

For Respondent: Steven P. Goodell, Esq. (Herbert, Van Ness, Cayci & Goodell)

PROCEDURAL HISTORY

This matter has come before the Commissioner of Education by way of a Petition of Appeal and Brief in Support thereof filed on December 11, 1998 by the State-operated School District of Paterson and Paterson Eastside High School (petitioners) seeking a reversal of the decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) Executive Committee dated September 17, 1998, which affirmed the determination of the Controversies Committee dated June 29, 1998, to place the Paterson Eastside High School (Eastside) basketball team on probation for two years and suspending the team from participation in the 1999 NJSIAA Basketball Tournament due to unsportsmanlike conduct at a March 5, 1998 Group IV semi-final basketball championship game against Teaneck High School. Petitioners seek reversal of NJSIAA's decision as being a violation of their due process rights because the decision was a violation of NJSIAA's own rules on sportsmanship (Article IX) and was arbitrary and capricious.

On January 5, 1999, respondent NJSIAA filed its answer to the Petition of Appeal. By letter dated January 11, 1999, the Director of the Bureau of Controversies and Disputes directed NJSIAA to submit by January 19, 1999 its brief and any pertinent information

contained in the record of the matter which had not already been submitted by petitioners.[1] On January 22, 1999, petitioners requested that they be provided an opportunity to submit a letter brief in reply to NJSIAA's brief. With the submission of the petitioners' reply letter brief on January 27, 1999, the record in this matter was closed.

The Findings of Fact determined by the Controversies Committee in its June 29, 1998 decision are as follows:

1. On March 5, 1998, Teaneck High School hosted a Group IV semi-final NJSIAA championship contest with Paterson Eastside High School.

2. There were approximately 400 to 450 people in the Teaneck gym and there was substantial security provided by both schools. The contest was played without any [untoward] incidents and the conduct of the coaches throughout the contest was totally appropriate.

3. With Teaneck winning by a score of 90 to 64, that school took possession of the basketball after [an] Eastside basket with approximately 15 seconds to play. The ball was brought to the Eastside court, at which time Teaneck player No. 20 was fouled.

4. When Teaneck player No. 20 was surrounded by Eastside players No. 14 and 40, he had some difficulty in getting back to his feet. Some shoving broke out between the players at that point.

5. [A.T.] (Teaneck player No. 42), a JV sophomore player who had been inserted in the last quarter of the game, attempted to prevent Eastside player No. 40 from joining the conflict which was occurring in the vicinity of the fouled player. He approached Eastside player No. 40, with his hands at his side, stating that his Eastside opponent should "calm down" and that "we don't need a fight."

6. Eastside player No. 40 at first backed away from the approaching [A.T], and then threw a punch at the Teaneck player, which was blocked by him.

7. Immediately after Eastside player No. 40 threw a punch at Mr. [T.], another Eastside player, No. 12, ran toward the Teaneck player and struck him with his fist on his jaw.

8. As a result of the blow received from Eastside player No. 12, Mr. [T.] was knocked unconscious and suffered a broken jaw.

9. In the midst of this melee, the game officials terminated the contest.

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[1] On January 13, 1999, a review of petitioners' submissions indicated that the videotape of the March 5, 1998 incident which had been reviewed by the NJSIAA Committees had not been submitted nor had the June 29, 1998 Controversies Committee Report. NJSIAA was contacted by the Bureau of Controversies and Disputes to request that these documents be submitted with the brief due on January 19, 1999.

10. It is undisputed that several Eastside players who were on the bench came onto the court and joined their battling teammates.

11. Both schools took disciplinary action against various members of their team. Eastside suspended from class, five players who had entered the floor or who had been engaged in fighting. In addition, two of the Eastside players who participated in spring sports were suspended from three contests.

12. Eastside also apologized for the events of March 5 and conducted special meetings with the team to emphasize good sportsmanship. (Controversies Committee Decision at pp. 3-4)

Based on the above Findings of Fact, the Controversies Committee reached the following conclusions:

1. The NJSIAA has taken a strong stand against violence, particularly as it involved NJSIAA championship contests. If a participating team, or the fans of that team engage in violence, at a minimum the team will not be allowed to participate in the subsequent year's championship contests in that sport. That penalty is most appropriate in this case since the team itself was engaged in unprovoked and dangerous conduct which resulted in the serious injury to the Teaneck player.

2. The Committee commends Teaneck for the extraordinary efforts and success in crowd control which effectively curtailed fighting between the two teams.

3. The coaching staff and administration of Paterson Eastside High School were not responsible for any of the improper conduct of the basketball team.

4. The Paterson Eastside boys basketball team is placed on probation for a period of two years, during which time game reports are to be submitted to the NJSIAA. The team shall be excluded from participation in the 1999 NJSIAA basketball tournament.

5. The two underclassmen on the Paterson Eastside team, who were previously suspended for improper conduct, shall be reported to the NJSIAA, and shall be ineligible for the first two regular season contests in the 1998-99 season. (*Id.* at p. 4)

PETITIONERS' POSITION

Initially, petitioners assert that NJSIAA violated their due process rights by failing to implement properly the Rules and Guidelines of the *NJSIAA Handbook*, asserting that NJSIAA contradicted Article IX of the Bylaws when it meted out to the Paterson Eastside basketball team the severe penalty of two years probation and suspension from participation in

the 1999 championship tournament. In support of this it points to the wording of the Sportsmanship rules which states:

> It shall be the responsibility of each member school to insure that all individuals employed by or directly associated with the athletic program, including its Student-Athletes, comport themselves in a sportsmanlike manner when representing their school, especially at interscholastic events.
>
> Unsportsmanlike conduct shall subject the individual to disciplinary action. The member school with which the individual is associated may also be subject to disciplinary action if it is found that the member school's policies, actions, or failure to act, substantially contributed to the individual's conduct. (NJSIAA Constitution, Bylaws, *NJSIAA Handbook*, at p. 52)

With respect to this, petitioners aver, *inter alia,* that the two underclassmen involved in the incident were found to be ineligible for the two regular season contests for the 1998-99 school year. Moreover, they point to the fact that the Controversies Committee also found that the coaching staff and administration of Paterson Eastside were not responsible for any improper conduct of the basketball team and were, in fact, actually praised by NJSIAA for their actions. Petitioners, therefore, contend that it is apparent from the findings that the member school did not do anything that may have contributed to the individual's action which caused the incident and, in actuality, the offenders of the unsportsmanlike conduct were readily identifiable individuals who were singled out by NJSIAA for punishment.

Petitioners also point out that Dr. Westlake, Chairperson of the Controversies Committee, stated at the Executive Committee hearing that both teams were able to control the amount of people coming onto the court (Executive Committee Transcript at pp. 26–27) and yet Dr. Westlake concluded that Eastside's punishment was justified as he stated

> ***Our concern, however, is in cases such as Perth Amboy and Camden, where we had similar situations, that the punishment that we have given to Eastside is uniform, and we feel is justified in this case, especially since the NJSIAA has such a strong stance on violence, and that's the reason we have extended the penalty to Paterson Eastside, and not to Teaneck because we saw that this was initiated from the Eastside bench, and that the punishment we meted out to Eastside is justified. (Executive Committee Transcript at p. 27)

As to this, petitioners argue that the factual circumstances of this matter and those of Perth Amboy High School and Camden High School vary greatly. Petitioners contend that in

the Perth Amboy matter, NJSIAA found that members of that basketball team deliberately instigated the fighting and lead the attack on innocent Shawnee High School students and fans and its coach should not have left the bench, thereby allowing his own team to do so, which resulted in an extended period of fighting and chaos. They maintain that in the instant matter it was a Teaneck player that instigated the incident, not Eastside. They further argue that Eastside's basketball program cannot be compared to Camden High School's because Eastside High School has never been in trouble with NJSIAA prior to this incident, while Camden High School has a lengthy history of serious infractions. They state

> In 1991, the Camden High School Basketball program was placed on a two-year probation following a riot after a Camden-Trenton basketball game in the State Tournament. This incident is distinguishable from the present incident because there was no identifiable individual(s) with whom to find fault. In the present matter, however, the NJSIAA identified the individuals that caused the disturbance in the game.***
>
> In 1997, Camden was found to be responsible for a disturbance which erupted after a basketball game in Atlantic City High School due to poor crowd control. In the present matter, Paterson did not have a problem with controlling its fans.***
>
> In February 1991, the coach of the Camden High School basketball team refused to complete a game thereby violating the NJSIAA sportsmanship rule. In the present matter, the officials terminated the game and found Paterson Eastside coaches acted in a sportsmanlike manner.***
>
> In March 1998, the Camden High School basketball team fans were unruly, belligerent and out of control. The basketball coach sent three unsupervised players to the locker room before the game ended. The Camden High School basketball team climbed into the stands after making obscene gestures to the crowd. In the present matter, the Eastside fans were in control and the team was supervised closely.*** (Petitioners' Brief at p. 10)

Petitioners further contend that the actions NJSIAA took against Eastside were reached in an arbitrary and capricious manner, averring, *inter alia*, that the facts and findings of the case do not comport with the sportsmanship rules that NJSIAA so diligently attempted to uphold and protect and NJSIAA went beyond the formulated and stated rules in order to make an example out of the Paterson Public School District. Petitioners urge that NJSIAA cannot bend and twist rules so as to find guilt and fault in every interscholastic athletic incident. (Petitioners' Brief at p. 13) Petitioners acknowledge that NJSIAA has a compelling interest to prevent

violence on the playing field but urge that NJSIAA also has a compelling interest to make sure that all schools are treated fairly and justly under the rules which it promulgates. Petitioners also maintain

> The NJSIAA states that its decision is to be an example to other member schools. However, such punishments fail to serve their expected purpose. Although all member schools teach good sportsmanship and proper field conduct, there will be instances when individual team members will engage in activities which the member schools do not condone or cannot control. In most cases involving interscholastic athletics at the high school, the majority of the athletes are very passionate about their involvement in their particular sport. In such passion, the emotions of players run very high sometimes resulting in great moments for the athlete or detrimental actions. In the present matter the results were detrimental for both the player injured and the players causing the injury. However, the member school, who has abided by all of the rules and regulations of NJSIAA and has taught its players good sportsmanship, cannot always control the passionate actions of individual team members.***
>
> Secondly, the identifiable individual or individuals which NJSIAA stated caused the injury are no longer students in the school district. The identified students graduated from Paterson Eastside High School. The two students who were suspended for one game were suspended for leaving the bench but did not cause any injuries. The punishment for those individual students leaving the bench is justified and is not being appealed. It is the unfair action of the NJSIAA of suspending an entire team for actions for those who are no longer in school which are fundamentally unfair. (*Id.* at p. 14)

RESPONDENT'S POSITION

NJSIAA avers, *inter alia,* that although the videotape presented at the Controversies Committee hearing shows the entire event, it does not clearly show all the actors and points to the testimony of Eastside's Assistant Athletic Director, Elbert Harris, that it was impossible to determine definitively who threw the punch that broke A.T.'s jaw. Mr. Harris[2] states

> ***I want the committee to look at every particular individual who landed a punch, where it lands, where it goes, what happens because you just cannot -- it is my contention it is impossible to

[2] At this point in the transcript of the May 12, 1998 Controversies Committee hearing, Mr. Harris is incorrectly identified as Mr. Harrison.

> tell what blow broke this kid's jaw. It's impossible. If you would follow each and every blow, you will find -- you will see where the origin is and where the conclusion of the punch is.
>
> ***So, it's impossible to definitively say who broke this kid's jaw. (Controversies Committee Transcript at pp. 252-253)

In response to petitioners' allegations that they were denied due process, NJSIAA contends that its bylaws provide a two-step process for determining facts and penalties. On May 12, 1998, via notice from NJSIAA, the Controversies Committee, comprised of nine educators from around the state, held a hearing to review the events of the March 5, 1998 Group IV semi-final game between Teaneck and Eastside. The hearing was transcribed by a certified shorthand reporter, the transcript of which has 74 pages of testimony. All documents submitted by the parties were reviewed by the Committee, including a videotape of the incident. Sworn testimony was heard from ten witnesses and counsel for both schools were permitted to examine and cross-examine witnesses and give closing statements. The Controversies Committee issued a formal decision with findings of fact and conclusions on June 29, 1998. Pursuant to NJSIAA's Bylaws (Article XIII, Section 5, *NJSIAA Handbook*, 1998-99), that decision was able to be appealed to NJSIAA's Executive Committee, the Association's governing body. Petitioners invoked this provision and the 34-member Executive Committee heard oral argument from Eastside's counsel and from Dr. Eugene Westlake, Chairperson of the Controversies Committee. The Executive Committee voted 29-5 to deny the appeal. Of this, NJSIAA states "[t]here can be no question but that the NJSIAA provided Eastside with the fullest due process. Eastside had every opportunity to present its case to educators who were knowledgeable in the area." (NJSIAA's Brief at p. 9)

NJSIAA further contends that the Eastside student-athletes have no constitutional right to participate in the State Championship Tournament, citing in support thereof *Burnside v. NJSIAA,* unpublished decision of the Appellate Division dated November 15, 1984 (Docket No. A-625-84T7), *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 188, *Palmer by Palmer v. Merluzzi,* 689 *F. Supp.* 400, 408-409 (*D.N.J.* 1988), aff'd 868 *F.* 2d 90, 96 (3d Cir. 1978), *Camden City Bd. of Ed. v. NJSIAA*, unpublished decision of the Appellate Division dated February 18, 1992 (Docket No. A-2802-91T2), *Van Velson v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 264.

NJSIAA next argues that it has the authority to exclude Eastside's basketball team from the 1999 State Tournament, contending that the Constitution, Bylaws, Rules and

Regulations give the Association the broad power to penalize inappropriate conduct (Article X of the Bylaws, *NJSIAA Handbook* at pages 53-54). The Controversies Committee, after conducting a hearing and subject to appeal to the Executive Committee, may impose one or more of a number of penalties, which may include probation, forfeiture of games and championship rights, suspension of players and fines. Of this, NJSIAA states

> ***These penalties serve the same three purposes that all penalty provisions serve. By publishing penalties in advance they discourage inappropriate conduct and **deterrence**. By requiring reports and monitoring of the offender, they offer **rehabilitation**. And by allowing strong penalties for bad conduct, they impose **punishment**. (emphasis in text) (NJSIAA's Brief at p. 10)

NJSIAA avers that there is nothing arbitrary or capricious about keeping a team out of a championship tournament due to the actions of selected team members. It maintains, *inter alia,* that in this case, it is particularly appropriate that the team be punished because it was the acts of team members, as opposed to actions of an administrator, coach or fans, that caused the melee. Moreover, it contends that the Eastside team is responsible for the acts of team members who instigated the fight and caused serious bodily injury to a Teaneck player, averring that

The following facts are undeniable, and all bespeak team involvement and team responsibility for the incident:

- Eastside was the team about to [lose] a championship–caliber game by a lopsided margin.
- Two Eastside players knocked down a Teaneck player.
- An Eastside player threw a wild first punch.
- Another Eastside player threw a punch that knocked a Teaneck player unconscious and broke his jaw.
- The player who committed the assault was not in the game at the time, but left the bench to enter the fight.
- Other Eastside players left the bench to join the fight.
- It was impossible to identify all the Eastside team players involved, and even the player who committed the assault could not be definitively identified. (NJSIAA's Brief at p. 12)

NJSIAA rebuts Eastside's argument that it is fundamentally unfair to suspend the team from championship play for the actions of students who are no longer in school, urging that it cannot be said that punishing a team for the acts of another individual violates due process. It cites a variety of judicial decisions in support of this factor and quotes the following passage from the Appellate Division decision in *Camden City Bd. of Ed., supra,* which states

> We conclude that due process was afforded at every stage, and that the sanction imposed was reasonably designed to serve a legitimate state interest. **Unfortunately, the sanction also falls upon players who were personally innocent of any wrongdoing last March. But this is not a ground for vacating the otherwise valid order of the Commissioner.** We cannot say that the Commissioner's action was disproportionate to the threat of harm. (Slip Op. at p. 6) (emphasis in text) (NJSIAA's Brief at p. 13)

NJSIAA flatly rejects petitioners' argument that it has played fast and loose with the rules, averring that petitioners would have the Commissioner conclude that because no administrator, coach or fan contributed to the incident, the Eastside team cannot be held responsible. It reiterates that "[c]ertainly a team can be held responsible for acts of members of the team, and, as noted above, this incident was the result of team action in a team sport." (*Id.* at p. 14) NJSIAA also argues that petitioners have misread the Sportsmanship Rule, maintaining that the rule says that the individual shall be punished for unsportsmanlike conduct, and the school may be punished. As to this, NJSIAA emphasizes that (1) the rule does **not** say that if the school's policies or actions did not contribute to the unsportsmanlike conduct, then **only** the individual can be punished and (2) the penalty provision of Article X allows a team to be excluded from the championships, subject only to a hearing before the Controversies Committee with right of appeal to the Executive Committee, and subject to the constraints of substantive due process, all conditions which were followed in the instant matter.

It is NJSIAA's contention that the penalty levied in this matter was balanced and in proportion to the seriousness of the incident in that Eastside and its players are still permitted to play a full schedule of conference and nonconference games and the players are still eligible for individual awards and recognition. It also avows, *inter alia,*

> Unfortunately, violence is often not far from the surface at sports contests. Sports is by its nature competitive, emotional, and often rewards aggression. That is all the more reason that authorities that regulate sports must be vigilant to catch and contain violence when it erupts. It is incumbent upon the NJSIAA to spread the message that violence is unacceptable, no matter who started a

> particular incident, and that violence has consequences that extend far beyond the individual participants. The Commissioner recognized this when he wrote that "[no]thing less than swift, certain action must be taken by the Association to deter any notion that aggression at sporting events will be tolerated. [*Camden, supra,* at p. 191] (NJSIAA's Brief at pp. 15–16)

PETITIONERS' REPLY

Petitioners' reply brief objects to the statement on page two of NJSIAA's brief which references Teaneck's Athletic Director's testimony (Controversies Committee Transcript at pp. 222-223) that according to the Teaneck player, someone had stepped on his hand while he was on the floor and he pushed that person in order to get up. They object to the statement because the Teaneck player did not testify and, therefore, the statement is hearsay. Petitioners also object to the statements on page two relative to A.T.'s testimony, averring, *inter alia*, that A.T. has a vested interest in this matter, given that he and his parents have filed tort claims against the Paterson school district and individuals involved in the March 5, 1998 incident. They further except to the NJSIAA's description of A.T.'s actions, arguing that he approached the Eastside player with raised hands across most of the court while the Eastside player tried to retreat. Petitioners characterize A.T.'s action in doing this as provocation for the Eastside player's actions, maintaining that it is evident from the Eastside player's retreat and his missed punch that he was trying to ward off A.T. They also point out that it was security and personnel from both Teaneck and Paterson that restored order to the game, not just Teaneck's.

Petitioners go on to object to NJSIAA references to violent incidents in other basketball games found on page 11 of NJSIAA brief (lines 1-7) which had nothing to do with the incident in this matter, stating, *inter alia*, that

> ***The mere mention of these facts seems to suggest that NJSIAA is promoting the idea of arbitrary and capricious decision making in order to control the violent atmosphere at sporting events in urban areas. This statement alone presents the prejudice and bias of the NJSIAA against urban schools which leads to arbitrary and capricious decisions. There are incidents of violence throughout all schools in the state of New Jersey whether urban, suburban, or rural. However, it is apparent that the only schools that seem to be addressed are the urban school districts.***
>
> The NJSIAA would attempt to blind all involved with the incident that occurred by harping on the violence of the incident, the violence in other school districts, and its attempts to control such violence. However, the NJSIAA is also committing violence in this

> matter. It is violence against basic fairness and justice. It is violence against its own rules. Rules which the NJSIAA carefully thought out and crafted. The NJSIAA would now like to commit violence upon those rules by offering a separate meaning than what the plain text states.
>
> The NJSIAA has a history of being a stickler for the rules and being unyielding in its decisions in regard to those rules. The NJSIAA has a long history of suspending athletes and coaches for a misinterpretation of the NJSIAA rules. The NJSIAA always seems to state that the rule is the rule as stated in the handbook. Now, in this incident it seems that a rule is not actually the rule. The rule seems to mean something other than what the plain text conveys. The NJSIAA seems to be nothing more than an all too powerful organization that will do anything to control its membership. (Petitioners' Reply Brief at pp. 2-3)

NJSIAA vehemently objects to what they consider to be petitioners' extraordinary attack against the Association, avowing that it had no vested interest in finding for or against either Paterson or Teaneck at the hearing, its only interest being to make a determination based on the evidence. NJSIAA also vehemently denies that it demonstrated prejudice and bias against urban schools which leads to arbitrary and capricious decisions, pointing out that by way of a letter dated October 6, 1998, it provided Paterson's counsel with a list of contested cases involving schools that had been kept out of the playoffs since 1984 (Paterson Exhibit 29), a list which includes rural, suburban and urban schools alike. Moreover, NJSIAA emphasizes, *inter alia*, that Paterson ignores the fact that during the 1980's the Association expended over $100,000 fighting in the courts for the right of urban schools to compete against suburban schools in integrated conferences. NJSIAA states "[t]to imply that NJSIAA has targeted urban schools under these circumstances is simply reckless." (NJSIAA letter dated January 27, 1999)

COMMISSIONER'S DETERMINATION

The NJSIAA is a voluntary association. The Commissioner's scope of review in NJSIAA determinations is an appellate one. *N.J.S.A.* 18A:11-3, *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 188. That is, the Commissioner may not overturn an action by NJSIAA in applying its rules absent a finding that NJSIAA applied the rules in a patently arbitrary, capricious or unreasonable manner. *B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987) Nor may the Commissioner substitute his judgment for that of NJSIAA, even if he were to decide differently in a *de nova*

hearing, where due process has been provided and where there is adequate basis for the decision reached by the NJSIAA Committees. *Dam Jin Koh and Hong Jun Kim v. NJSIAA* 1987 *S.L.D.* 259. Further, the burden of proof rests with the person challenging the decision. *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 297 (App. Div. 1960). Moreover, it is well-settled that participation in interscholastic sports is a privilege, rather than a right. *Burnside, supra; Palmer by Palmer, supra; Camden City Bd. of Ed., supra.*

Initially, the Commissioner will deal with those portions of petitioners' reply brief which he, too, regrettably finds to be an extraordinary attack on NJSIAA. To accuse NJSIAA of prejudice and bias against urban districts because in section four of its brief it refers to violent incidents that had nothing to do with the instant matter is, in the Commissioner's judgment, unfounded. Clearly, the specified passage from NJSIAA's brief is intended to do no more than provide examples of violence in the milieu of sporting events which have occurred recently and were highly publicized.[3] Furthermore, Petitioners' brief submitted on January 5, 1999 clearly raises the Camden matter referenced at page 11 of NJSIAA's brief, as well as the 1992 Camden case. As pointed out by NJSIAA in its October 6, 1998 letter (Petitioners' Exhibit 29), the Association provided to petitioners' counsel a series of matters which resulted in the suspension of teams from State championships, a series of cases which includes schools with a wide array of demographic characteristics. Further, having undertaken a painstaking review of the record in this matter, including a thorough scrutiny of the videotape of the incident, the Commissioner finds no basis whatsoever to support petitioners' allegations that NJSIAA has shown prejudice or bias against urban schools. Having so determined, the Commissioner will now turn to the other substantive issues under consideration in this matter.

Integral to this matter is a determination as to whether or not NJSIAA violated its own rules and regulations when it levied punishments against not just individual players, who were involved in the March 5, 1998 incident at the Group IV semi-final championship basketball game between Eastside and Teaneck, but also the Eastside team when NJSIAA put it on probation for two years and prohibited it from playing in the 1998-99 championship season. The text of the Sportsmanship Rule pertinent to the instant matter reads as follows:

[3] The disputed passage in NJSIAA's brief also references a recent incident at the girls basketball game between Newark's West Side High School and Wayne Valley High School involving the shooting of two youths outside of the West Side High School.

Section 3. Association Responsibility:

> The Association recognizes and appreciates that the influence and responsibility of the school administration with regard to good sportsmanship extends to all levels of competition. However, it must also be seen that the NJSIAA has been vested with the responsibility to ensure that all contests under its jurisdiction are concluded satisfactorily. In exercising its responsibility as it applies to the principles of good sportsmanship, the Association will be guided by the following rule:
>
> SPORTSMANSHIP RULE/POLICY
>
> HIGH STANDARDS OF COURTESY, FAIR PLAY AND SPORTSMANSHIP MUST FEATURE ALL ASSOCIATION COMPETITIONS.
>
> (While this rule is a general statement and one which may be difficult to reduce to objective standards in terms of enforcement, it is the heart of the entire Association program. Good sportsmanship, respect for rules, respect for others, and fair play, are basically the motives through which an interscholastic athletic program is justified and defended.)
>
> It shall be the responsibility of each member school to insure that all individuals employed by or directly associated with the athletic program, including Student-Athletes, comport themselves in a sportsmanlike manner when representing their school, especially at interscholastic events.
>
> Unsportsmanlike conduct shall subject the individual to disciplinary action. The member school with which the individual is associated may also be subject to disciplinary action if it is found that the member school's policies, actions, or failure to act, substantially contributed to the individual's conduct. (*NJSIAA Handbook* at pp. 51-52)

Upon careful and independent review of the record of this matter, including transcripts from the Controversies Committee and the Executive Committee hearings and a the videotape of the March 5, 1998 incident, the Commissioner affirms the determination of NJSIAA to place the Paterson Eastside High School basketball team on probation for two years and to prohibit the team's participation in the 1998-99 championship tournament based upon the findings and conclusions about the culpability of Eastside players involved in the incident reached by the Controversies Committee and Executive Committee after their examination of the evidence. In reaching his determination in this matter, the Commissioner agrees with NJSIAA's argument that the above-cited Sportsmanship Rule does not prevent it from levying a penalty

against a team, even in circumstances where individual perpetrators are able to be identified and are punished. In the instant matter, NJSIAA determined to punish individual Eastside players who participated in and/or instigated the violent melee **and,** given the magnitude of the unsportsmanlike behavior by Eastside team members, NJSIAA also concluded that the team itself should be held accountable for the flagrantly unsportsmanlike actions of a number of players on the team. Such conclusion is supported in the record and, therefore, the penalties levied in the instant matter are not deemed to be a violation of NJSIAA's rules nor are they deemed to be patently arbitrary, capricious, or unreasonable or a violation of petitioners' due process rights. As clearly stated in the above-cited Sportsmanship Article IX, the NJSIAA Rule in dispute herein is a **general statement** which is intended **to be a guide** to NJSIAA in exercising its responsibility relative to good sportsmanship which, as stated in the Constitution and Bylaws of NJSIAA, is the heart of the Association's entire program. That NJSIAA determined in the instant matter to apply the Sportsmanship Rule such that the "member school's actions" may be found to be actions of individual team members, and not just actions by coaches, administrators or fans, is a reasonable decision on NJSIAA's part, one which has the legitimate and rational purpose of promoting not only good sportsmanship at sporting events but also a safe environment free from violence and/or chaotic disruption, no matter how quickly contained or controlled those conditions may have been dealt with.

As quoted above, NJSIAA and its member schools have determined that good sportsmanship, respect for rules, respect for others, and fair play, are basically the motives through which an interscholastic athletic program is justified and defended. A review of the record in this matter demonstrates that these elements of good sportsmanship were flagrantly violated by the Eastside basketball team. The fact that several of the participants in the melee have graduated and that only two of the other student-athletes who were also disciplined remain on the Eastside basketball team is of no moment whatsoever. As NJSIAA correctly indicates, it is well-established in law that teams can be kept from participating in championship games even where players were personally innocent of wrongdoing. *City of Camden, supra.* That the unsportsmanlike actions in the instant matter may be distinguishable from those demonstrated by Perth Amboy High School or Camden High School in a variety of games which resulted in suspension from championship games does not make NJSIAA's determination relative to the Eastside High School incident of March 5, 1998 improper or any less valid. Each circumstance of unsportsmanlike conduct, particularly those involving brawls/melees, and certainly where violence is involved, as unequivocally happened herein, must be judged and swiftly dealt with by

NJSIAA. Vigilant action by NJSIAA is necessary so that member schools know that their Association "will catch and contain violence when it erupts" so as to deter future violence and aggression at sporting events. This is true whether a brawl or a melee, particularly where violence and bodily harm results, is instigated or contributed to by coaches, administrators, fans or team members, individually identifiable or not, and, whether the incident occurs in a rural, suburban or urban setting. As aptly stated by NJSIAA, violence is unacceptable no matter who starts a particular incident and, indeed, NJSIAA is entirely correct when stating that **violence has consequences that extend far beyond individual participants**.

Accordingly, the Commissioner finds no basis on which to overturn NJSIAA's decision and, therefore, affirms its determination in this matter.[4]

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

January 29, 1999
Faxed and Mailed, January 29, 1999

[4] In accordance with *N.J.S.A. 18A:11-3,* this decision, as the Commissioner's final determination in the instant matter, may be appealed to New Jersey Superior Court.

22-99

C #22-99L
SB #16-99

IN THE MATTER OF THE DISSOLUTION :

OF THE LOWER CAMDEN COUNTY : STATE BOARD OF EDUCATION

REGIONAL HIGH SCHOOL DISTRICT : DECISION

NO. 1, CAMDEN COUNTY. :

Decided by the Commissioner of Education, January 27, 1999

Decision on Motion by the State Board of Education, May 5, 1999

Decided by the Commissioner of Education, February 25, 2000

For the Petitioners-Appellants Board of Education of Waterford, Township of Waterford, Board of Education of Chesilhurst and Borough of Chesilhurst, Anat Gordon, Esq.

For the Respondents-Respondents Board of Education of Berlin, Township of Berlin, Board of Education of Clementon, Borough of Clementon, Board of Education of Lindenwold, Borough of Lindenwold, Board of Education of Pine Hill, Borough of Pine Hill, Board of Education of Winslow Township and Township of Winslow, Porzio, Bromberg & Newman (Vito A. Gagliardi, Jr., Esq., of Counsel)

For the Respondent-Respondent Lower Camden County Regional High School District No. 1, Weinberg, McCormick, Chatzinoff & Zoll (Barry Chatzinoff, Esq., of Counsel)

For the reasons expressed by the Administrative Law Judge, the State Board of Education affirms the decision of the Commissioner of Education in this matter.

Ronald K. Butcher and Arnold G. Hyndman abstained.

July 5, 2000

Date of mailing JUL 07 2000

24-99

MIDDLESEX COUNTY EDUCATIONAL SERVICES COMMISSION,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Educational Services Commission sought recalculation by the Office of Compliance of the sum determined to be due to the respondent Department of Education pursuant to audit.

ALJ found that the Commission must refund $49,035.66 because that amount was fraudulently charged to State and Federal sources by a Commission employee and the Commission had no legal basis for retaining any of these funds. ALJ determined that there was no legal precedent that would require the Department to accept a *pro rata* payment and that the controlling statute, *N.J.S.A.* 18A:46A-14, provides that if an expenditure incurred by any district is less than the amount of State aid received, the district shall refund the unexpended State aid after the completion of the school year. Moreover, an educational services commission may not be a profit-making entity.

Commissioner concurred with the findings and conclusions of the ALJ. Commissioner granted summary judgment to respondent and directed petitioner to refund respondent the sum of $49,035.66.

February 5, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

GRANTING MOTION

FOR SUMMARY JUDGMENT

OAL DKT. NO. EDU 6566-98

AGENCY DKT. NO. 188-6/98

MIDDLESEX COUNTY EDUCATIONAL SERVICES COMMISSION,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION,

Respondent.

Anthony B. Vignuolo, Esq., for petitioner, (Borrus, Goldin, Foley, Vignuolo, Hyman, Stahl & Clarkin, attorneys)

Terri A. Cutrera, Deputy Attorney General, for respondent (Peter Verniero, Attorney General of New Jersey, attorney)

Record Closed: November 23, 1998 Decided: December 22, 1998

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

The Middlesex County Educational Services Commission (Commission), petitioner, seeks recalculation by the Office of Compliance, Department of Education (Department), respondent, of a sum determined by audit to be due and returnable to the Department.

The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 through -13. After notice, a prehearing conference was held and it was determined that this matter could proceed on motion and cross motion for summary judgment, all relevant facts being stipulated.

BACKGROUND OF THE CASE

The Department audited the Commission's records and produced a report dated March 13, 1997. The report concluded fraudulent activities had occurred in the period July 1986-December 1995. The amount of money involved was $273,690.96. Of that sum, $150,830.00 could not be traced to a specific funding source. Of the $122,860.00 remainder, $49,035.66 was identified and charged to financial assistance from State and Federal sources. The report directed that this amount be returned to the Department.

The Commission pursued appeals within the Department. The Office of Compliance informed the Commission by letter dated October 23, 1997, that the first level appeal was denied.

In November 1997, the Commission filed a second level appeal. The appeal hearing was conducted before the Office of Compliance in January 1998. On April 8, 1998, the Office of Compliance concluded that the Commission, because it received insurance proceeds and fidelity bond money, exceeded its recovery for losses and costs for audit and legal fees by $49,035.66. The report stated this amount was attributable to State and Federal financial assistance. The Department again directed the Commission to return the sum.

The Commission asserts that the total amount recovered from all available fidelity bonds was $156,515.52. The Commission also received $15,000.00 from an insuror. The maximum recovery under the insurance coverage was limited to $25,000.00 per year. During the nearly ten-year period in which the fraud was perpetrated, losses exceeded the available annual insurance limit. The Commission did not fully collect its loss. The Commission calculated that it collected only fifty-six percent of its losses. In the petition that underlies this case, the Commission seeks

an order directing the Commissioner to recalculate the sum due to the Department on the same pro rata basis.

The Department denies it acted wrongfully in any way, asserts the Commission has not been denied any right, privilege, or immunity secured by State or Federal law and seeks dismissal of the petition. The Department states the Commission suffered no injury attributable to the Department and that all acts the Department took in this case were performed pursuant to laws, statutes and regulations and, therefore, are valid as a matter of law.

The parties essentially agreed that the Commission suffered an embezzlement totaling $273,690.92. The Commission incurred audit fees of $22,000.00 and legal fees of $6,873.00. This yields a total of $302,563.96. The Commission recovered through bond $156,515.52 and recovered through and insuror $15,000.00. Thus, total recovery was $171,515.52 leaving $131,048.44 unrecovered. The amount recovered represents nearly fifty-seven percent of the loss.

Of the $273,690.90 embezzled, the Office of Compliance traced $122,860.96 to payroll. It determined that $47,919.75 of that amount came from State financial aid and $1,115.91 came from Federal financial aid. This totals $49,035.66 and is the amount the Commission was ordered to repay.

The Office of Compliance stated:

> Total fidelity bond and other insurance proceeds received by the Commission exceeded the payments made for audit and legal fees associated with the fraud, other potential liabilities as well as the liability of $49,035.66 attributable to state and federal financial assistance for services not provided. The Commission, therefore, has recorded a positive cash flow that exceeds its liabilities after receiving fidelity bond and insurance payments.

Fox letter to Bartoletti, April 8, 1998 at 2.

THE ARGUMENTS

The Petitioner

The Commission argues that, because it recovered approximately fifty-seven percent of the funds embezzled, the recovery should be limited to that percentage of the amount the Department demands. The Commission concedes it cannot point to an authority that is dispositive. The Commission also asserts that, despite the fact that the total monies recovered exceeds the loss claimed by the Department, it falls short of compensating the Commission for its complete loss.

The parties are both public entities. The Commission asserts it would be both unequitable and unfair to suggest that the State be reimbursed one hundred percent for a loss while the Commission suffers the complete loss of all sums not covered by insurance. If the State recovers $49,035.66, the Commission's losses will be increased by the same amount. This would bring total Commission losses $184,394.00. In the absence of the theft of these monies, there was a clear contractual and statutory mandate to apply the funds received to their dedicated purpose. *N.J.S.A.* 18A:46A-1; *N.J.S.A.* 18A:46-19.1 through -19.9.

The Commission argues that the theft of funds changed the relationship of the parties to one of quasi contract. The resulting status requires a pro rata distribution of the losses to prevent one party from being unjustly enriched. *Weichert Co. Realtors v. Ryan,* 128 N.J. 427 (1992). The Commission has liability insurance and the State could have made a claim for third party protection on those policies. The Department elected not to do so. A third party claim could, potentially, result in a full and complete recovery of the funds lost.

The matter is further complicated by a pending suit brought by the New Jersey Education Association in the Superior Court, Law Division, Middlesex County, for more then $30,000.00. If this action is successful, the Commission's losses would be increased by any amount it has to pay.

The Commission concludes its argument thus:

> The Commission charges itself equitably as a constructive trustee of all monies recovered in this matter. See (authorities cited). However these monies recovered, which impact the monies of third parties, should not be the loss completely of the Commission. The Commission has acted diligently in maintaining insurance and proceeding to collect on the insurance to minimize its loss. It should not be further penalized in this matter by being compelled to return the entirety of the full amount claimed herein by the Department of Education.

This seems to say that the Commission sees itself as a sort of trustee of all monies recovered. What authority there is for this remains a mystery. The Commission further argues that it should not bear the complete loss. Because it maintained insurance and collected on the insurance to the extent possible, thereby minimizing its loss, it should not be further penalized by being compelled to return the complete amount claimed by the Department.

The Respondent

The Department says that the Commission must refund the $49,035.66 because that amount was fraudulently charged to State and Federal sources by a Commission employee and the Commission has no legal basis for retaining any of these funds. There is no legal precedent that would require the Department to accept a pro rata payment. The controlling statute provides that if an expenditure incurred by any district is less then the amount of State aid received, the district shall refund the unexpended State aid after the completion of the school year. Further, if the district requests to use the unexpended aid, and if the request is approved and funds are available from refunds received from school districts from the prior year, payments for the additional aid shall be made immediately from those funds.

School law decisions have clearly held that an educational services commission may not be a profit-making entity. Because the funds embezzled by the Commission's employee were obtained from either State or Federal aid or tuition charges to local school districts, and because the Commission provided no services in exchange for the funds, any insurance proceeds retained by the Commission in excess of its costs would constitute a windfall. The Department requested

only that the $49,035.66 attributable to State and Federal assistance be returned to the State so that it can be used in the manner provided at *N.J.S.A.* 18A:46A-14, summarized above.

Further, this statute was found applicable to an educational services commission in *Middlesex County Educational Services Commission v. State Department of Education*, 94 *N.J.A.R.* 2nd (EDU) 234 (1994). That case involved the return of unexpended funds referred to as Chapters 192-193 funds. The Commission disputed the nature and identity of the funds and also asserted that it was not a school district subject to a legal obligation to return unused funds. The judge concluded that the Commission had presented no argument to justify retention of unused funds. *Id.* at 239. In finding that the Commission was subject to the statutes and was required to refund unexpended monies, the judge reasoned

> The obvious intent of [*N.J.S.A.* 18A:46A-1 and *N.J.S.A.* 18A:46:19.1] is to insure that the identified children receive the needed services. Since funds are limited it is obvious that refunds can play a critical role in achieving the Legislature's objective. The MCESC's position that it can retain unused monies is clearly inconsistent with this legislative intent... .
>
> Although it may be true as argued by the MCESC that a private agency would not be require to refund any unused money, the MCESC is public entity and as such has a "responsibility (that is) owed to the public which places governmental function, relationships and practices at a higher level than those of the market-place." *N.J.E.A. v. Essex County Education Services Commission,* 5 *N.J.A.R.* 29, 63. Also, as a public entity, the MCESC has a unique relationship with the school districts it services. *Id.* at 240

The Department also argues that the Commission does not dispute the amount or nature of the funds in question. The Commission also seems to agree that some money should be returned to the Department. The only issue, then, is whether the Commission may prorate the amount returned in accordance with the amount recovered from its liability insurer. There is no basis in the law for this position. As noted in the April 8, 1998 letter from Thomas King, the Commission received insurance proceeds in excess of the payments it made for audit and legal fees associated with the fraud, other potential liabilities, and the $49,035.66 attributable to State

and Federal financial assistance for services not provided. The Commission has recorded a positive cash flow in this case.

Based on the foregoing, the Commission should be ordered to refund the entire amount of $49,035.66 to the Department as determined by audit and the Office of Compliance decision date April 8, 1998.

DETERMINATION AND ORDER

The Commission's idea of sharing the losses sustained as the result of an embezzlement lacks any support in law. Similarly the notion of quasi contract misses the mark. There is a statutory, not contractual, relationship between the parties. The Commission is a political subdivision of the State. It is created by statue to perform a State function and its powers are derived from the Legislature. It can perform only those acts for which express or implied authority exists in law or in the rules and regulations of the State Board of Education.

In the absence of any authority for the quasi contract concept or the trustee concept, I cannot adopt either. The State has no duty that I can determine to substitute itself for the Commission with reference to a claim for losses by embezzlement. There is no real or implied subrogation involved.

In consideration of the facts and the legal the arguments, I **FIND** and **CONCLUDE** that the motion for summary judgment brought by the Department of Education must be **GRANTED** under these circumstances. Having considered and rejected the petitioner's theories, what remains are the controlling statutes, *N.J.S.A.* 18A46A-1 through -17 and *N.J.S.A.* 18A:46-1 through -46. The statues being unambiguous, I **CONCLUDE** that the Middlesex County Education Services Commission is liable for and must pay to the Department of Education the sum of $49, 035.66 representing State and Federal assistance monies for which no services were rendered. It is so **ORDERED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

DEC 2 2 1998
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

12/23/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 24 1998
DATE

Barbara A Harnes
OFFICE OF ADMINISTRATIVE LAW

mamf

OAL DKT. NO. EDU 6566-98
AGENCY DKT. NO. 188-6/98

MIDDLESEX COUNTY EDUCATIONAL SERVICES COMMISSION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions.

Upon careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ. Accordingly, the initial decision is adopted for the reasons expressed therein. Summary Judgment is hereby granted to respondent, and petitioner is directed to refund respondent the sum of $49,035.66.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 5, 1999
Date of Mailing, February 5, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

25-99 R

DARREN RESSLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK, BERGEN COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

SYNOPSIS

Petitioner, tenured physical education teacher who was riffed and awarded compensation by the Commissioner in June 1994 when it was found that he was entitled to 1992-93 employment, claimed entitlement to 1993-94 employment based on endorsement as an elementary school teacher acquired in June 1992, after the date of the RIF. Petitioner contended that if the Board had properly employed him for 1992-93, he would have been protected by his elementary endorsement issued prior to the commencement of that academic year. Respondent Board sought motion seeking dismissal on two grounds: that the petition was untimely pursuant to *N.J.A.C.* 6:24-1.2(c) and that any tenure rights were fixed as of the date when the Board abolished his position on April 4, 1992.

State Board remanded for further proceedings in order to determine whether the Board had employed any nontenured individuals within the scope of petitioner's elementary education certification in the 1993-94 school year and for a resultant determination of petitioner's claim in accordance with the terms of the State Board's decision.

On remand, the Commissioner found no cause to disturb the initial decision and, thus, affirmed the ALJ's initial decision.

January 5, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1882-98
(EDU 10156-94 - remanded)
AGENCY DKT. NO. 368-9/94

DARREN RESSLER,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK, BERGEN COUNTY
Respondent/Appellant.

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

Anthony N. Gallina, Esq., for respondent,

Record Closed: December 16, 1998 Decided: December 17, 1998

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

Statement of the Case

This is a remand by the State Board of Education for development of a more complete factual record. The convoluted procedural history of this case is fully set forth in the State Board's decision and need not be repeated here. By decision entered on February 4, 1998, the State Board determined that petitioner's tenure rights include "any assignment within the scope of his elementary education certification held by a

non-tenured teacher." Nonetheless, since the parties were unable to stipulate the full circumstances concerning respondent's employment of non-tenured elementary-level teachers in 1993-94, the State Board remanded this matter to the Commissioner:

> . . . for further proceedings in order to determine whether the [respondent] had employed any non-tenured individuals within the scope of petitioner's elementary education and certification in the 1993-94 school year and for a resultant determination of petitioner's claim in accordance with the terms of our decision herein.

On March 3, 1998, the Commissioner transmitted this matter to the Office of Administrative Law for further findings consistent with the State Board's ruling.

Findings of Fact

I **FIND**:

Subsequently, the parties exchanged discovery and have reached a stipulation of all additional information required by the State Board's remand order. A copy of this stipulation, dated December 15, 1998, is attached to and incorporated as part of this decision.

Conclusions of Law

I **CONCLUDE** that the stipulation of the parties, together with the State Board's decision of February 4, 1998, constitutes a final judgment on all facts and issues raised in this matter.

Order

It is **ORDERED** that this decision and the attached stipulation be forwarded to the Commissioner for review.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Dec. 17, 1998
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

12/24/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 30 1998
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

al

BUCCERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2440
(973) 773-5665
Counsel for Petitioner

DARREN RESSLER,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF
Petitioner,	:	ADMINISTRATIVE LAW
v.	:	AGENCY REF. NO. 368-9/94 O.A.L. DOCKET NO. EDU 01882-98
SADDLE BROOK BOARD OF EDUCATION,	:	
Respondent.	:	**STIPULATION OF FACTS**

The undersigned, counsel for the parties, hereby agree as follows:

1. The current proceeding before the Office of Administrative Law, as captioned above, results from an Order of Remand issued by the State Board of Education in Ressler v. Saddle Brook Board of Education, Docket No. 66-96 (February 4, 1998).

2. Pursuant to the remand order, the parties have exchanged discovery and hereby stipulate as to the following facts:

(a) The respondent did in fact employ one or more full-time, non-tenured teachers for the entire 1993-94 school year who were serving under an elementary (K-8) certificate in grades K-8.

(b) If the State Board of Education's decision of February 4, 1998 is not reversed on appeal, petitioner is entitled to back salary for the 1993-94 school year in the gross amount of $63,766.00, subject to mitigating income in the amount of $13,908.00. A total gross back salary amount of $49,858.00 would therefore be due, subject to all normal payroll and pension deductions.

(c) If the State Board of Education's decision of February 4, 1998 is not reversed on appeal, petitioner is also entitled to retroactive and/or prospective payments and credits for matters such as contractual longevity payments, sick leave credit, seniority credit, pension credit and any other credit or benefit gauged to years of service, by virtue of the inclusion o the 1993-94 school year as a year of active duty for petitioner.

3. Respondent's initial appeal from the State Board of Education's decision of February 4, 1998 to the Superior Court, Appellate Division was denied, without prejudice, because the remand order rendered the State Board's decision interlocutory. (Exhibit A attached.)

4. Adoption of this Stipulation by the Administrative Law Judge, Commissioner of Education and State Board of Education will constitute a final judgment on all facts and issues as to which the respondent may appeal to the Superior Court, Appellate Division. It is agreed that said appeal will relate to the

findings in the State Board's decision of February 4, 1998 and not to the stipulations of facts contained in paragraph 2 of this document.

5. The officers and agencies involved are asked to expedite the issuance of decisions incorporating paragraph 2 of this stipulation as their respective final findings and orders in compliance with the State Board's decision of February 4, 1998 so that this matter may be brought before the Appellate Division as soon as possible.

I hereby consent to the form and entry of the foregoing stipulation.

For Petitioner:

BUCCERI & PINCUS, ESQS.

Louis P. Bucceri, Esq.

Dated: 12/2/98

I hereby consent to the form and entry of the foregoing stipulation.

For Respondent:

Anthony N. Gallina, Esq.

Dated: 12-15-98

OAL DKT. NOS. EDU 1882-98 and EDU 10156-94 (ON REMAND)
AGENCY DKT. NO. 368-9/94

DARREN RESSLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK, BERGEN COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Upon such review, the Commissioner notes that the sole purpose of the State Board of Education's remand of this matter was

> for further proceedings in order to determine whether the Board had employed any non-tenured individuals within the scope of petitioner's elementary education certification in the 1993-94 school year and for a resultant determination of petitioner's claim in accordance with the terms of our decision herein. (*Darren Ressler v. Board of Education of the Township of Saddle Brook, Bergen County*, February 4, 1998, Slip Opinion at p. 4)

In that the parties have stipulated to the material facts, and said facts establish that petitioner, in accordance with the State Board's decision, *supra*, is entitled to compensation for back salary and related emoluments for the 1993-94 school year, the Commissioner finds no cause to disturb the initial decision.

Accordingly, the initial decision of the Administrative Law Judge is affirmed.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 5, 1999
Date of Mailing, February 5, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

26-99

M.J., on behalf of minor child, N.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

February 5, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5697-98
AGENCY DKT. NO. 114-4/98

M.J., ON BEHALF OF MINOR CHILD, N.J.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,
Respondent.

M.J., ***pro se***

Frank Pomaco, Esq., for respondent
(Gaccione, Pomaco & Beck, attorneys)

Record Closed: November 23, 1998 Decided: December 16, 1998

BEFORE **RICHARD McGILL,** ALJ:

M.J. filed a petition with the Commissioner of Education challenging a residency determination by the Board of Education of the Township of Belleville in regard to her minor child, N.J. The matter was transmitted to the Office of Administrative Law on June 25, 1998, for determination as a contested case.

Prior to hearing, the parties agreed to an amicable resolution of the matter and submitted a written settlement agreement. Having reviewed the record and the settlement terms, I **FIND:**

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

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

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time

limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Dec. 16, 1998
DATE

RICHARD McGILL, ALJ

Receipt Acknowledged:

12/24/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 30 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cml

MJ, on behalf of minor child NJ,	**OAL DKT. NO: EDU 5697-98**
Petitioner,	**AGENCY DKT. NO: 114-4/98**
BELLEVILLE BOARD OF EDUCATION,	**SETTLEMENT AGREEMENT**
Respondent.	

Judge: Richard McGill

Counsel to the Belleville Board of Education: Frank Pomaco, Esq.

Counsel to M.J.: Pro Se

The above parties participated in a telephone conference along with Judge Richard McGill, on October 7, 1998, concerning Petitioner's pending appeal of Respondent's residency determination, and reached the following settlement agreement, based upon the parties' acknowledgement of the current circumstances stated herein:

1. N.J. graduated from Belleville High School in June of 1998.

2. N.J. is currently attending college and no longer wishes to remain in Belleville High School.

3. Pursuant to the above, Petitioner shall withdraw its Petition appealing Respondent's residency determination,

which was filed with the Department of Education on April 27, 1998, Agency Docket Number 114-4/98, and transferred to the Office of Administrative Law on June 25, 1998, OAL Docket Number EDS 1952-98.

4. In return, Respondent shall withdraw its Answer and Counterclaim, which was filed with the Department of Education on or about June 4, 1998, Agency Docket Number 114-4/98, and transferred to the Office of Administrative Law on June 25, 1998, OAL Docket Number EDS 1952-98.

DATED:

For Petitioner:

Mattie Jones,
Parent of Minor Child N.J.
Pro Se Litigant

For Respondent:

Joe Ciccone,
Superintendent of Schools

Frank Pomaco, Esq.
Attorney for the
Belleville Board of Education

OAL DKT. NO. EDU. 5697-98
AGENCY DKT. NO. 114-4/98

M.J., on behalf of minor child, N.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

In that the parties have agreed to the withdrawal of their respective claims pursuant to *N.J.A.C.* 1:1-19.2, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 5, 1999
Date of Mailing, February 5, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

27-99

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN CERUTTI,	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT	:	DECISION
OF HUMAN SERVICES.	:	
	:	

SYNOPSIS

Department certified tenure charge of unbecoming conduct against respondent teaching staff member, who worked for the Commission for the Blind and Visually Impaired, for allegedly having sexual relations with a client, C.B., and falsifying work records.

In light of the testimony of witnesses especially the consistent, credible testimony of C.B., and the exhibits in the record, the ALJ found that respondent took advantage of C.B.'s vulnerability and carried on a sexual affair with her while she was an active client and he falsely reported those dates on which he had sexual relations as working sessions in order to be compensated for services he did not provide. ALJ concluded that the Department had sustained the tenure charge of unbecoming conduct against respondent and that the appropriate penalty was dismissal. (*In re Fulcomer*; *Redcay*)

Finding no basis to challenge the ALJ's credibility determinations, the Commissioner affirmed the determination of the ALJ that respondent's actions, as proven, constituted conduct unbecoming a teacher necessitating his removal from his tenured position. Commissioner ordered respondent dismissed from his position as of the date of this decision and transmitted the matter to the State Board of Examiners for action, as that body deems appropriate, against respondent's teaching certificate.

February 9, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1665-97
AGENCY DKT. NO. 589-12/96

IN THE MATTER OF THE TENURE HEARING OF JOHN CERUTTI

Yvette Gibbons, Deputy Attorney General, for petitioner
(Peter Verniero, Attorney General of New Jersey, attorneys)

Paul D. Muller, Esq., member of the Pennsylvania Bar, admitted *pro hac vice*, for respondent Attorney of Record: **Steven P. Weissman**, Esq. (Weissman & Mintz, attorneys)

Record Closed: April 3, 1998 Decided: November 12, 1998

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

Statement of the Case

This is a tenure proceeding under *N.J.S.A.* 18A:60-1 to -60-2. Tenured teachers and other certified persons employed by the Department of Human Services hold employment "during good behavior and efficiency." Petitioner New Jersey Commission for the Blind and Visually Impaired ("Commission"), an agency within the Department of Human Services, has brought charges of unbecoming conduct against one of its tenured employees, respondent John Cerutti ("Cerutti). Specifically, the charges allege that Cerutti "had sexual relations with [his] client" while he was supposed to be providing instruction to her, that he "falsified work records including client itineraries,

time sheets, and travel vouchers" in an attempt to conceal his wrongful use of state time, and that he "threatened and intimidated [the] client when she brought to his attention that she was pregnant." Although Cerutti admits that he engaged in a romantic relationship between consenting adults, he denies that the encounter occurred while she was still his active client, that he falsified work records or threatened and intimidated her. Both parties agree that, as expressed by respondent's attorney, the central issue "is one of credibility." Inevitably, the outcome turns on whether one believes Cerutti or his accuser. If the charges are sustained, the Commissioner of Education must also assess the appropriate penalty.

Procedural History

In November 1996 Commission officials submitted proposed tenure charges together with the results of an internal investigation. By action taken on November 15, 1996, the Commission determined that there exists probable cause to credit the supporting evidence and that the charges, if true, warrant removal or reduction in compensation. Accordingly, the Commission determined to file tenure charges and to suspend Cerutti without pay. On December 11, 1996, the Commission filed the tenure charges with the Commissioner of Education. Cerutti filed his answer on January 17, 1997.

Subsequently, on February 6, 1997, the Commissioner of Education transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The OAL held hearings on March 2, 3 and 4, 1998. Witnesses and exhibits are listed in the appendix. Both sides filed briefs by April 3, 1998.

Statement of Facts

General Background Facts

Most of the background facts are undisputed. The Commission is a state agency which offers a variety of support services, including vocational training, health counseling, Braille education, and instruction in daily living skills, to persons with visual impairments. John Cerutti, age forty-five, started working for the Commission in January 1979 and has been an orientation-and-mobility instructor for almost twenty years. Forty-five years old at the time of the hearing, Cerutti is married and has two young children. His wife also works for the Commission. In addition to his full-time employment by the Commission, Cerutti also has a part-time job as a real estate sales representative.

As a mobility instructor, Cerutti meets regularly with clients, usually at their home or job site, and assists them in learning how to travel from one location to another. He demonstrates proper techniques for using a cane, such as responding to environmental cues and differentiating between parallel and cross traffic. Sessions normally last one to one and-a-half hours, with the number of sessions depending on the complexity of the client's goals. A typical course of instruction would cover how to get around the house, how to get out the front door, how to stay on the sidewalk, how to cross the street safely, how to maneuver in the work place, and how to use public transportation.

Cerutti spends four days per week in the field visiting clients and the fifth day in the office doing paperwork. In any given year, his case load is seventy to one-hundred twenty clients. Trust is an essential ingredient of the professional relationship, since the client must be able to rely on the instructor for accurate feedback and interpretation of the surrounding physical world. Jamie Hilton, executive director of the Commission and herself sightless since the age of eight, explained that the instructor becomes "your life line" and "your path to getting around independently."

C.B. has been blind from birth.[1] Cerutti first met the C.B. in 1985, when she had just graduated from college and was waiting for her first guide dog. From 1985 through 1988, Cerutti provided extensive training to her on cane travel and using a dog. He was a capable teacher and C.B. was very grateful for his help. When the training ended in 1988, they became "good friends" and would occasionally go out together for drinks after work. Sometimes Cerutti would see her at her family's home. Due to the attention Cerutti gave her, C.B. began to think "he was interested in me." They slept together for the first time in 1991. Because "you remember dates like that," C.B. fixes the exact time and place as October 24, 1991 at her mother's house. After C.B. found a job and moved to her own apartment in Morristown, their friendship grew "closer" and, in Cerutti's own words, "we began to have an intimate relationship."

Although C.B. was then in her late twenties or early thirties, both parties agree that she was socially immature and young for her age. Jamie Hilton, who is a certified social worker and had a private practice for ten years before becoming director of the Commission, described her as "naive," "emotionally frail and fragile" and someone who "has not had many life experiences." C.B. had never had a physical relationship before and had been "very sheltered by her family." Recognizing that C.B. was an adult and that no force was used, Hilton nonetheless regarded her as "easy prey." However, Cerutti, who was already married at the time, places much of the responsibility for what happened on C.B. rather than himself. In his view, C.B. "became infatuated with me" and her "advances" were "so persistent" and "overbearing" that finally he succumbed "in a moment of weakness." While professing genuine love for C.B., Cerutti stated that C.B. "accepted her role or position."

On November 24, 1994, a vocational counselor referred C.B. for additional orientation-and-mobility training. Apparently the original goal was to assist her in learning to travel to Hunter College in New York City, but those plans never materialized. Instead, since her beloved guide dog Nia was dying from liver disease,

[1]To protect her privacy and preserve the confidentiality of Commission records, the complainant will be referred to by her initials rather than her full name.

the goal changed to refreshing C.B.'s skills in using a cane. Death of a successful guide dog is a traumatic occurrence for a blind person. Director Hilton, who has had four guide dogs, compared losing a dog to "going blind all over again." You and your dog are seen as a team, she elaborated, and the loss of a dog has impacts negatively on "your self-image," "your feeling of independence" and "your security." Consequently, C.B. was particularly vulnerable at this particular time in her life. Since Cerutti was the only instructor assigned to the county in which C.B. lived, her case automatically went to him. Realizing the delicacy of the situation, Cerutti accepted the assignment rather than tell his supervisors about their personal involvement.

A final-contact report written by Cerutti recites that he delivered mobility instruction to C.B. on thirteen specific dates between December 1994 and May 1995. Basically, the factual dispute centers on whether sexual activity occurred during those hours when Cerutti was reportedly working. C.B. maintains that their affair continued on-and-off again over a period of five years and that they had sexual relations on numerous occasions in 1994-95 which Cerutti had falsely listed as work sessions.[2] For his part, Cerutti insists that their "rocky" sexual relationship temporarily halted in late 1992 or early 1993 and did not resume again until January 1996 (at which time C.B. was no longer his active client.) Both of them agree that their relationship ended on September 19, 1996, when C.B. told Cerutti that she was pregnant with his baby.

Dates When Cerutti Committed Sexual Acts During Work Hours

C.B. has a remarkable ability to recall the details of past events, including specific dates, times and places. What makes her testimony so convincing is that she is able to attach many of the dates to other significant happenings in her life. Quite obviously, she was deeply in love with Cerutti, and her genuine devotion to him made each encounter special to her. As C.B. herself put it, "I remember the dates because

[2] Contrary to Cerutti's assertions, C.B. never claimed that that there weren't any interruptions in their five-year relationship. For example, C.B. had only a few sexual encounters with Cerutti in 1992 and stopped seeing him for an extended period in July 1995 when Cerutti took paternity leave to care for his and his wife's baby.

they always meant something to me." Generally, C.B. estimates that she had sexual relations with Cerutti approximately three times a month. Typically he would be with her for one and a half to two hours, but sometimes they spent half the day together. Of the thirteen dates listed by Cerutti in his final report, C.B. stated that only two were actually devoted to business pursuits. At around Christmas of 1994, Cerutti saw her in his official capacity and gave her a lesson in using a cane. Itinerary sheets, kept by Cerutti in the ordinary course of business, reflect that C.B. was his first client of the day on Wednesday, December 21, 1994 in Morristown. C.B. also recounted a second work session, in mid-May 1995, at which he came to her new office in Denville and showed her how to get around with the cane.

On Friday, December 23, 1994, Cerutti went to her house in Morristown after lunch. According to C.B., no lesson was delivered that day, we "just had sex." C.B. remembers the date because Cerutti had just come from a holiday lunch. His itinerary sheet for that day indicates that C.B. was his last client. Right after New Year's Day, on Wednesday, January 4, 1995, Cerutti stopped by her house at about 11:00 in the morning and stayed for two and-a-half hours. During his visit, they had sexual relations, but Cerutti did not provide any mobility instruction. C.B. is named as his second client on Cerutti's itinerary sheet.

One month later, on Friday February 3, 1995, the two ate lunch together at a restaurant in Morristown and, as C.B. testified, "then we came back to my house and we slept together." That date was particularly memorable because her guide dog Nia had recently died and, earlier that morning, she and Cerutti held a burial ceremony at the Seeing Eye facility. Corresponding itinerary sheets identify C.B. as Cerutti's only client for the first half of the day. Cerutti was with her again on Thursday February 23, 1995, a significant date because it was the day that C.B. brought home her replacement guide dog. Cerutti arrived at about 10:00 a.m., and, in C.B.'s version, "we slept together and then we went out to breakfast." Again, the itinerary sheet confirms that C.B. was Cerutti's first client of the day.

Shortly thereafter, on March 24, 1995, Commission held a public forum for clients to voice their concerns about the agency and its programs. Since Cerutti had to attend the event, he offered to drive C.B. to the forum. After meeting at her office, they had lunch together and "fooled around" or, as C.B. clarified her use of the term, "we had oral sex in the car before we went to the meeting." On the itinerary sheet, C.B. appears as the last entry for that day.

Several of the other March dates mentioned in Cerutti's final report did not involve either work or sexual activity. Although Cerutti's itinerary lists her as his second and last client on Wednesday March 1, 1995, C.B. stated that she "went to the doctor" and "never saw him on that day." C.B. felt so sick that she went to stay at her mother's house. The following day, Thursday, March 2, 1995, Cerutti visited her at her mother's house for an hour. Cerutti took her for a walk "to get me out of the house," but did not provide any instruction. He didn't want to have sex because C.B. was still sick. An itinerary sheet shows that C.B. was Cerutti's first client. On Thursday March 16, 1995, Cerutti came to her office in the middle of the afternoon and they "went for a walk," but "there was no lesson that day." C.B. distinctly remembers it was the day before St. Patrick's Day because Cerutti "was going to come over the next day, but didn't." While Cerutti's final report designates March 16, 1995 as an instruction date, his itinerary sheet for that day fails to make any reference to C.B. Similarly, Cerutti stopped by her office for forty-five minutes on Thursday March 23, 1995 but, according to C.B., "we didn't do anything."

John Reiff, the Commission's regional officer manager, explained that all of Cerutti's work sessions with a particular client, "from first to last," are required to be itemized in his final report. Nevertheless, C.B. recollected various unreported dates, when Cerutti had sexual relations with her instead of working. For instance, on Monday April 7, 1994, Cerutti visited C.B. at her apartment in the morning and had sex with her. C.B. had taken off from work due to concern that she might be pregnant. Likewise, on Friday, December 16, 1994, Cerutti came to her apartment in the late afternoon and the two of them had oral sex. C.B. was able to pinpoint the date because her dog Nia needed a blood test and she took the day off to take the dog to

the veterinarian. Cerutti's itinerary lists C.B. as his last client on that day, although the date is missing from his final report. On Monday, February 27, 1995, Cerutti arrived at her apartment around 9:30 a.m., the couple "slept together" and then "went to breakfast." C.B. recalls the date because she was home to be with her new dog. Cerutti's itinerary sheet shows C.B. as his first client of the day.

Even after officially closing her case, Cerutti continued seeing C.B. for personal reasons and charging his time to work. Thus, on Wednesday, June 28, 1995, Cerutti came to her office, took her to lunch, went on a walk with her and "had sex in the park." This date was noteworthy to C.B. because it was Nia's birthday. Cerutti's itinerary lists C.B. as his second client that day. Also, on Wednesday, July 26, 1995, Cerutti picked her up from the office, took her to lunch and "we had oral sex in the car." Cerutti's itinerary for that date names C.B. as his second client.

Confronted by Commission staff, Cerutti admitted his sexual involvement, but initially claimed that C.B. had not been his client since the late 1980s. However, Cerutti's final report establishes that C.B. was his client during the critical time period in 1994 and 1995. Later during the same interview, Cerutti contended that he usually met C.B. around lunch time and that, if any sexual activity occurred during the day, it would have been on his own time. Once more, however, Cerutti's explanation was contradicted by his own itinerary sheets, which show that many of his encounters with C.B. occurred either early in the morning or late in the afternoon. At the hearing, Cerutti testified that he participated in various special projects and made plans for workshops with C.B., implying that they were colleagues rather than instructor and client. Although C.B. happened to work for a separate agency funded by the Commission, she was not working on any special projects with Cerutti in 1994 or 1995. Her testimony, as well as the available records, indicate that any special projects in which they both participated, such as the auditory mapping of a train station or Cerutti's appearance as guest speaker at an Adjustment to Blindness conference, were completed or abandoned prior to 1992.

Attempting to impugn C.B.'s motives for reporting their relationship to the Commission, respondent's counsel argues that she acted vindictively and out of a desire to punish Cerutti. But Jamie Hilton, a trained social worker, testified that C.B. still had "a lot of loyalty" to Cerutti and "did not want to get [him] into trouble." Hilton did not sense any anger "as much as hurt and bewilderment."

Without addressing the specific dates in question, Cerutti gave a meticulous account of the mobility lessons he purportedly gave C.B. in 1994 and 1995. Illustratively, he described teaching her how to get from her apartment to a shopping area, how to avoid a "sound shadow" where a hill blocked the sound of traffic, how to choose a safer alternative route, how to approach a three-cycle traffic light with a delayed green arrow, how to negotiate an area with muddy sidewalks, how to avoid barriers such as an open stairwell, how to catch the train between Morristown and Denville and how to find her way from her new office to a nearby delicatessen. Since Cerutti was familiar with the territory, knew C.B.'s weaknesses and frequently accompanied her on walks, it would have been easy for him to fabricate these episodes.

I FIND that Cerutti took advantage of C.B.'s vulnerability and carried on a sexual affair with her while she was his active client. In particular, he engaged in sexual relations with her on December 23, 1994, January 4, 1995, February 3 and 23, 1995, and March 24, 1995 and falsely reported those dates as working sessions in order to be compensated for services which he did not provide. Cerutti's story contradicts the known facts and the written record. Originally he claimed that C.B. was not his client in 1994 and 1995, then he changed his story and claimed that all his encounters took place during lunch, notwithstanding that his own itineraries prove otherwise. He also maintained that C.B. was a co-worker, when the records clearly demonstrate that she was his client. Furthermore, Cerutti's attitude, typified by his contention that the inexperienced C.B. seduced him and his callous remark that she "accepted her role or position," betray his selfish and calculating treatment of the blind woman who genuinely loved him. In contrast, C.B. gave largely consistent testimony, was able to pinpoint

many of the crucial dates by reference to other important events, and her sincerity was buttressed by her visible embarrassment at having to reveal the intimate details of her private life.

Threats Against a Client

By all accounts, the relationship between Cerutti and C.B. came to an abrupt end on September 19, 1996, when Cerutti told her "the good news" that his wife was pregnant and C.B. informed him that she too was pregnant with his baby. A year earlier, according to C.B., Cerutti had offered to have a baby with her. Now, however, he demanded that she have an abortion. Although C.B. "wanted that baby more than anything," she was unable to care for a baby alone. Despite religious reservations, C.B. decided to go ahead with an abortion. After that meeting, she never saw Cerutti again. Her parents shunned her because of her pregnancy out-of-wedlock. Cerutti testified that he felt like C.B. "tricked me and got pregnant on purpose to force me to leave my wife and child."

Subsequent contacts between the two of them took place by telephone. C.B. wanted the abortion performed by her own doctor, which would cost $3,000, but Cerutti wanted her to have it done at a clinic. C.B. did not have enough money to pay for the abortion by herself. At first, Cerutti promised to help pay for the abortion, but later he backed away from his promise. Cerutti left five separate messages on C.B.'s telephone answering machine on October 13, 1996.[3] In his chilling first message, Cerutti announced that, "I can't help you out," threatened to tell her family an untrue story that C.B. had been engaging in sex with her sister's husband, and concluded his message by wishing her "good luck." Even his own attorney concedes that Cerutti exhibited "poor judgment" by threatening to "make up a sordid tale about her pregnancy."

[3]Cerutti's attorney objects that there was a missing sixth message recorded on C.B.'s answering machine on October 13, 1996. However, there is no reason to believe that the sixth message was from Cerutti or had anything to do with this case.

Acknowledging that he had invented the malicious story about sex with her brother-in-law, Cerutti contended that he made the threat in retaliation for what he described in one of his telephone messages as C.B.'s "idle threats." Making it sound like she was blackmailing him rather than desperately pleading for help, Cerutti claimed that C.B. had threatened to tell his wife about their love affair. C.B. denies ever threatening to tell Cerutti's wife. Instead, she said that his "idle threat" remark probably refers to her telephone message that, if he was unwilling to contribute to the abortion, she would keep the baby and seek child support.

Ultimately, Cerutti changed his mind and decided to give her half of the cost of the abortion. The remaining messages from Cerutti dealt mainly with arrangements for delivery of the money. As a result of Cerutti's false accusation, C.B. was afraid of him and did not want to meet him alone. She had become aware of "a whole side I never saw of him." Therefore, she asked Cerutti to place the money in an envelope and slip it under the door of her neighbor. When she retrieved the envelope the next day and opened it in the presence of a co-worker, it contained only $1,100.[4] C.B. had an abortion on October 15, 1995 at Valley Hospital in Ridgewood. One of her friends went with her, but Cerutti did not come to the hospital. In his last telephone message to her on October 13, 1995, he had asked her to do him a favor: "Don't call me and I won't call you."

I FIND that Cerutti threatened to destroy C.B.'s reputation when she requested his help in resolving their mutual problem. Actual tape recordings of the telephone messages left by Cerutti establish that he made the threat to avoid responsibility for his own actions. These were not private conversations that C.B. secretly recorded without his consent. Rather, they were messages which Cerutti left on her answering machine in full knowledge that his words would be recorded. Moreover, Cerutti readily admits that the story he threatened to tell was a complete lie. Unfortunately, his threat had the intended effect of causing C.B. to be fearful of him. While the threat did not deter her

[4]Cerutti has a "memory" of putting $1,200 in the envelope, but he did not appear to be certain of the amount.

from reporting his activities to the appropriate authorities, it did put her in fear for her personal safety.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that the Commission has sustained its tenure charge of unbecoming conduct against Cerutti and that the appropriate penalty is dismissal.

N.J.S.A. 18A:60-1.2 confers tenure on "[a]ny teacher or other certified individual serving in a teaching capacity in a State institution within . . . the Department of Human Services . . . who has completed at least two academic years of teaching service or its equivalent within three calendar years with satisfactory evaluations." Tenure protects teachers from arbitrary dismissal for "unfounded, flimsy or political reasons." *Spiewak v. Rutherford Bd. of Educ.*, 90 *N.J.* 63, 73 (1982). It is designed to aid in the establishment of "a competent and efficient school system" by affording to teachers a measure of security in the ranks they hold after years of service. *Viemeister v. Prospect Park Bd. of Educ.*, 5 *N.J. Super.* 215, 218 (App. Div. 1949). Toward that end, *N.J.S.A.* 18A:60-2 provides that no tenured instructor shall be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct or other just cause." Additional procedural safeguards, including the right to a list of charges, a sworn statement of evidence and an impartial hearing, are written into the law.

Proofs establish by a preponderance of the credible evidence that Cerutti abused his public trust and betrayed the confidence of his female student. Expert opinion shows the unique dependence of a blind client on her mobility instructor. Not only did Cerutti take improper advantage of his position to engage in sexual relations with his client, but also he falsified official records to cover up his misdeeds and, when faced with exposure of his conduct, he threatened his client in an unsuccessful attempt

to keep her quiet. "Unbecoming conduct," is an elastic term broadly defined to include "any conduct, which has a tendency to destroy public respect for [public] employees and competence in the operation of [public] services." *Karins v. City of Atlantic City*, 152 *N.J.* 532, 554 (1998). It is sufficient that the complained-of conduct and its attending circumstances be such as to offend publicly accepted standards of decency. *Karins*, at 555. Improper touching for sexual gratification, of the type proven here, unquestionably constitutes conduct unbecoming a teacher within the meaning of the tenure law. *In re Tenure Hearing of Borrelli*, 91 *N.J.A.R.* 2d (Vol. 4) 77 (Comm'r of Educ.).

Factors to be considered in assessing penalty include the nature and gravity of the offense; any extenuating or aggravating circumstances; and the effect on the maintenance of discipline and the proper administration of the school system. *In re Fulcomer*, 93 *N.J. Super.* 404, 420-422 (App. Div. 1967). Courts recognize that a single instance of misconduct, if sufficiently flagrant, is enough to justify removal of an unfit teacher. *Redcay v. St. Bd. of Educ.*, 130 *N.J.L.* 369 (Sup. Ct. 1943), aff'd 131 *N.J.L.* 326 (E. & A. 1944). Here Cerutti's behavior was especially heinous because he sought to conceal his guilt by falsifying public records and threatening his client. Such conduct is strongly condemned as "demeaning to the personality and interests of young female students." *In re Tenure Hearing of Apkarian,* 1986 *S.L.D.* 1889, 1914 (Comm'r of Educ. July 16, 1986), *aff'd* 1985 *S.L.D.* 1916 (St. Bd. Sept. 3, 1986), *aff'd* No. A-927-8678 (App. Div. No. 20, 1987).

Sexual contact by a teacher with pupils is a violation of the teacher-pupil relationship and may have life long consequences. *In re Tenure Hearing of Gregg*, 1989 *S.L.D.* 1803 (Comm'r of Educ. June 2, 1989). Recently, the Commissioner reiterated the long-standing educational policy that "teachers who resort to inappropriate physical contact with those in their charge must expect to face dismissal or other severe penalty." *Borrelli, supra*, at 85. Support for this "black letter of law" is derived from a long line of cases, including *In re Tenure Hearing of Cooke*, 1991 *S.L.D.* 1381 (Comm'r of Ed. Aug. 30, 1991); *In re Gwaley*, 1986 *S.L.D.* 168 (Comm'r of Educ. Jan. 30. 1986), *aff'd* 1986 *S.L.D.* 196 (St. Bd. June 4, 1986); and *Elizabeth Bd. of Educ.*

v. Pasquale, 1984 *S.L.D.* 1 (Comm'r of Ed. Jan. 9, 1984), *modified* 1984 *S.L.D.* 34 (St. Bd. Sept. 5, 1984). Cerutti's past record includes a written warning in February 1994 for interfering with a co-worker and a three-day suspension in April 1996 for disrespect to a supervisor. Coupled with his past record of violations, the circumstances of the current offense are so detrimental to the welfare of his client and to his continued effectiveness as an instructor that termination is necessary.

Order

It is **ORDERED** that the tenure charge of unbecoming conduct is sustained.

And it is further **ORDERED** that John Cerutti is dismissed from his tenured position as an instructor employed by the Commission.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Nov. 12, 1998
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

11/16/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 17 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX
List of Witnesses

1. John Reiff, regional officer manager, N.J. Commission for the Blind and Visually Impaired

2. Gilbert Dick, administrator of fiscal and management services, N.J. Commission for the Blind and Visually Impaired

3. Jamie Hilton, executive director, New Jersey Commission for the Blind and Visually Impaired

4. C.B.

5. John Cerutti, orientation and mobility instructor, N.J. Commission for the Blind and Visually Impaired

List of Exhibits

No.	Description
J-1	Copy of tenure charges, dated November 15, 1996, and supporting affidavit
J-2	Copy of statement by Jamie C. Hilton, dated October 14, 1996
J-3	Copy of statement by Jamie Hilton, dated November 14, 1996
J-4	Copy of statement by Seymour Shlakman, dated November 14, 1996
J-5	Copy of interview with client C.B., dated November 1, 1996
J-6	Copy of statement by Gilbert Dick and Seymour Shlakman, dated November 14, 1996

J-7 Copy of statement by John Reiff, dated November 15, 1996

J-8 Copy of client service payment summary inquiry, dated October 25, 1996 with handwritten statement by Gilbert Dick, dated November 15, 1996

J-9 Copy of ancillary worker final contact report by John Cerutti, dated June 26, 1995

J-10 Copy of statement by C.B., dated November 14, 1996

J-11 Copy of memorandum to John Cerutti from Jamie C. Hilton, dated November 12, 1996

J-12 Copy of letter to Jamie C. Hilton to John Cerutti, dated November 12, 1996

J-13 Copy of memorandum to Jamie Hilton from Donald Mangus, dated December 10, 1996

J-14 Copy of letter to Leo Klagholz from Donald Mangus, dated December 9, 1996

J-15 Copy of letter to John Cerutti from Donald Mangus, dated December 9, 1996

J-16 Copy of certificate of determination of tenure charges, dated December 9, 1996

J-17 Copy of respondent's statement of position by Lionel Leach, dated December 5, 1996

J-18 Copy of letter to Lionel Leach from Debra Antanaitis, dated January 22, 1997

J-19 Copy of memorandum to Joanne Puco from Gilbert Dick, dated April 9, 1997

J-20 Copy of assorted weekly itinerary sheets for the period January 9, 1994 to March 1, 1996

J-21 Copy of assorted bi-weekly time sheets for the period December 10, 1994 to August 2, 1996

J-22 Copy of assorted travel expense invoices for the period January 1995 to December 1995

J-23 Copy of job description of instructor-counselor published by the New Jersey Department of Personnel, dated March 1, 1997

J-24 Copy of letter to John O'Connell from C.B., dated July 26, 1991

J-25 Copy of letter to John Cerutti from C.B., dated August 13, 1991

J-26 Copy of letter to John Cerutti from C.B., dated September 19, 1991

J-27 Copy of letter to John Cerutti from C.B., dated July 21, 1995

J-28 Copy of letter to John T. Cerutti from Todd A. Wigder, dated August 1, 1995

J-29 Copy of letter to John Cerutti from Donald Mangus, dated November 18, 1996

J-30 Copy of newsletter of the New Jersey Chapter of the Association for Education and Rehabilitation of the Blind and Visually Impaired for December 1997

J-31 Copy of newspaper article, undated

J-32 Copy of Christmas cards from C.B., undated

J-33		Copy of portion of performance assessment review of J.C. for the period July 15, 1995 to June 30, 1996
P-1		Copy of job description of instructor for the Commission for the Blind and Visually Impaired, revised July 1971
P-2		Tape recording of messages left at home telephone of C.B. on October 13, 1996
P-3		Copy of record of written warning, dated February 1, 1994
P-4		Copy of notice of suspension from duty without pay, dated April 4, 1996
P-5		Copy of birthday card from John Cerutti, undated
P-6		Copy of birthday card from John Cerutti, undated
P-7	Id.	Answers of John Cerutti to interrogatories propounded by the New Jersey Commission for the Blind and Visually Impaired, undated
R-1		Handwritten notes of Gilbert Dick, dated November 8, 1996
R-2		Handwritten memo to Gilbert Dick from John Reiff, dated November 8, 1996
R-3	Id.	Map of streets in Morristown drawn by John Cerutti on March 3, 1998
R-4	Id.	Map of green in Morristown drawn by John Cerutti on March 3, 1998
R-5	Id.	Map of streets of Denville drawn by John Cerutti on March 3, 1998

OAL DKT. NO. EDU 1665-97
AGENCY DKT. NO. 589-12/96

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN CERUTTI,	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT	:	DECISION
OF HUMAN SERVICES.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent requested and was granted an extension of time within which to file exceptions in this matter and such exceptions were timely filed in accordance with the established schedule. Reply/cross exceptions filed by counsel for the Department on December 31, 1998, in response to exceptions which, it is indicated were faxed to her on December 15, 1998, were untimely, pursuant to *N.J.A.C.* 1:1-18.4(d), and will, therefore, not be considered herein.

Respondent's exceptions essentially recast and reiterate his arguments with respect to credibility advanced before the Administrative Law Judge (ALJ) below. Here, he contends that the ALJ's recommended decision is solely based on the testimony of only one witness, C.B., despite her testimony being inconsistent and "riddled with contradictions." (Respondent's Exceptions at p. 7) Respondent presents a recitation of ten specific instances which, he avers, demonstrate that C.B.'s testimony is unreliable and motivated by personal animus against respondent, and he, therefore, requests the Commissioner to reject the ALJ's credibility determinations and reinstate him to his position. *(Id.)*

Upon careful and independent review of the entire record in this matter, which includes transcripts of the hearing conducted at the OAL[1], and the exceptions filed by respondent, the Commissioner affirms the determination of the ALJ, for the reasons well expressed in the initial decision, that respondent's actions, as proven, constitute conduct unbecoming a teacher necessitating his removal from his tenured position. Notwithstanding respondent's exception assertions to the contrary, the Commissioner finds no basis, either in the transcripts or in the record as a whole, to challenge the ALJ's credibility determinations, being fully satisfied that the ALJ's recitation of testimony is both accurate and thorough, and that he carefully measured conflicts, inconsistencies and potential biases in deciding which testimony to credit.

Accordingly, the Commissioner affirms the initial decision of the OAL and hereby orders that John Cerutti be dismissed from his tenured position with the Department of Human Services, the Commission for the Blind and Visually Impaired, as of the date of this decision. This matter shall be transmitted to the State Board of Examiners, pursuant to *N.J.A.C* 6:11-3.6, for action, as that body deems appropriate, against respondent's teaching certificate.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 9, 1999
Date of Mailing, February 9, 1999

[1] The record reflects that the hearing was held on March 2, 3, and 4, 1998.
[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

28-99

IN THE MATTER OF THE TENURE	:	
HEARING OF RONALD SHAW,	:	
SCHOOL DISTRICT OF THE TOWN-	:	COMMISSIONER OF EDUCATION
SHIP OF TEANECK, BERGEN COUNTY.	:	DECISION
	:	

February 9, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7246-98
AGENCY DKT. NO. 227-7/98

IN THE MATTER OF THE TENURE HEARING OF RONALD SHAW, BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY

Sidney A. Sayovitz, Esq., for petitioner
(Schenck, Price, Smith & King, attorneys)

Harold N. Springstead, Esq. for respondent
(Springstead & Maurice, attorneys)

Record Closed: December 24, 1998 Decided: December 24, 1998

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

Statement of Facts

This matter involves tenure charges of inefficiency certified by the Teaneck Board of Education ("Board") against Ronald Shaw ("Shaw") under the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 to -18.1.

Ronald Shaw is a tenured teaching staff member employed by the Board. On October 27, 1995, the school administration filed tenure charges of inefficiency against Shaw. Soon thereafter, Shaw began an extended unpaid leave of absence from the

district and returned on February 2, 1998. By resolution adopted on July 6, 1998, the Board revived the earlier tenure charges and added additional charges of inefficiency relating to Shaw's performance after his return to work. Basically, the charges allege the Shaw committed various acts of inefficiency, including: failure to utilize positive and effective teaching techniques in his classroom; failure to properly organize, manage and control his classroom; failure to demonstrate effective techniques of lesson planning; failure to implement administrative directives; and engaging in unprofessional and insubordinate conduct. As a result of its determination, the Board suspended Shaw, without pay, effective July 6, 1998.

On July 10, 1998, the Board filed its written tenure charges with the Commissioner of Education ("Commissioner"). Respondent filed an answer on July 24, 1998. Subsequently, on July 27, 1998, the Commissioner referred this matter to the Office of Administrative Law ("OAL") for hearing as a contested case.

Both parties have agreed to a proposed settlement, subject to approval by the Commissioner. (A copy of the proposed settlement is annexed hereto.) In accordance with the decision of the State Board of Education in *Cardonic v. Brooklawn Bd. of Educ.*, 193 *S.L.D.* ___ (St. Bd. April 6, 1983), the record of any proposed settlement must include:

> . . . the nature of the charges, circumstances justifying the settlement consent or authorization by the Board of Education and the teacher to the proposed agreement, the Administrative Law Judge's finding that the teacher entered into the agreement with a full understanding of his rights, and [a finding] that the agreement is consistent with the public interest.

On December 4, 1998, the OAL held a public hearing on the issue of whether or not the proposed settlement should be accepted. Counsel for both parties set forth on the record the reasons why settlement would be in the public interest. Shaw testified that he fully understood and voluntarily agreed to the terms of settlement. In addition, the parties have prepared a stipulation of settlement, which is attached and fully

incorporated in this decision. The Board approved the settlement terms on December 6, 1998.

Based on my review of the records and the testimony at the hearing, I **FIND** that the proposed settlement is consistent with the public interest for the following reasons:

1. Ronald Shaw has been employed as a science teacher by the Board since September 1985. Prior to that, he had served as a teacher for many years in other school districts.

2. It is anticipated that the hearing in this matter would be protracted and costly. The OAL had scheduled the matter to be heard on seven separate hearing dates in December 1998. Board proofs would consist of voluminous written exhibits pertaining to events spanning an eight-year period. Board counsel also intended to call four or five fact witnesses.

3. At the hearing, the Board expressed its considered judgment that money which would be expended to prosecute this case to final conclusion could be better "funneled back into instruction to benefit youngsters."

4. In addition, the Board has submitted the certification of its assistant superintendent, A. Spencer Denham, setting forth why it believes the settlement is in the public interest. (A copy of this certification is annexed hereto.)

5. Under the proposed terms of settlement, Shaw will resign from his position effective May 15, 1999 and, in the meantime, will remain on terminal leave. In exchange, he would receive his salary from December 4, 1998 through May 15, 1999. The Board will withdraw its appeal in a pending unemployment-compensation case and Shaw will give the Board a general release for any and all liability.

6. Given the best of circumstances, it is unlikely that the tenure hearing would be concluded and transcripts prepared until the end of January. Then the administrative law judge would have forty-five days to prepare an initial decision and the Commissioner would have an additional forty-five days for review and issuance of a final decision.

7. At the hearing, Shaw responded appropriately to questions and was not under any emotional stress or duress. Before entering into this agreement, Shaw fully understood his rights and had an adequate opportunity to consult with legal counsel.

. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that the terms of the settlement are in the public interest.

It is **ORDERED** that the parties comply with the settlement terms and that the proceedings are hereby concluded.

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

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

Dec. 24, 1998
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

Dec 31 1998
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 04 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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SCHENCK, PRICE, SMITH & KING, LLP
10 Washington Street, P.O. Box 905
Morristown, NJ 07963-0905
(973) 539-1000
Attorneys for the Board of Education of the Township of Teaneck, Bergen County

IN THE MATTER OF THE TENURE CHARGES AGAINST RONALD SHAW, A TEACHING STAFF MEMBER OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DOCKET NO. EDU 7246-98** **AGENCY REFERENCE NO. 227-7/98** **CERTIFICATION OF** **A. SPENCER DENHAM**

I, A. Spencer Denham, of full age, hereby certify as follows:

1. At all relevant times, I have been the Assistant Superintendent of Schools of the Board of Education of the Township of Teaneck, Bergen County (hereinafter "Board").

2. This certification is submitted in support of the Board's request that this Court and the Commissioner of Education approve the proposed settlement in this matter, as described in the attached Stipulation of Settlement (Exhibit A) and further approve the resignation of Ronald Shaw, effective May 15, 1999.

3. On October 27, 1995, I filed tenure charges of inefficiency with the Board against Respondent, Ronald Shaw (hereinafter "Mr. Shaw"), a tenured teacher employed in the Teaneck Public Schools. As the ninety day period for correction was to begin, Mr. Shaw advised the

Board of a disabling condition relating to stress anxiety and began, thereafter, a leave of absenc This leave continued until February 2, 1998, when he returned to work. The tenure charges of inefficiency against Mr. Shaw were re-filed on February 13, 1998, with a new ninety day period for remediation.

4. After having determined that Mr. Shaw had not remedied the charges of inefficiency, on or about July 9, 1998, I filed tenure charges with the Commissioner of Education against Mr. Shaw. These tenure charges were primary charges of inefficiency and a single charge of insubordination. There was nothing in the tenure charges or in the statement of evidence alleging that Mr. Shaw engaged in any type of misconduct with students, or unbecoming conduct relating to fraud, dishonesty or moral turpitude.

4. The gravamen of the tenure charges is that a teacher with more than a decade of experience became deficient in his teaching performance. Mr. Shaw denied those charges.

5. On December 4, 1998, Mr. Shaw submitted a letter of resignation to me (see Exhibit B). On December 9, 1998, the Board passed a resolution accepting the letter of resignation of Mr. Shaw, effective May 15, 1999 (see Exhibit C). The Board's acceptance of the letter of resignation was subject to the Commissioner's approval.

6. The Board believes that acceptance of the letter of resignation is in the public interest as considerable expenditure of public funds would be required to pursue tenure charges herein. The tenure charges involve voluminous evidence accumulated over more than five years. Seven days of hearing were scheduled requiring considerable expenditure of time by Board administrators. Costs for legal fees and transcript charges associated with a tenure hearing would be substantial.

7. The goal of the Teaneck School District is to remove a teaching staff member whose performance, in its judgment, has fallen below the standards and expectations of the Board of Education. Settlement with Mr. Shaw's resignation achieves that goal with certainty. Settlement also saves the district tens of thousands of dollars in litigation costs.

8. The Board and Mr. Shaw also understand that this matter will be referred to the New Jersey Board of Examiners, who will have jurisdiction regarding the teaching certificate of Mr. Shaw.

9. The Board has not agreed to provide any financial incentives to Mr. Shaw and, therefore, believes that Mr. Shaw will receive no extraordinary benefit as a result of this settlement.

10. After reviewing the factors referenced above, the Board and I have determined that the proposed settlement will be in the public interest and respectfully request that the Commissioner of Education approve the settlement.

A. SPENCER DENHAM

DATED:

Sworn and subscribed to before me
this 15th day of December, 1998.

ERIKA A. BERGMAN
Notary Public, State of New Jersey
No. 2096043
Qualified in Bergen County
Commission Expires April 2, 2002

Notary Public

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SCHENCK, PRICE, SMITH & KING, LLP
10 Washington Street, P.O. Box 905
Morristown, NJ 07963-0905
(973) 539-1000
Attorneys for the Board of Education of the Township of Teaneck, Bergen County

IN THE MATTER OF THE TENURE CHARGES AGAINST RONALD SHAW, A TEACHING STAFF MEMBER OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DOCKET NO. EDU 7246-98** **AGENCY REFERENCE NO. 227-7/98** **STIPULATION OF SETTLEMENT**

The parties in the above captioned matter, having resolved their dispute, agree as follows, subject to the approval of this Stipulation of Settlement by the Commissioner of Education:

1. On December 4, 1998, Ronald Shaw ("Shaw") submitted a letter of resignation. The letter of resignation is attached hereto as Exhibit A.

2. On December 9, 1998, the Board of Education of the Township of Teaneck, Bergen County, adopted a resolution accepting the letter of resignation of Mr. Ronald Shaw, effective May 15, 1999. The resolution further provided that the resignation was subject to the approval of the Commissioner of Education. A copy of the Board of Education resolution is attached hereto as Exhibit B.

3. The Board of Education agrees to pay Shaw his regular salary through May 15, 1999 and agrees to withdraw its pending appeal of a determination regarding Shaw's application for unemployment benefits.

4. Shaw agrees to immediately execute a release satisfactory to the Board of Education.

5. The parties agree that the tenure charges filed herein, along with the supporting documentation filed with the Commissioner of Education, will be referred to the New Jersey State Board of Examiners for a possible revocation proceeding.

6. Except as set forth herein, the Board of Education has made no representation to Shaw regarding any other matter, including, but not limited to, the form of reference to potential employers or the referral to the New Jersey State Board of Examiners.

7. All terms of this Agreement are deemed material. This document constitutes the entire understanding of the parties and may not be altered, amended, modified or revoked except by mutual agreement executed in writing by the parties.

8. This Stipulation of Settlement shall be subject to the approval of the Commissioner of Education.

9. Shaw acknowledges that he has been represented by counsel, that he understands the terms and conditions of this Stipulation of Settlement, and that he enters into this Agreement voluntarily. In addition, Shaw acknowledges that he has been advised that the tenure charges, along with supporting documentation, will be referred to the State Board of Examiners for possible revocation of his teaching certificate.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals as of the da

first above written.

WITNESS:

BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY

MARGARET ANGELI, BOARD PRESIDENT

WITNESS:

RONALD B. SHAW

::ODMA\PCDOCS\SPSKLIB1\348209\I

RONALD SHAW
P.O. Box 177
Ridgefield Park, NJ 07660

December 4, 1998

I hereby tender by irrevocable resignation as a teaching staff member in the Teaneck School District effective May 15, 1999 following my terminal leave.

Ronald B. Shaw

RONALD SHAW

PERSONNEL **DECEMBER 9, 1998**

Any Board member who takes exception to any of the following listed actions under the category of Personnel may so indicate now and a separate motion for each of the excepted actions will be entertained.

MOTION made by seconded by that the following Personnel actions of the Board, as recommended by the Superintendent, numbered **90** through **103**, excepting actions be approved.

Roll call.

90. that the Board accept the following resignations/leave of absence, as of the effective dates listed:

NAME	ASSIGNMENT/LOCATION	EFFECTIVE DATE REASON
Sally Wilson	Art Aide/Bryant	12/4/98 Relocation
Ronald Shaw	Science/TJ	5/15/99* Personal
Lisa Cunningham	ESL/TJ	Family Leave 12/16/98 - 3/16/99 Child Rearing Leave 3/16/99 - 6/30/99

*subject to the Commissioner of Education's approval

91. that the Board approve the following personnel be employed for the period indicated and at the salary listed:

NAME	ASSIGNMENT	ACCOUNT #
EMPLOYMENT PERIOD	LOCATION	ANNUAL SALARY
Garrett Turner	Social Studies	#11-130-100-101-15-11-0-F-0
11/30/98 - 6/30/99	BF	TE 1 - 7 $42,320
Linda Cifelli	District	#11-000-219-104-72-11-0-C-0
12/14/98 - 6/30/99	School Psych. P/T	TE 4 - 8 $33,442

EXPLANATION: These are replacement positions for individuals who resigned.

92. that the Board approve application for county substitute certification for the following individuals:

Edward Clarke	Renna Edwards	Robert McKee
Lisa Ann Lottermann	Barbara Maher	

EXPLANATION: All applications for substitute certification must be approved by the Board of Education prior to submission to Bergen County Office of Certification.

OAL DKT. NO. EDU 7246-98
AGENCY DKT. NO. 227-7/98

IN THE MATTER OF THE TENURE	:	
HEARING OF RONALD SHAW,	:	
SCHOOL DISTRICT OF THE TOWN-	:	COMMISSIONER OF EDUCATION
SHIP OF TEANECK, BERGEN COUNTY.	:	DECISION
	:	

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

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

COMMISSIONER OF EDUCATION

February 9, 1999
Date of Mailing, February 9, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

29-99

N.B., on behalf of minor child, S.A.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

February 9, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

SETTLEMENT

N.B. ON BEHALF OF A MINOR, S.A.B.
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD,
Respondent.

OAL DKT. NO. EDU 11289-98
AGENCY DKT. NO. 522-11/98

S.A.B.
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD,
Respondent.

OAL DKT. NO. EDS 11421-98
AGENCY DKT. NO. 99-2150E

CONSOLIDATED

Michaelene Loughlin, Esq., appearing for petitioner
(Loughlin & Latimer, attorneys)

Eric Martin Bernstein, Esq., appearing for respondent
(Mauro, Savo, Camerino & Grant, attorneys)

Record Closed: December 22, 1998 Decided: January 5, 1999

BEFORE **MARGARET M. HAYDEN**, ALJ:

Petitioner N.B. requested a hearing in this matter. In accordance with 20 *U.S.C.A.* §1415 and 34 *C.F.R.* §300.500 *et seq.*, the Commissioner of Education

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requested that an Administrative Law Judge conduct a hearing. The Department of Education transmitted these matters, *EDU* 11289-98 on November 30, 1998 and *EDS* 11421-98 on December 4, 1998, to the Office of Administrative Law (OAL) for determination as a contested case.

Pursuant to the provisions of *N.J.S.A.* 52:4F-5(o), the Director of the OAL assigned the undersigned to hear this matter. Pursuant to the applicable rules and with the agreement of the parties, the OAL assigned December 9, 1998, as hearing date at 185 Washington Street, Newark, New Jersey.

At the hearing, the parties withdrew the matter *EDU* 11289-98 and agreed to settle the matter docketed as *EDS* 11421-98. On December 22, 1998, they submitted the attached Stipulation of Settlement, dated December 17, 1998, which sets forth the terms of the settlement which are fully incorporated herein.

I have reviewed the Stipulation of Settlement and Dismissal and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or by the signatures of their representatives; and

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

I, therefore, **ORDER** that the parties comply with the terms of the settlement and that these proceedings be **CONCLUDED**.

This decision is final pursuant to 20 *U.S.C.A.* §1415(i)(1)(A) and 34 *C.F.R.* §300.509 and is appealable by filing a complaint and bringing a civil action either in the Superior Court of New Jersey or in a District Court of the United States. 20 *U.S.C.A.* §1415(i)(2), 34 *C.F.R.* §300.511. If either party feels that this decision is not being fully implemented, this concern should be communicated in writing to the Director, Office of Special Education Programs.

Jan 5, 1999
DATE

MARGARET M. HAYDEN, ALJ

jb

Michaelene Loughlin, Esq.
Loughlin & Latimer
131 Main Street - Suite 235
Hackensack, NJ 07601
201/487-9797
Attorney for Petitioner

S.A.B., a minor, Petitioner, v. Englewood Board of Education, Respondent.	:	**OFFICE OF ADMINISTRATIVE LAW** OAL Doc. No.: EDS 11421-98 Agency Ref. No.: 99-2150E
A.B., a minor, and N.B., his guardian, Petitioners v. Englewood Board of Education, Respondent.	:	OAL Doc. No. EDU 11289-98N Agency Ref. No.: 522-11/98 **(Consolidated)** **Stipulation of Settlement**

S.A.B., petitioner, a minor, by his guardian, N.B., and the Englewood Board of Education, respondent, have voluntarily resolved the matters which led to the filing of this emergency petition for due process and hereby enter a stipulation of settlement which disposes of the issues as follows:

1. S.A.B. will be classified "Eligible for Special Education Services." An interim Individual Education Program ("IEP") will be agreed upon between the parties. N.B. will forward her changes to the Board's draft IEP as soon as feasible;

2 Respondent will arrange for N.B. to view the following potential intermim alternative educational placements for S.A.B. on Friday, December 11, 1998: Bergen County Alternative Middle School, Lodi, N.J., Holmstead School, Ridgewood, N.J. and Windsor

Academy, Paterson, N.J.; S.A.B. will be placed in one of these schools or other suitable school as soon as feasible;

3 The Board will incorporate N.B.'s corrections into the Social Evaluation prepared by the Child Study team;

4 The Board will provide an independent Neuro-psychiatric evaluation for N.B. to be performed by Sherry Barron-Seabrook, M.D. 315 East Northfield Road, Livingston, NJ 07039;

5 The Board will provide an independent child study team evaluation to be performed by the Bergen County Independent Child Study Teams, 141 Ayers Court, Teaneck, NJ 07666, if requested by N.B.

6 The Board will provide N.B. with after school tutoring at Liberty School, during the month of January, 1999, if requested by N.B.

7 Petitioner withdraws his petition for due process.

Loughlin & Latimer
Attorney for Petitioner

by: Michaelene Loughlin
Michaelene Loughlin, Esq.

Dated: 12/7/98

Mauro, Savo, Camerino & Grant, P.A.
Attorney for Respondent

by: Michael V. Camerino
Michael V. Camerino, Esq.

Dated: December 15, 1998

Loughlin & Latimer
131 Main Street Suite 235
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Michaelene Loughlin, Esq.
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(NJ and NY bars)
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Of Counsel
Elizabeth F. Defeis, Esq.
(NJ and NY bars)

December 18, 1998

Honorable Margaret M. Hayden
Administrative Law Judge
Office of Administrative Law
185 Washington Street
Newark, NJ 07102

Re: N.B. on behalf of a minor, S.A.B. v. Board of Education of the City of Englewood
OAL Doc. No. EDU 11289-98N; Agency Docket No. 522-11/98 &
S.A.B. v. Board of Education of the City of Englewood
OAL Doc. No. EDU 11421-98N; Agency Docket No. 99-2150E (Consolidated)

Dear Judge Hayden:

I enclose duplicate originals of the Stipulation of Settlement in the above captioned consolidated cases. If this stipulation meets with your approval, kindly issue your final decision under the EDS number incorporating this stipulation. The EDU is withdrawn as we stipulated on the record.

Thank you for your attention and assistance in this matter.

Respectfully,

Michaelene Loughlin

cc: Michael V. Camerino, Esq.
Norma Banks

3L

OAL DKT. NO. EDU 11289-98
AGENCY DKT. NO. 522-11/98

N.B., on behalf of minor child, S.A.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal* transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

February 9, 1999
Date of Mailing, February 9, 1999

* It is noted that this matter was withdrawn as part of the parties' settlement of the EDS portion of this consolidated case.

30-99 SEC

IN THE MATTER OF LAWRENCE JAMES,	:	
CHESILHURST BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
CAMDEN COUNTY.	:	DECISION
	:	

February 9, 1999

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
LAWRENCE JAMES, *CHESILHURST BOARD OF EDUCATION, CAMDEN COUNTY*	:	**Docket No.: C10-98**
	:	**DECISION**

PROCEDURAL HISTORY

This matter arises from a claim that respondent Lawrence James, a member of the Chesilhurst Board of Education (Board), violated the School Ethics Act, N.J.S.A. 18A:12-21 et seq. Specifically, Complainant Wadia Alwan, also a member of the Board, alleged that Mr. James violated N.J.S.A. 18A:12-24(b) by using his office to influence the hiring of an insurance broker, Associated Insurance Management, owned by the Mayor of Haddonfield in violation of N.J.S.A. 18A:12-24(a), (b), (c) and (f). The second paragraph of the complaint alleged that Mr. James switched the board's computer software contract from Edmunds to ICS, a company that is owned by Mr. James's friend who sits on the Camden County Human Relations Commission, which he serves as Executive Director in violation N.J.S.A. 18A:12-24(a), (b), (c) and (f). The third paragraph alleged that Mr. James transferred school funds from First Union Bank to Commerce Bank when First Union denied Mr. James a home equity loan for the sum he requested in violation of N.J.S.A. 18A:12-24(f). The fourth and fifth paragraphs of the complaint alleged sex discrimination against one of the employees of the Chesilhurst School District and a violation of the Sunshine Law.

At its meeting of November 24, 1998, the School Ethics Commission found probable cause to credit the allegation that Mr. James violated N.J.S.A. 18A:12-24(b) of the School Ethics Act by using his position to secure privileges for himself with First Fidelity, now First Union, Bank. The Commission found no probable cause and dismissed the remainder of the charges in paragraphs one, two, four and five. The Commission found that the material facts were not in dispute in the matter on which it found probable cause and therefore invited Mr. James to file a written submission setting forth the reasons that the Commission should not find him in violation of the School Ethics Act.

Mr. James filed his written submission on December 2, 1998. The Commission reviewed his response and considered it in rendering this decision on December 15, 1998. For the reasons set forth below, the Commission now concludes that Mr. James violated N.J.S.A. 18A:12-24(b) of the act and recommends that the Commissioner of Education impose a sanction of censure.

STATEMENT OF FACTS

The Commission finds the following material facts to be undisputed regarding he charge on which it found probable cause.

Regarding the First Union matter, the Commission found that Mr. James did not switch the Board's accounts from First Union because the bank turned him down for a home equity loan as originally alleged in the complaint. In fact, Mr. James did receive a home equity loan, and there are other plausible reasons for the change of banks. However, when First Union was First Fidelity, it turned Mr. James down for an unsecured loan. At that time, Mr. James asked the then Business Administrator for the Board, Abdi Gass, to intervene with the bank on his behalf. Mr. Gass then wrote a letter dated November 14, 1995, which set forth that Mr. James has been instrumental in making sure that the bank remains the custodian and fiscal agent for the schools' numerous accounts. It further indicated that the bank should reciprocate by advancing Mr. James a personal unsecured line of credit. The letter requested assistance to secure approval of the loan. It is directed to the head of unsecured loan processing. The letter copies Mr. James and Mr. Gass. Mr. Gass presented it to the Vice President of the bank and asked her to put the letter on her letterhead, sign it and forward it to the employee who could secure approval of Mr. James's loan. She refused to do so. Mr. James did not acquire the loan.

ANALYSIS

The Commission must now determine whether Mr. James violated N.J.S.A. 18A:12-24(b) of the School Ethics Act. This subsection sets forth:

> No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family, or others.

Mr. James denies that he asked Mr. Gass to write a letter, but admits to asking him to intercede on his behalf. Mr. James states that he never approved or agreed to what was done. The Commission accepts Mr. James's representation that he asked Mr. Gass to intercede, but did not ask him to write the letter. The content of the letter was apparently Mr. Gass's interpretation of Mr. James's request. Nevertheless, the Commission finds the request in and of itself to be inappropriate and in violation of the act.

The Commission strongly discourages board members from seeking favors from employees of the Board, especially personal favors such as this. When this conduct is coupled with the fact that the favor requested is to intercede with the bank at which the

Board's accounts are held, it becomes clear that Mr. James was attempting to secure unwarranted privileges for himself in violation of N.J.S.A. 18A:12-24(b) when he asked Mr. Gass to intercede on his behalf.

DECISION

For the foregoing reasons, the Commission finds that Mr. James violated N.J.S.A. 18A:12-24(b) by asking the Board's Business Administrator to intercede for him in acquiring an unsecured loan from the bank that held the Board's accounts. The Commission finds that the appropriate penalty for this violation is a censure. This penalty takes into account that using one's position to secure unwarranted privileges is a gross violation of the act. A censure will inform the public of his conduct and put other board members on notice that there will be serious consequences when a Board member seeks such an inappropriate favor from an employee of the Board. The Commission also recognizes that a harsher penalty would have been more appropriate if the evidence was clear that he instructed Mr. Gass to write the letter in question.

Upon adoption by a formal resolution of the School Ethics Commission, this matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction only, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C10-98

Whereas, the School Ethics Commission has considered the pleadings, the documents, submitted in support thereof and the testimony of the parties; and

Whereas, the Commission now finds that Mr. Lawrence James violated the School Ethics Act and recommends that the Commissioner of Education impose a penalty of censure; and

Whereas, the Commission has reviewed the proposed decision of its staff; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 15, 1998.

Lisa James-Beavers
Executive Director

AGENCY DKT. NO. 561-12/98

IN THE MATTER OF LAWRENCE JAMES,	:	
CHESILHURST BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
CAMDEN COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission have been reviewed. Initially, it must be emphasized that pursuant to *N.J.S.A.* 18A:12-29(c), the determination of the Commission as to violation of the Act is **not reviewable by the Commissioner** herein. Only the School Ethics Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed following a finding of a violation by the School Ethics Commission. Therefore, this decision is restricted solely to a review of the recommended penalty and its implementation.

No comments with respect to the Commission's recommended penalty were submitted to the Commissioner by the parties.

Upon thorough review of the full record in this matter, the Commissioner determines to accept the Commission's recommendation that censure is the appropriate penalty for the reasons expressed in the Commission's decision finding that a violation of the School Ethics Act occurred.

IT IS HEREBY ORDERED that Lawrence James be censured as a school official found to have violated the School Ethics Act.*

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

IN THE MATTER OF LAWRENCE	:	
JAMES, CHESILHURST BOARD	:	**RESOLUTION OF CENSURE**
OF EDUCATION, CAMDEN	:	
COUNTY.	:	
	:	

WHEREAS, Chesilhurst Board of Education member Lawrence James was found by the School Ethics Commission to have asked the Board's Business Administrator to intercede for him in acquiring an unsecured loan from the bank that held the Board's accounts; and

WHEREAS, the School Ethics Commission further concluded that such conduct violated *N.J.S.A.* 18A:12-24(b) of the School Ethics Act; and

WHEREAS, considering the facts determined during the course of the investigation, the Commission recommended that the Commissioner of Education impose a penalty of censure for Mr. James' violation; and

WHEREAS, no comments were submitted to the Commissioner contending that the sanction should not be imposed or that it should be increased due to the serious nature of the violation; and

WHEREAS, the Commissioner, upon review of the record, has concluded that censure is the appropriate penalty for the aforementioned violation for the reasons set forth in his decision; now therefore

BE IT RESOLVED, that Lawrence James is hereby censured as a school official found to have violated the School Ethics Act; and

BE IT FURTHER RESOLVED that the Chesilhurst Board of Education is ordered to read this resolution at its next public meeting following the School Ethics Commission's adoption and to post it in such places as the Board posts its public notices.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 9, 1999
Date of Mailing, February 9, 1999

30-99

EDU #8969-98 and #10489-98 (consolidated)
C # 181-99
SB # 30-99

IN THE MATTER OF THE TENURE HEARING OF GREGORY VEREEN, SCHOOL DISTRICT OF THE TOWNSHIP OF LAWRENCE, MERCER COUNTY,

AND

IN THE MATTER OF THE TENURE HEARING OF THEODORE PRUSAKOWSKI, SCHOOL DISTRICT OF THE TOWNSHIP OF LAWRENCE, MERCER COUNTY.

STATE BOARD OF EDUCATION

DECISION

Decision on motion by the Commissioner of Education, February 22, 1999

Decided by the Commissioner of Education, June 9, 1999

Decision on motion by the State Board of Education, October 6, 1999

For the Petitioner-Respondent, Parker, McCay & Criscuolo (James F. Schwerin, Esq., of Counsel)

For the Respondent-Appellant, Bergman & Barrett (Michael T. Barrett, Esq., of Counsel)

The Board of Education of the Township of Lawrence (hereinafter "Board") certified tenure charges of incapacity and excessive absenteeism against Gregory Vereen and Theodore Prusakowski (hereinafter "respondents"), tenured custodians in the district. As stipulated by the parties, Vereen had been employed by the Board as a custodian since October 1979. He suffered injuries to both of his knees in June 1996 while on the job and received medical treatment authorized by the Board's workers'

compensation carrier. It was further stipulated that his absences were related to the workers' compensation matter. He returned to work, in a limited capacity, in late 1998 or early 1999.[1]

On February 1, 1999, the Administrative Law Judge ("ALJ") issued an order dismissing the tenure charges of excessive absenteeism. The Commissioner granted the Board's request for interlocutory review of that determination, and, on February 22, 1999, he set aside the ALJ's order and directed that the matter proceed to a hearing on the merits of the Board's charges for both incapacity and excessive absenteeism.

On April 23, 1999, following a hearing, the ALJ concluded that the Board had demonstrated by a preponderance of the credible evidence that the extended absences of the respondents rose to the level of unbecoming conduct. The ALJ found that the respondents' absences had had a negative effect on the operation of the district's schools, and he concluded that the appropriate penalty for such conduct was dismissal of the respondents from their tenured positions. In addition, the ALJ concluded that the respondents were incapacitated as a matter of law unless they could demonstrate to the contrary in the immediate future.

On June 9, 1999, the Commissioner of Education adopted the ALJ's recommended decision and directed that the respondents be dismissed from their positions. In so doing, the Commissioner observed that respondent Vereen "has not returned to the District in full capacity, although he is, apparently, back at work, 'on a

[1] Although the Board suspended Vereen from his custodial position when it voted to certify the instant tenure charges to the Commissioner in September 1998, the record indicates that he returned to work on a part-time basis shortly thereafter. According to the counsel for the respondents, "Vereen is back at work now, on a modified or work hardening schedule to determine whether he will be able to return to his full time duties....[T]he petitioner Board is not paying any salary to either respondent and has not for some time. They are being paid under workers' compensation." Letter from Michael T. Barrett, Esq. to Administrative Law Judge Bruce R. Campbell, dated March 10, 1999.

modified or work hardening schedule to determine whether he will be able to return to his full time duties.' (Respondents' Letter Memorandum, March 10, 1999 at p. 1) There is no indication in the record when, or even whether, Respondent Vereen will be able to resume his duties in full capacity." Commissioner's Decision, slip op. at 12-13.

The Commissioner agreed with the ALJ that the Board had demonstrated a negative effect from the respondents' absences and that the appropriate penalty was dismissal of the respondents from their tenured employment, "notwithstanding that their absenteeism constituted a legitimate use of sick leave and the possibility remains that one, or both, of them might ultimately, at some point not presently foreseeable, once again become physically capable of performing their duties." Id. at 13. In addition, the Commissioner noted that although the ALJ had equated excessive absenteeism with unbecoming conduct, the Board had not charged the respondents with unbecoming conduct.

The respondents filed the instant appeal to the State Board. Prusakowski subsequently withdrew his appeal. Consequently, the matter before us is now limited to the appeal filed by respondent Vereen. In a decision dated October 6, 1999, we directed that the record be supplemented with documentation from Vereen's treating physician "with regard to his medical status and ability to return to full-time employment in the district at the time of his dismissal by the Commissioner of Education."

On October 18, 1999, Vereen submitted the requested documentation, which included reports from his treating physician, Dr. Eric Gokcen. In a response filed thereto, the Board maintained that "such medical information is irrelevant to the

excessive abseenteeism charge which was the prime basis for Vereen's dismissal by the Commissioner." Letter from James F. Schwerin, Esq., dated October 19, 1999.

After a thorough review of the record before us as supplemented on appeal,[2] we reverse the determination of the Commissioner to dismiss Vereen from his tenured employment.

The medical reports prepared by Dr. Gokcen, which were included in the supplemental materials submitted on behalf of respondent Vereen, show a steady improvement in Vereen's condition following knee surgery in 1998.[3] Dr. Gokcen cleared Vereen to return to work part-time in December 1998. In a letter to the counsel for the Board in January 1999, Dr. Gokcen confirmed that Vereen "will be able to return to his full physical capacity at some point in the foreseeable future. Presently, both he and I and his rehabilitation nurse are in the process of progressively getting him back to increasing levels of employment. Please note that with the type of surgery that he had, it is not uncommon to take six to twelve months for return to work status."

On April 7, 1999, Dr. Gokcen recommended that Vereen increase his work hours to five days a week, four hours per day. In a report dated June 2, 1999, Dr. Gokcen recommended that Vereen "continu[e] with his work duties and increas[e] them to one day a week at eight hours and remaining days at four hours per day." In a report dated June 30, 1999, Dr. Gokcen indicated that Vereen "appears to be doing fairly well. He

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[2] We note that the record before us does not include a transcript of the hearing held in the Office of Administrative Law in this matter.

[3] Counsel for Vereen relates in his appeal brief that: "Respondent was initially injured in June, 1996. He underwent authorized conservative treatment related to his right knee, the situs of the injury. When that treatment was ineffective, surgery was recommended. The Petitioner's Workers' Compensation carrier refused to provide surgery. Respondent had to fight for months to obtain the authorization for surgery. Finally, Respondent was compelled to apply to the division of Workers' Compensation for court approval of the surgery which was obtained in November of 1997." Appeal Brief, at 7.

was able to tolerate 24 hrs. of work per week....I feel that he may be able to increase the hours as his knee continues to improve and I anticipate that the knee should continue to improve for the next year."

In determining the appropriate penalty, it is necessary to consider the nature and gravity of the offense under all the circumstances involved, mitigating and extenuating circumstances, and any injurious effect the conduct may have on the maintenance of discipline and the proper administration of the school district. In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967). Although excessive absenteeism may be found to warrant dismissal of a tenured staff member even when the absences in question were for legitimate medical or health reasons, e.g., State-Operated School District of Jersey City v. Pellecchio, decided by the Commissioner of Education, 92 N.J.A.R.2d (EDU) 267, aff'd by the State Board of Education, 93 N.J.A.R.2d (EDU) 30, we cannot ignore the fact that Vereen's absences in this instance were the result of injuries he had suffered on the job and that he was receiving medical treatment authorized by the Board's workers' compensation carrier.

The record further reveals that Vereen had returned to work on a part-time basis and that he was gradually increasing his work hours pursuant to his doctor's instructions. There is no indication in the record before us that he was uncooperative or otherwise recalcitrant in his dealings with the Board during the period of his absence. See In the Matter of the Tenure Hearing of Robert C. Bates, decided by the State Board of Education, December 3, 1986, aff'd, Docket #A-2700-86T7 (App. Div. 1987). It is also noteworthy that Vereen had been employed by the Board for 17 years at the time he was injured on the job in 1996, and the instant tenure charges relate solely to

absences resulting from those injuries. Finally, while we do not diminish the importance of the Board's ability to maintain its schools, we recognize that Vereen was not a teaching staff member and that his absences did not directly impact upon instruction in the district.

Therefore, upon consideration of all the circumstances involved, we conclude that dismissing Vereen from his tenured position for excessive absenteeism would not be appropriate in this instance.

We turn therefore to the tenure charge alleging incapacity. "'Incapacity' as identified in N.J.S.A. 18A:6-10 relates to the inability to perform a position, irrespective of the cause of the inability to work." In the Matter of the Tenure Hearing of Stanley, decided by the Commissioner of Education, 95 N.J.A.R.2d (EDU) 495, 498. Under the circumstances, we find that the Board has failed to demonstrate by a preponderance of the credible evidence that Vereen is incapable of fulfilling his duties as a custodian. See In the Matter of the Tenure Hearing of William Gramlich, decided by the Commissioner of Education, June 27, 1986, aff'd by the State Board of Education, November 7, 1986, aff'd, Docket #A-1934-86T8 (App. Div. 1988).

As previously stated, the medical reports in the supplemented record reveal that Vereen had been making steady progress towards recovering from his injuries and had gradually been increasing his work hours. The prognosis offered by Dr. Gokcen was for a return to full physical capacity. Compare with In the Matter of the Tenure Hearing of Margaret McCoy, decided by the Commissioner of Education, 93 N.J.A.R.2d (EDU) 297 (incapacity demonstrated where there was little prospect for improvement of teacher's condition). We stress in that regard that the Board has provided no evidence other than

the fact of Vereen's absence to support its charge of incapacity. Indeed, the Board acknowledges that Vereen returned to work on a part-time basis, and it does not contend that he was not capable of fulfilling his duties during that period. Nor has the Board provided any evidence contrary to Dr. Gokcen's reports that would indicate that Vereen is not capable of making a full recovery from his injuries. Under these circumstances, we conclude that incapacity has not been demonstrated.[4]

Hence, on the basis of the record as supplemented on appeal, we reverse the decision of the Commissioner to dismiss respondent Vereen from his tenured employment. We therefore direct the Board to reinstate Vereen to his tenured custodial position with back pay and other emoluments, less mitigation, which would include any moneys he received as the result of the Workers' Compensation proceedings. See, supra, note 1.

Attorney exceptions are noted.

July 10, 2001

Date of mailing JUL 12 2001

[4] We reject the Board's contention in its exceptions to the Report of our Legal Committee that an absence of more than one year should create a presumption of incapacity and that the burden of proof in such cases "should shift to the employee to demonstrate a reasonable likelihood of ability to perform the job duties in the reasonably near future." Board's Exceptions, at 3. We stress that it is well established that a district board has the burden of proving the truthfulness of tenure charges by a preponderance of the credible evidence. In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989), certif. den., 121 N.J. 615 (1990). See In re Polk License Revocation, 90 N.J. 550, 560-61 (1982); Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).

31-99 SEC

IN THE MATTER OF KATHERINE MALLETTE,	:	
JACKSON TOWNSHIP BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, OCEAN COUNTY.	:	DECISION
	:	

February 9, 1999

IN THE MATTER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
OF	:	
	:	**Docket No.: C09-98**
KATHERINE MALLETTE,	:	
JACKSON TOWNSHIP	:	
BOARD OF EDUCATION	:	**DECISION**
OCEAN COUNTY	:	
	:	

PROCEDURAL HISTORY

This matter arises from a complaint filed by Jackson Township Board members Joy Ann Harmer, Marvin Krakower, Chuck Murphy and Twila Rust on February 23, 1998. Therein they alleged that Katherine Mallette, a Jackson Township board member, participated in discussions and closed session meetings concerning the Board's purchase of property when one of the parcels was owned by her brother-in-law in violation of the School Ethics Act, N.J.S.A. 18A:12-21 et seq. They also alleged that she wrongfully participated in discussions concerning the selection of an auditor. The complainants also alleged that Board members Ted Koch and Stephen Chisholm violated the act when they assisted Ms. Mallette in trying to persuade the Board to purchase her brother-in-law's property. Last, the complainants alleged that Katherine Mallette and Ted Koch violated the act when they met with the Transit Workers Union (TWU).

Ms. Mallette filed her answer with the School Ethics Commission on May 29, 1997, admitting to participating in some discussions, but denying that she violated the School Ethics Act. Respondents Ted Koch and Stephen Chisholm also denied having violated the act in their answers. The Commission advised the parties that it would discuss this matter at its July meeting. All of the parties attended the meeting in July except for Stephen Chisholm, who became unable to attend when the Commission had to change the date of the meeting to July 30, 1998.

At the Commission's October 26, 1998 meeting, the Commission found no information upon which to base a finding that Ms. Mallette attempted to secure unwarranted privileges or advantages for her brother-in-law. Therefore, it found no probable cause and dismissed the charge that Ms. Mallette violated N.J.S.A. 18A:12-24(b). The Commission similarly dismissed the charges against Ms. Mallette regarding her vote on the auditor and the meeting with the TWU as not setting forth facts upon which it could base a finding of probable cause. In addition, the Commission found no probable cause and dismissed all charges against Ted Koch and Stephen Chisholm. However, the Commission found probable cause to credit the allegations that Ms.

Mallette violated N.J.S.A. 18A:12-24(c) when she participated in Board meetings in which her brother-in-law's property was discussed on July 29, 1997, December 16, 1997.

The Commission determined that the material facts of the case were undisputed. Thus, rather than transmit the case to the Office of Administrative Law for a hearing, the Commission invited the parties to file written statements setting forth whether Ms. Mallette should be found in violation of the School Ethics Act. The Commission received timely statements from Ms. Mallette and Mr. Murphy, on behalf of the complainants, and considered them in rendering this decision at its meeting of December 15, 1998. The Commission also received a written statement from Mr. Chisholm and considered it in rendering this decision as well.

FACTS

The Commission finds that the facts upon which it bases its finding of probable cause are undisputed. Respondent Katherine Mallette is married to the brother of George Glory's wife. Mr. Glory is thus her brother-in-law. George Glory's corporation, Pleasant Grove, Inc., owns 60 acres of property on West Pleasant Grove Road. When the Board was seeking property on which to build a school in 1997, the Board considered Mr. Glory's land in addition to several other parcels. Ms. Mallette participated in all closed session and public meetings and discussions concerning the Board's purchase of property. Ms. Mallette specifically participated in meetings on the purchase of property in which Mr. Glory's land was either directly or indirectly discussed on the dates of July 29, 1997 and December 16, 1997.

ANALYSIS

As set forth in the procedural history in its probable cause determination, the Commission previously rejected the complainants' argument that Ms. Mallette should not have participated in any discussions involving property, whether Mr. Glory's land was discussed or not. Complainants ask the Commission to reconsider this conclusion and its statement in its probable cause determination that because Ms. Mallette was board president at the time she should have been able to participate on an issue as important as the location of a new school. The Commission declines to reconsider its prior conclusions and now proceeds to determine whether there is sufficient information from which to conclude that Ms. Mallette violated N.J.S.A. 18A:12-24(c) when she participated in discussions concerning Mr. Glory's land.

The Commission must now determine whether Ms. Mallette acted in her official capacity in a matter in which she had a personal involvement that might reasonably be expected to impair her objectivity or independence of judgment as prohibited by section 24(c). Ms. Mallette makes several points in her response to the finding of probable cause. First, she corrects some facts set forth in the probable cause determination. She indicates

that she and Mr. Glory do not share the same father-in-law as the Commission set forth and that Mr. Glory did not say that they had known each other since the second grade. Mr. Glory's testimony may have been inaccurately recorded. Since neither fact is material to the ultimate finding in the case and Ms. Mallette says that she met Mr. Glory when she was engaged to her husband in approximately September 1981, the Commission accepts her representations as fact.

Next, Ms. Mallette charges Mr. Krakower with lying under oath when he stated that he did not know that she was related to Mr. Glory. The Commission recognizes that there is a clear dispute as to whether Ms. Mallette advised the Board at its July 29, 1997 meeting that she is related to Mr. Glory. Complainants say that she did not advise the Board, but she and the other named respondents state that she did. The complainants have asked in their submission that the Commission interview more witnesses in order to resolve this issue. However, the Commission declines to do so. The Commission did not and could not base its finding of probable cause on Ms. Mallette's alleged failure to disclose her relationship to Mr. Glory. A failure to disclose a relationship in and of itself does not constitute a violation of the act unless it is the failure to disclose it on a disclosure form pursuant to N.J.S.A. 18A:12-25. Therefore, this dispute is not material to the Commission's determination of whether Ms. Mallette violated section 24(c) of the School Ethics Act.

Ms. Mallette makes several other points. She takes issue with the Commission's statement that her agreement not to vote on George Glory's property is a tacit admission that she knew that she had a conflict of interest. She states that she agreed not to vote on Mr. Glory's property because of how it may be perceived in public; however, she believed that she had a right to vote. Further, she denies having advocated for the purchase of Mr. Glory's property at any Board meetings, particularly the ones noted. She then proceeds to explain her participation in each of the meetings as it relates to the discussion of Mr. Glory's property in an attempt to show the Commission that George Glory's land was not discussed in any of the meetings. The Commission finds Ms. Mallette's arguments to be persuasive only with regard to the meeting of January 5, 1998.

Regarding Ms. Mallette's argument that she believed that she could vote, but agreed not to vote because of the public's perception, the Commission has stated many times that the public's perception is extremely important in determining whether the act has been violated. Section 24(c) is phrased so that the emphasis is on whether the public might reasonably expect to impair a school official's objectivity, not whether the school official believes that she can be objective. Further, the Legislature's findings and declarations set forth at N.J.S.A. 18A:12-22(a) that:

> In our representative form of government it is essential that the conduct of members of local boards of education and local school administrators hold the respect and confidence of the people. These board members and administrators must avoid conduct which is in violation of

> their public trust or which creates a justifiable impression among the public that such trust is being violated.

Thus, the Commission recognizes that the purpose of the act is to foster public trust in school officials and this requires giving due consideration to the public's perception. With this in mind, the Commission will discuss the dates of each of the meetings on which the Commission found probable cause.

At the July 29, 1997 Board meeting, Ms. Mallette says that at this meeting the West Pleasant Grove parcels were introduced and the minutes reflect that the parcel could not be considered for the construction of the elementary school at hand and could only be considered in the future because the parcel did not meet the 208 water plan. However, she states that the memorandum introducing the parcel was acknowledged as received but the parcel was not discussed. She goes on to state, "No discussion of Mr. Glory's or the West Pleasant Grove properties were discussed." The Commission finds her statement to contradict the minutes of the meeting. Clearly, the parcel was discussed, and although it may have been ruled out at the time, it was kept on the list of potential sites for future consideration. Ms. Mallette appears to be confusing the notion of advocating for the property with improperly discussing the property because of the impression created by her participation. The Commission already said she that she did not attempt to use her position to secure unwarranted privileges for others when it dismissed the charges under N.J.S.A. 18A:12-24(b). She did not advocate for Mr. Glory's property at this meeting, but the minutes show that it was discussed, if only to introduce it and rule it out.

At the December 16, 1997 meeting, Ms. Mallette and Mr. Koch presented the Board a chart comparing of all of the properties based on the information gathered. The West Pleasant grove site was noted as the most cost-effective site on that chart. Mr. Chisholm notes in his submission that he said that the West Pleasant Grove site was the least costly at the meeting and Ms. Mallette did not make that statement. The Commission does not find it important that Ms. Mallette made the statement, as she had made the cost comparisons on the chart presented to the Board. Ms. Mallette notes in her submission that the property was ultimately disqualified and she asserts that no discussion on her chart took place. The minutes set forth:

> It was the recommendation of both Mr. Elms and Mr. Campbell that the Kelly property be selected over the Hyson Road property conditioned on the outcome of the January 5th meeting.
>
> Mrs. Mallette then presented the board with a comparison of costs she and Mr. Koch had put together as shown on the attached sheet. Based on their analysis, the Pleasant Grove property works out to be the most cost-effective site for new construction. Board members were asked to review the cost comparison for future discussion.

As Ms. Mallette notes, she did not respond to the request for a straw poll vote on the Kelly property.

Again Ms. Mallette appears to confuse the sections that she was charged with violating. The Commission can agree that based on the memorandum and the minutes, Ms. Mallette did not try to secure unwarranted privileges for Mr. Glory in violation of N.J.S.A. 18A:12-24(b). However, the Commission cannot conclude that his West Pleasant Grove Road property was not discussed at the meeting she attended as she has been charged with under N.J.S.A. 18A:12-24(c). The minutes show clearly that it was discussed and Mr. Chisholm's submission confirms as much.[1] The fact that it was ultimately ruled out for this project because of the sewer issue is of no consequence to the determination of whether Ms. Mallette participated in a meeting in which Mr. Glory's property was discussed.

Based on the foregoing, the Commission finds Ms. Mallette to have violated N.J.S.A. 18A:12-24(c) of the School Ethics Act for acting in her official capacity in a matter in which she had a personal involvement that might reasonably be expected to impair her objectivity or independence of judgment.

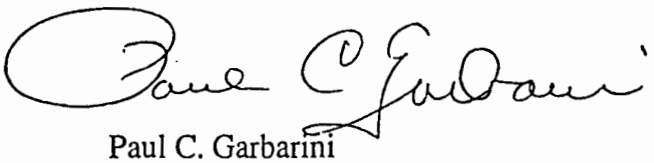
With regard to the January 5, 1998 meeting, the Commission noted in its probable cause determination that Ms. Mallette discouraged a suggestion to purchase property other than that of George Glory. She offered the 110-acre parcel of West Pleasant Grove Road that did not belong to Mr. Glory as an alternative. However, the Board had always referred to the property on West Pleasant Grove as one contiguous parcel, thus, giving the appearance that she was advocating for Mr. Glory's property. Ms. Mallette clarifies that she only asked Mr. Vena if the land could be sewerable with a septic system installed. She states that Mr. Vena replied that it could not be and that was the end of the discussion. The Commission has found no evidence to refute Mr. Glory's testimony that he has no ownership interest in the parcel contiguous to his that was discussed on January 5, 1998. Further, the minutes do not provide additional information to contradict Ms. Mallette's representations that Mr. Glory's land was not discussed at that time. Therefore, the Commission dismisses the charge that Ms. Mallette violated N.J.S.A. 18A:12-24(c) in connection with the January 5, 1998 meeting.

[1] Ms. Mallette sets forth in her submission that she had a discussion with a board member outside of the meeting in which this board member made an offer to her that she believes was in violation of the School Ethics Act. The Commission will not address such an allegation in the context of a statement in response its probable cause determination. If Ms. Mallette believes that this school official violated the act, then she can file a complaint with the Commission.

CONCLUSION

For all the foregoing reasons, the Commission concludes that Katherine Mallette violated N.J.S.A. 18A:12-24(c) of the School Ethics Act when she participated in discussions in which her brother-in-law's property was discussed. As a result of the above, the Commission recommends that the Commissioner of Education impose the lowest sanction of reprimand. In making the recommendation, the Commission has considered the fact that Mr. Glory is Ms. Mallette's brother-in-law in the loosest definition of the term so that they are related by marriage, but not closely. Further, as set forth, the Commission found that she participated in discussions on property, but did not find information that she attempted to persuade the Board to purchase Mr. Glory's property during the discussions.

Upon adoption of this decision by a formal resolution of the School Ethics Commission, the matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction only pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.



Paul C. Garbarini
Chairperson

Resolution Adopting Decision -- C09-98

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof and has considered the testimony of the parties; and

Whereas, the Commission found probable cause to credit the allegations in the complaint and invited respondent to file a written statement in response; and

Whereas, the Commission has reviewed respondent's written statement and now concludes that respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act; and

Whereas, the Commission has reviewed the proposed decision of its staff setting forth the reasons for its conclusion; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby finds that Katherine Mallette has violated N.J.S.A. 18A:12-24(c) of the School Ethics Act and recommends that the Commissioner impose a sanction of reprimand; and

Be it Further Resolved that the Commission adopts the enclosed decision referenced as its decision in this matter.

Paul C. Garbarini, Chairman

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 15, 1998.

Lisa James-Beavers
Executive Director

[c0998/c:lisa/decisions]

IN THE MATTER OF KATHERINE MALLETTE,	:	
JACKSON TOWNSHIP BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, OCEAN COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission ("Commission") have been reviewed. Comments were filed by Complainants, as was a reply thereto by respondent. Initially, it must be emphasized that pursuant to *N.J.S.A.* 18A:12-29(c), the determination of the Commission as to violation of the Act is **not reviewable by the Commissioner** herein. Only the School Ethics Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed following a finding of a violation by the School Ethics Commission. Therefore, this decision is restricted solely to a review of the recommended penalty and its implementation.

Complainant Chuck Murphy submitted comments on behalf of himself and the other Complainants in this matter. Complainants strongly urge that the Commissioner impose a stronger penalty because they believe that the suggested sanction of reprimand is insufficient to adequately correct respondent's behavior. They also contend, among other things, that the lightness of the recommended penalty is inconsistent with the meaningful efforts needed to uphold the law. Respondent Mallette's response to Complainants' comments expresses deep disappointment that Mr. Murphy continues to argue his case, notwithstanding the fact that all but one of the charges filed against Mr. Chisholm, Mr. Koch and herself were dismissed. She further indicates that until she received a copy of Complainants' comments on January 4, 1999, she would not have voiced her feelings to the Commissioner regarding the School Ethics Commission's decision recommending that she be issued a reprimand for the violation which the Commission found because until that point she had determined to accept the outcome.

Respondent's comments essentially reiterate or recast the clarification of the facts she previously put forth to the Commission relative to the two meetings wherein it was found she had participated in discussions in which her brother-in-law's property was discussed. Respondent's comments also provide additional clarification on several other points.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that reprimand is the appropriate penalty in this matter for the reasons expressed in the Commission's decision, wherein it was found that respondent violated *N.J.S.A.* 18A:12-24(c) when she participated in discussions in which her brother-in-law's property was discussed, but that she did not attempt to persuade the Jackson Township Board of Education to purchase that property during the discussions. In so ruling, the Commissioner notes that the Commission considered and addressed all aggravating and mitigating factors raised by the parties in reaching its penalty determination, and that the Commission was in the optimum position to make such determinations in that it had the opportunity to fully investigate the facts presented. Therefore, its recommended penalty in this matter will not be disturbed absent a compelling basis to do so.

Accordingly, IT IS HEREBY ORDERED that Katherine Mallette be reprimanded as a school official found to have violated the School Ethics Act.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 9, 1999
Date of Mailing, February 9, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

32-99

IN THE MATTER OF THE TENURE	:	
HEARING OF JIMMY DYKES,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL	:	DECISION
DISTRICT OF THE CITY OF NEWARK,	:	
ESSEX COUNTY.	:	
	:	

SYNOPSIS

District certified tenure charges of unbecoming conduct against respondent physical education teacher for allegedly participating in a scheme to defraud the State Health Benefits Program (SHBP) by conspiring with a doctor to submit claims for psychological services purportedly rendered.

ALJ determined that the record clearly supported a conclusion that respondent was aware of the improprieties and he knowingly and willingly engaged in conduct intended to defraud the SHBP by referring the doctor to his wife despite misgivings, by allowing false claims for services to remain unchallenged and by failing to act to rectify the situation. Thus, the ALJ concluded that the District sustained its burden of proving the charges by a preponderance of evidence. Moreover, because of the seriousness of the charges, the ALJ concluded that dismissal was warranted. ALJ ordered respondent terminated from his tenured employment.

Upon careful and independent examination and study of the record, including the parties' exception arguments and the transcripts of the hearing, the Commissioner determined to affirm the conclusion of the ALJ that the District established its charge of unbecoming conduct on the part of the within respondent necessitating his removal from his tenured position. Commissioner concluded that the District established said charge as the quality of the evidence herein leads a cautious mind to the conclusion that respondent engaged in knowing and intentional participation in conduct with a purpose to defraud. Moreover, despite respondent's apparently unblemished 13-year record, the Commissioner determined that the charge established herein, under the particular circumstances of this matter, was sufficiently flagrant to warrant respondent's dismissal. (*Redcay*) Commissioner ordered respondent dismissed from his tenured position as of the date of this decision and transmitted the matter to the State Board of Examiners for action, as that body deems appropriate.

February 11, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1747-97

AGENCY DKT. NO. 584-12/96

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

Petitioner,

v.

JIMMY DYKES,

Respondent.

Philip E. Stern, Esq., for Petitioner
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Diane E. Ristaino, Esq., for Respondent
(David Tykulsker & Associates)

Record Closed: October 19, 1998 Decided: November 19, 1998

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

Petitioner, State Operated School District of the City of Newark brought tenure charges against Respondent, Jimmy Dykes, alleging conduct unbecoming a teacher so as to require that his employment be terminated. The charges were predicated on

Respondent's intentional participation in a scheme to defraud the State Health Benefits Program (SHBP) by conspiring with Dr. Carl H. Lichtman (Lichtman) to submit claims for psychological services purportedly rendered. According to Petitioner, Respondent allegedly provided information required and utilized to submit fraudulent claims to the insurance carrier for payment for psychological services. Respondent was to receive a share of the fees collected.

The charges were promulgated and served on Respondent on November 18, 1996; Respondent was duly notified of his right to submit a Statement of Position and Evidence within 15 days; the charges were certified on December 6, 1996. Respondent was suspended without pay on December 7, 1996. An answer was filed on January 31, 1997 and the case was transmitted to the Office of Administrative Law (OAL) on February 10, 1997, along with several others of a similar nature. This case was consolidated with those others and scheduled for hearing in September 1997.

On April 12, 1997, Respondent's pay was reinstated pursuant to *N.J.S.A.* 18A:6-14. Prior to the scheduled hearing date, the attorney for the Respondents requested an adjournment in order to protect his clients' Fifth Amendment rights; the consolidated matter was placed on the inactive list. As a result of this request, Respondents agreed to waive their right to be paid during the period of adjournment.

On or about December 12, 1997, Respondent Jimmy Dykes retained a new attorney. Subsequent to that, an application to sever this case from the consolidated case and restore it to the active list was granted; Respondent's salary was restored. The hearing was held on July 22 and 23, 1998. Both parties requested an opportunity to submit written summations. Consequently, the record closed on October 19, 1998.

FINDINGS OF FACT

Based on the evidence presented at the hearing as well as on the opportunity to observe the witnesses and assess their credibility, I make the following findings of fact, which are essentially undisputed, in this matter.

1. Respondent Jimmy Dykes is a physical education teacher who has been employed in the Newark school system for 13 years.

2. All of Respondent's annual evaluations were satisfactory.

3. Lichtman perpetrated insurance fraud upon the SHBP by submitting insurance claims for services rendered to various teachers employed by the District. In fact, those services were never rendered.

4. Respondent's wife, Paula Yancy-Dykes, entered into a plea agreement in which she pleaded guilty to theft by deception and forfeited her position as a teacher employed by the Petitioner.

5. Respondent became aware of Lichtman through his friend Rossi Kearson.

6. Respondent did not have insurance coverage for the services Lichtman provided.

7. There were no insurance claims submitted to Respondent's carrier on behalf of Mr. Dykes in furtherance of Lichtman's scheme.

8. Respondent's wife provided the personal information requested by Lichtman in furtherance of his scheme.

DISCUSSION AND CONCLUSIONS

The issues to be determined are whether Respondent engaged in conduct unbecoming a teacher and, if so, the appropriate penalty to be imposed. The charges against Respondent are predicated on his alleged participation in the Lichtman scheme to defraud SHBP. Respondent asserts that he did not give Lichtman any information with the intent of participating in an insurance fraud scheme; moreover, Respondent asserts that he never received money from Lichtman nor did any benefits inure to Dr. Lichtman as the result of any fraudulent claim filed on Respondent's behalf. Consequently, Respondent urges that the District has failed to prove that he participated in the insurance fraud scheme.

While this assertion may have some validity if the definition of "participation [in the] insurance fraud scheme" is narrowly limited to the giving of information to enable Lichtman to file false claims and the direct receipt of financial benefit as a result of providing such information, a broader definition of the term "participation in the insurance fraud scheme" as well as consideration of a teacher's obligation to conduct himself with integrity leads to a different conclusion.

Respondent and his wife both testified that it was he who first learned of Lichtman; moreover, the initial telephone contact was between Lichtman and Respondent, who provided Lichtman with certain information about his wife. Although Respondent contends otherwise in his post hearing submission, the record is clear that he was uncomfortable with the scheme initially when he heard about it from his friend Kearson and after he spoke to Lichtman. Moreover, in his statement to the investigators he indicated that Kearson told him that "he knew of a psychiatrist that you could have a couple of sessions with over the phone and after speaking with the doctor several times you would recieve [sic] a check."

I am cognizant of the problems surrounding the reliability of this sworn statement because, as demonstrated during the hearing, it is not a transcript; it is a synthesis of the statements of both Mr. and Mrs. Dykes regarding their involvement in the matter. There was, however, ample opportunity for counsel to probe the content of the statement. Counsel for Respondent availed herself of the opportunity; however, this specific statement was never questioned. When this statement is considered together with the statements that he felt the scheme was shaky, it is very clear that Respondent had serious reservations about Lichtman and his scheme. Moreover, the use of the words "a couple of sessions . . . over the phone" belies the testimony that Respondent thought he was participating in a study or workshop. In addition, it is inconceivable that a person occupying the position of teacher could believe that he would receive legitimate compensation for a few telephone conversations. Notwithstanding his doubts about Lichtman and his scheme Respondent still encouraged his wife's participation by handing the phone over to her.

Respondent's active participation in the interview by the state investigators undercuts his assertion that he was uninvolved and unaware of the fraud. Although the record is clear that no claims were paid on behalf of Respondent, it is equally clear that he and his wife received explanation of benefit (EOB) statements for claims submitted on his behalf. It strains credulity to think that he never saw the forms or discussed the contents with anyone including his wife, especially in light of his discomfort with the situation. Moreover, it is inconceivable to think that, at minimum, no questions arose at the request for insurance information to participate in a study or workshop.

The record is equally clear that Respondent was aware that his wife received a check from Lichtman. Respondent was also aware that false claims had been submitted on his behalf, but, according to his testimony, he did nothing to clarify the situation because no money had been derived from the claims. In addition, he testified that although he told his wife to call Lichtman and/or the carrier to find out what was going on, he did not follow up on the false claims because the check had already been deposited.

Based on the foregoing, I **CONCLUDE** that Respondent was aware that there was something wrong with the Lichtman proposal. Moreover, he admitted at the hearing that he probably had some responsibility to do something, although he testified that telling his wife to call the carrier twice absolved him of that responsibility.

Viewed in juxtaposition with Kearson's description of a couple of "phone sessions with a psychiatrist," Respondent's admitted reservations about the scheme, his awareness of the check and the false claims, it is clear that Respondent was aware of the improprieties being perpetrated and chose to ignore the situation. In short, I **CONCLUDE** that Respondent's testimony lacks credibility.

I **CONCLUDE**, therefore, that Respondent was aware of the fraud; I further **CONCLUDE** that he failed to accept responsibility and failed to investigate the basis for the false claims submitted in his name. I specifically reject the assertion by Respondent that there was no way he could initiate calls to inquire about the claims without implicating his wife. Calls by Respondent to Prudential to alert the carrier to the falsity of the claims submitted in Respondent's name are not equivalent of reporting a wrong doing. Such calls would have demonstrated the very state of mind that Respondent asserts prevailed, *i.e.,* some uneasiness about the scheme coupled with a desire to disassociate himself from it. Moreover, the assertion that his failure to make such calls was because he would have had to implicate his wife indicates that he was aware that there was wrong doing and, furthermore, tends to support the foregoing conclusion that Respondent knew that the scheme did not include compensation for a "workshop" or "study" which Lichtman was conducting.

Even though no direct financial benefit was derived as a result of claims submitted on behalf of Respondent, he was implicated in the scheme when, despite "shaky" feelings about it, he not only accepted Lichtman's call, but referred Lichtman to his wife; moreover, he was aware that his wife provided his personal information to Lichtman, he was aware that she received EOB's for which claimed services which had

not been rendered but for which benefits were paid; he knew she deposited the check sent by Lichtman. He became further enmeshed in the scheme by failing to alert Prudential or the District of the false claims submitted in his name. Finally, the money, although never actually used, was initially deposited in the couple's joint checking account, which allowed him equal access to the funds as well as the opportunity to either return the monies to Lichtman when he became aware that false claims had been submitted, turn it over to Prudential, or, again, at minimum, to put it into a special account while he initiated an inquiry into the false claims.

In cases such as this, where tenure charges are brought against a teacher, the District is required to establish the allegations supporting the charges by a preponderance of credible evidence. See *In re Polk License Revocation*, 90 *N.J.* 550, 560 (1982); *Atkinson v. Parsekian*, 37 *N.J.* 143, 149 (1962). The record clearly supports a conclusion that the Respondent was aware of the improprieties and he knowingly and willingly engaged in conduct intended to defraud the SHBP by referring Lichtman to his wife despite his misgivings, by allowing false claims for services purportedly rendered to him to remain unchallenged and by failing to act to rectify the situation.

Accordingly, I **CONCLUDE** that Petitioner has sustained its burden of proving the charges by a preponderance of the evidence. Moreover, because of the seriousness of the charges, the Respondent's breach of the public's trust which is an inherent part of public employment, and the deleterious effect the action and inaction of this Respondent can have on the children for whom he should set an example, I **CONCLUDE** that dismissal is warranted. Cf., *IMO Tenure Hearing of Ernest Tordo, School District of Jackson, Ocean County,* 1974 *SLD* 97, 98-99.

ORDER

It is, therefore, hereby **ORDERED** that the Respondent be and hereby is **TERMINATED** from his employment by the State Operated School District of the City of Newark.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 19, 1998
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

11/24/98
DATE

D. N. Centanaro Jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 30 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

Witnesses:

Dr. Carl H. Lichtman

Paula Yancey-Dykes

Jimmy Dykes

Exhibits:

P-1 Affidavit by Lichtman, October 29, 1996

P-2 Voluntary Sworn Statement, November 2, 1994

P-3 Certified Transcript of Plea, February 26, 1998

R-1 Letter to US Health Care, May 19, 1994

R-2 Plea agreement - 5 pages, May 28, 1996

R-3 Copy of Dykes' US Health Care insurance card

R-4 Yancey-Dykes' Substitute 1099 for year 1994

R-5 Certification of Rossie Kearson, July 21, 1998

IN THE MATTER OF THE TENURE	:	
HEARING OF JIMMY DYKES,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL	:	DECISION
DISTRICT OF THE CITY OF NEWARK,	:	
ESSEX COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of respondent and the District's reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Respondent's extensive exceptions initially contend that the Administrative Law Judge's (ALJ) initial decision "is fraught with clear legal and factual errors that cannot legally or fairly form the basis of respondent's removal." (Respondent's Exceptions at p. 6) Although agreeing that the ALJ's Findings of Fact (initial decision at p. 3) are supported by the record, he avers that "strewn throughout her 'Discussion' and 'Conclusion,' are a series of factual findings [which are] not supported by the record." (*Id.*) Respondent presents and discusses, what he asserts are six such erroneous findings:

1. Jimmy Dykes knew of Lichtman's scheme immediately upon knowledge of and contact with Lichtman.

Respondent asserts that the ALJ erroneously finds "the record is clear that [respondent] was uncomfortable with the scheme initially when he heard about it from his friend Kearson and after he spoke to Lichtman." (Initial Decision at p. 4) Respondent urges that such a finding is clearly

contrary to the record. He cites what he asserts is his uncontroverted testimony that he believed that Lichtman was conducting a study or a program. Such a thesis, he argues, is corroborated by the Certification of Rossi Kearson (Exhibit R-5). Respondent additionally provides specific transcript citations which, he maintains, confirm that he repeatedly testified "that his discomfort with Lichtman related only to the actual mechanics of what he initially and fairly believed to be Lichtman's legitimate program/study." (Respondent's Exceptions at p. 7)

2. Jimmy Dykes' "sworn statement" regarding the fact that Lichtman spoke to subjects by telephone supports the conclusion that Mr. Dykes knew of Lichtman's scheme.

Here, respondent argues that in relying heavily on Exhibit P-2, respondent's sworn statement to investigators, wherein it is stated that Kearson told him "he knew of a psychiatrist that you could have a couple of sessions with over the phone and after speaking with the doctor several times you would receive [sic] a check" (initial decision at p. 4)," the ALJ fully ignored her own conclusion (*id.* at p. 5) that such statement was a "synthesis drawn up by an investigator of both Jimmy Dykes and Mrs. Dykes' statements." (Respondent's Exceptions at p. 7) Respondent further contends, citing hearing transcripts in support of such contention, "both Mr. and Mrs. Dykes testified repeatedly that this statement does not represent the exact words used by them at the time of the investigation," (*id.* at p. 9), a fact that he maintains the ALJ recognized both on the record (Transcript 7/23/98, 32/5-9), and in her initial decision at page 5. (*Id.*)

Even more significant, respondent argues, the ALJ stated that the investigator's statement should be accepted verbatim because "counsel for respondent never questioned respondent regarding the accuracy of this portion of the written statement. (Decision, p. 5)" (Respondent's Exceptions at p. 8) This, he asserts, is totally inaccurate and a grievious misapprehension of the record pointing out that the transcript reflects the following colloquy:

Q. Did you tell Investigator Binn the nature of the conversation [with Rossi Kearson]?
A. Yes.
Q. Okay.
A. I recall telling her, yes.
Q. Okay. Is there anything here that you would like to correct about the con -- I'm sorry, the -- interaction that you had with Rossi Kearson?
(Whereupon, there is a brief pause in the proceedings.)
A. Yes. There's a part where Kearson -- Can I read it, the part where --
Q. Surely.
A. -- I'm talking about.
Q. Um-hum.
A. [The investigator's statement] says Kearson telephoned me at home and said that he knew of a psychiatrist that you can have a couple of sessions with over the phone and after speaking with the Doctor several times you would receive a check.

That makes it seem like it's an ongoing type of a conversation. And it -- it wasn't.

What I was trying to say is that Kearson was telling me -- he was saying to contact the Doctor and you need to talk with him a couple of times to find out exactly what was going on. And if you were eligible to participate in this -- this workshop or study or whatever, you would meet with the Doctor several times and then you would receive a check.

In here it says that you can have a couple of sessions with, over the phone, and after speaking -- and I don't know, speaking/meeting but what I was trying to say is after -- and after the couple sessions or interviews with the Doctor several times and you would receive a check. That's what I understood Kearson to tell me. (Transcript of 7/23/98, 34/10 – 35/12) (Respondent's Exceptions at pp. 8-9)

This discourse, respondent argues, evidences that counsel did question him as to this particular portion of the investigator's statement, and that he clearly "repudiated the implication that he agreed to participate in a fraudulent scheme." (*Id.* at p. 9)

Respondent also asks that the Commissioner consider that the District failed to call either of the two investigators who completed the statement as witnesses to controvert the testimony of respondent and his wife. As such, he maintains, "an inference that their testimony would have supported the fact that Jimmy Dykes did not know from the outset that he was

participating in a fraudulent scheme is clearly compelled." (*Id.* at pp. 9-10) Consequently, respondent argues that the ALJ's use of the investigators' statement as a foundation for ordering respondent's termination from employment, without recognizing the statement's significant shortcomings, is totally capricious. Moreover, respondent maintains, it "strains logic and reason" for the ALJ to conclude, that these particular words "evidence respondent's knowing and willing participation in a scheme with Lichtman to defraud the State Health Benefits Program." *Id.* at p. 10) He reasons, that if there is something untoward about participating in a study by telephone, it was the District's burden to bring forth evidence in this regard, which it failed to do.

In summary on this particular point, respondent avers

> ***not only did the ALJ mischaracterize a significant portion of the record as to the investigator's statement, her finding that "[w]hen this statement is considered together with the statements that he felt that the scheme was shaky, it is very clear that Respondent had serious reservations about Lichtman and his scheme," (Decision, p. 5), ***simply does not have evidential support in the record considered as a whole. (Respondent's Exceptions at pp. 10-11)

3. Jimmy Dykes encouraged his wife's participation in Lichtman's scheme.

In this regard, respondent avers that the ALJ's finding here, *i.e.,* that "[n]otwithstanding his doubts about Lichtman and his scheme[,] Respondent still encouraged his wife's participation by handing the phone over to her[,]" is a statement which, itself, belies the absurdity of the conclusion, urging "that it is beyond any reasoned consideration of fairness in fact-finding to infer from giving the telephone to one's spouse in response to a caller asking for her amounts to culpable encouragement in a criminal enterprise." (Respondent's Exceptions at p. 11)

4. Jimmy Dykes' cooperation with state investigators belies his assertion that he was uninvolved and unaware of the fraud.

Respondent contends that the ALJ's finding here, that "[r]espondent's active participation in the interview with state investigators undercuts his assertion that he was uninvolved and unaware of the fraud[,]" (initial decision at p. 5) is wholly illogical. He states that hearing transcripts confirm that both he and his wife uncontrovertedly testified "that when investigators came to their house asking to speak to Mrs. Dykes, she went downstairs to the family room and asked Jimmy to join her. (Transcript of 7/22/98, 71/20-21; 7/23/98, 29/14-18)" (Respondent's Exceptions at p. 12) Moreover, he posits, it is just common sense that if state investigators come to someone's home to speak to one's wife, a husband will participate and provide whatever support he can for his wife. (*Id.*) Respondent maintains that the fact that he cooperated with and provided whatever information he could about Lichtman to investigators who came to his home to question his wife is in no way inconsistent with the fact that he was not "involved" with Lichtman or that he did not know of Lichtman's scheme at the time he spoke to Kearson, when he spoke to Lichtman on the phone, or at the time his wife spoke to Lichtman. (Respondent's Exceptions at pp. 12-13)

5. Jimmy Dykes must have had private communications which evidenced his knowledge of Litctman's scheme.

Respondent asserts that the ALJ's conclusion that "it 'strains credulity'" that Mr. Dykes never saw the explanation of benefits forms, nor discussed them with anyone including his wife, constitutes an extraordinary abuse of her discretion." (Respondent's Exceptions at p. 13) He advances that, notwithstanding the testimony of both he and his wife to the contrary, Kearson's Certification, and the documentary evidence in the record which substantiate respondent's innocence with respect to being a part of Lichtman's scheme, along

with the total failure of the District to advance any evidence that he knew of or participated in such scheme, "[t]he ALJ *** simply [chose] to disregard the evidence of record without explanation." (*Id.*)

The ALJ further evidenced abuse of her discretion, respondent argues, when she concluded that "it is inconceivable to think that, at a minimum, no questions arose at the request for insurance information to participate in a study or workshop." (*Id.*) He advances that the evidence and the record clearly establish that immediately upon hearing the name of his healthcare provider, "Lichtman told him he was not eligible to participate." As such, it is quite understandable that respondent "did not then press for details regarding the study" (*id.*), and it is ludicrous to conclude that his failure to do so demonstrates his complicity in an insurance fraud scheme.

6. Jimmy Dykes' testimony lacks credibility.

Respondent alleges that the ALJ's logic and the conclusion she draws therefrom were entirely misplaced when she concluded that his testimony lacked credibility because "[v]iewed in juxtaposition with Kearson's description of a couple of 'phone sessions with a psychiatrist', Respondent's admitted reservations about the scheme, his awareness of the check and the false claims, it is clear that Respondent was aware of the improprieties being perpetrated and chose to ignore the situation." (*Id.*) He advances

> First, for the reasons stated ***above, the ALJ's reliance on the "sworn statement" regarding phone sessions is misplaced. Second, as [previously] stated, while the Dykes did have concerns about the actual mechanics of what they initially and fairly believed to be Lichtman's legitimate program or study, it is uncontroverted that they were not initially aware of Lichtman's "scheme." Third, Mr. Dykes did not "ignore" the check and false claims – it is uncontroverted that Mr. Dykes instructed his wife to call Lichtman and the insurance company to rectify the situation. Put simply, the ALJ "juxtaposed" several faulty assumptions, rendering her conclusion that Mr. Dykes['] testimony lacked credibility groundless. (Respondent's Exceptions at pp. 14-15)

Next, respondent urges that the ALJ neglected to recognize and apply the appropriate legal standard. In this respect, he argues that the District's charge was "that [he] knowingly and intentionally participated in a scheme*** to defraud the State Health Benefits Program by providing Lichtman with personal information which he knew was going to be used to submit false insurance claims. In exchange Mr. Dykes was to be paid a portion of the monies provided to Dr. Lichtman as payment for the false claims. (*See* Statement of Charges, Charge Number One)" (Respondent's Exceptions at p. 15) Respondent maintains that it is unrefuted that it was his wife who gave Lichtman all of the family insurance information; she alone received, signed, and deposited the check from Lichtman, ultimately in her personal savings account; respondent never received any money from Lichtman nor did any benefit inure to Lichtman as a consequence of any false claim filed on respondent's behalf; and it was not until after his wife's receipt of the check and subsequent receipt of her related insurance statement that respondent was even remotely aware of the general nature of Lichtman's scheme. As such, he advances that it is unmistakable that the District did not establish that respondent participated in a scheme to commit insurance fraud as was charged. (*Id.* at p. 16) He avers that in the absence of any demonstration of "malfeasance" on the part of respondent, the ALJ and the District are now improperly attempting to broaden the District's charges to effectively proffer a heretofore unarticulated "nonfeasance" charge against respondent, *i.e.*, "failure to cure *his wife's* fraud" (emphasis in text) (*id.* at p. 16), a tactic which respondent argues is legally impermissible, an afront to due process and also unsupported by the record. (*Id.* at p. 19) He proffers that a position that he failed to act in this regard is indefensible in that there was uncontroverted testimony that upon becoming aware that claims had been submitted to his wife's insurance carrier in his name, notwithstanding that no payment had been made to anyone as a result of such claims, "***[he] told his wife to call Lichtman and Prudential to rectify the situation.

(Transcripts of 7/23/98, 48/7-11; 67/10-13; 68/9-21)" (*Id.*) Respondent maintains that the District and the ALJ fail to specify what additional action he should have taken in this regard and what legal authority compels that he was mandated to take further action, such as reporting his wife to authorities. (*Id.* at pp. 19-20)

Finally, even though the District has failed to sustain its tenure charge against him, respondent urges that if the Commissioner allows the District's "unspecified nonfeasance charge" (*id.* at p. 22) against him and finds him guilty of such unspecified charge, he consider respondent's 13-year unblemished teaching record in the District and impose some lesser penalty than termination.

The District's reply exceptions posit that the ALJ's decision is correct in all respects and urge that it be adopted by the Commissioner. It presents a general recitation of the *modus operandi* of the scheme conducted by Lichtman and cites the following excerpts from Exhibit P-1, certification of Carl H. Lichtman, dated October 29, 1996, which it asserts confirms it was apparent to Lichtman that respondent "understood how the scheme worked***,"

> ***using the information supplied by Jimmy Dykes, Dr. Lichtman would submit false claim forms to the insurance carrier indicating that Jimmy Dykes or a covered dependent had been treated by Dr. Lichtman on certain dates, when, in fact, Jimmy Dykes had not been treated by Dr. Lichtman as reflected on the claim forms submitted; and
>
> after Dr. Lichtman received the payment on the false claims, he provided 25% of the amount he received.
>
> Dr. Lichtman submitted false claims for the psychological treatment of Jimmy Dykes but received no payment on the claims from the carrier.
> (District's Reply Exceptions at p. 3)

The District presents other selected citations from hearing testimony and its interpretations of such testimony which it avows establish that "***in spite of the fact that Jimmy Dykes was, at all times, fully aware that Dr. Lichtman's scheme was suspicious, he

knowingly gave information to Dr. Lichtman about his wife which was ultimately used to defraud the State Health Benefits Program, and knowingly told his wife to call Dr. Lichtman." (*Id.* at p. 7)

The District further proffers that respondent's attempt to claim that he believed Lichtman's scheme was a "study" or a "workshop" is fully belied by the credible evidence in this matter. It argues

> First, Dr. Lichtman expressly disavowed ever telling the teachers who participated in his scheme that they were participating in a study. T22-8.24. Secondly, in their Voluntary Sworn Statement, at no time did either Jimmy Dykes or his wife mention a "study" or "workshop" as part of what they thought was involved in the scheme. Finally, Jimmy Dykes himself finally admitted that he was never told he would be participating in a workshop or study:
>
> **A. I believe I said study or workshop. I wasn't really characterizing it as a study for, you know, for sure 'cause I didn't know what it was. So I used the word study, workshop, I really didn't know what it was.** T23-49.4
>
> (District's Reply Exceptions at pp. 7-8)

It, therefore, maintains that the record substantiates that at no time did respondent actually contemplate that he would be participating in a workshop or a study. (*Id.* at p. 8)

With regard to the ALJ's determination that respondent's testimony was not credible, the District argues that such a conclusion is fully supported by the record. It cites *Sean Clark v. Trenton Housing Authority,* OAL Dkt. No. CSV 8248-97, Decision May 18, 1998, for the proposition that

> "When the testimony of witnesses is in disagreement, it is the obligation and responsibility of the trier of fact to weigh the credibility of the witnesses in order to make factual findings. Credibility is the value that a fact finder gives to the testimony of a witness. The word contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it 'hangs together' with other evidence." [citation omitted] "The term has been defined as testimony which must proceed from the mouth of the credible witness and must be such

> as our common experience, knowledge, and common observation can accept as probable under the circumstances. [citations omitted] A fact finder is expected to base decisions on credibility on his or her common sense, intuition or experience." *Id.* at 7.
> (District's Reply Exceptions at p. 10)

In conclusion, the District contends that the State Board's October 3, 1997 decision in *In the Matter of the Tenure Hearing of Alyce Stewart, State-operated School District of the City of Newark, Essex County*, wherein "the State Board held that participation in the Lichtman insurance fraud scheme constitutes unbecoming conduct warranting dismissal," is controlling in the instant case. (District's Reply Exceptions at p. 11) Accordingly, it avers, as "Jimmy Dykes took no action to remedy what he knew was a fraudulent transaction, hiding instead behind the spurious theory that he bore no obligation to act because the check in question was made out to his wife who[m] he referred to Dr. Lichtman" (*id. at* pp. 11-12), respondent's dismissal is mandated.

Upon a careful and independent examination and study of the record in this matter, including the parties' exception arguments and transcripts of the hearing conducted at the OAL on July 22 and 23, 1998, the Commissioner, finding respondent's exception arguments meritless, determines to affirm the conclusion of the ALJ, for the reasons articulated in the initial decision as explicated below, that the District has established its charge of unbecoming conduct on the part of the within respondent necessitating his removal from his tenured position.

The District herein charges respondent with unbecoming conduct for his knowing and intentional participation in a scheme to defraud the State Health Benefits Plan by conspiring with Dr. Carl Lichtman to submit claims for psychological services purportedly rendered. It is axiomatic that the burden lies with the charging party to establish the truth of the charge by the quantum of a preponderance of the believable and credible evidence. (*Atkinson v. Parsekian*, 37 *N.J.* 143, 149 (1962)) The Commissioner further recognizes that there need not be a residium of

competent evidence to establish each act considered by the Commissioner, as long as the combined probative force of the relevant hearsay and the relevant competent evidence sustains the ultimate finding of unbecoming conduct. (See *In the Matter of the Tenure Hearing of Cowan*, 224 *N.J. Super.* 737, 751 (App. Div. 1988), citing *Weston v. State*, 60 *N.J.* 36 (1972).) In determining whether the District has met its burden, in addition to giving full consideration to all evidentiary proofs which comprise the record, the Commissioner appreciates that, in this particular matter, a large consideration is the plausibility of the ALJ's factual findings and her weighing of the evidence and the credibility of the witnesses. In this regard, the Commissioner is satisfied, based on the record as a whole, that the ALJ considered all testimony and evidence and weighed it according to the credibility of the witnesses and the plausibility of its content and he finds no basis whatsoever in the record before him for overturning the credibility assessments of the ALJ who had the benefit of observing the witnesses firsthand. In so concluding the Commissioner was especially mindful that

> ***Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can appprove as probable in the circumstances.*** (*In re Perrone*, 5 *N.J.* 514, 522 (1950))

In considering respondent's exceptions to the ALJ's decision herein, it is noted that central to his objections is respondent's contention, that in reaching her findings and conclusions, the ALJ failed to ascribe proper credence to his proffered assertions that he was an "innocent victim" in this matter, at all times believing that participation in Lichtman's "enterprise" involved participation in a legitimate "program" or "study," a claim which is blatantly belied by the record. Specifically, the Commissioner observes that respondent reports that he was introduced to Lichtman's enterprise by his "personal friend of 30 years"

Rossie Kearson. (See T-7/23/98, p. 46, 17-23.) In his Voluntary Sworn Statement to state investigators (Exhibit P-2)[1] respondent declared

> I was approached by Rossie Kearson, who is also a teacher in the Newark School System in the Spring 1994, possibly in April early May. Kearson telephoned me at home and said that he knew of a psychiatrist that you can have a couple of sessions with over the phone and after speaking with the Doctor several times you would receive a check. Kearson said that he has received a check from the doctor and he knows of other who have also. Kearson gave the name of Carl Lichtman and gave me a telephone number. (Exhibit P-2, page 2)

Of particular import in this recitation is the fact that respondent declares that his personal friend, Kearson, had, at the time he spoke to respondent, *received a check* from Lichtman. The Commissioner concludes that it strains credulity to believe that upon learning that Kearson had received compensation from Lichtman as a result of his participation in Lichtman's "enterprise," respondent did not press his friend for details as to what specifically was required in order for his friend to have "earned" this compensation.

The Commissioner, consequently, finds respondent's attempts to portray himself as an "innocent victim" in this matter and, likewise, his contention that the ALJ and the District are attempting to pursue a "nonfeasance" charge against him for failure to cure his wife's fraud utterly devoid of any logical or reasonable inference from the record before him. Rather, the Commissioner concludes that, on the whole, the credible evidence in the matter *sub judice* establishes that

- Respondent made a conscious decision to involve himself in what he knew or should have known was, at the very minimum, a seriously questionable enterprise;

[1]The Commissioner finds that any objections on the part of respondent to this statement or attempts on his part to discredit or impugn its evidentiary value in this matter are unfounded. Full examination of the statement, transcripts, and respondent's proffered arguments leads the Commissioner to agree with the ALJ's determination at hearing that it is clear that any inaccuracies which might exist in this exhibit are technical rather than substantive in nature. (See T-7/22/98, p. 109, 8-14.)

- Respondent actively pursued contact with Lichtman and introduced this man and his "scheme" into his home;
- Upon learning that, due to his particular health care provider, he would be ineligible to receive compensation, he perpetuated his family's "participation" in this questionable enterprise by turning Lichtman over to his wife who he had reason to believe had insurance which would make her eligible to participate;
- Upon his wife's receipt of a check from Lichtman and insurance statements, which undeniably confirmed the impropriety of the enterprise, respondent failed to take any action to cure the consequences of his involvement in the scheme. The Commissioner finds it without question that reasonable individuals would agree that respondent's responsibility to right a wrong which he had initiated extended much further than merely telling his wife to call Lichtman and the insurance carrier. Even so, respondent made a conscious decision to take no action to remedy what he knew was a wrongful situation that he had initiated for both himself and his wife.

As such, the Commissioner finds that the District has established its charge of unbecoming conduct against respondent as the quality of the evidence here leads a reasonably cautious mind to the conclusion that respondent engaged in knowing and intentional participation in conduct with a purpose to defraud.[2]

As to the appropriate penalty, The Commissioner is compelled to reiterate his long-standing belief that educators, by virtue of the unique position they occupy must be held to an enhanced standard of behavior and must continually realize that they serve as role models

[2]Notwithstanding the Commissioner's ultimate determination herein, he is compelled to note that the District's reliance on *In the Matter of the Tenure Hearing of Alyce Stewart, State-operated School District of the City of Newark, Essex County,* as dispositive in this matter is misplaced. This cited case was decided on a summary basis, in that respondent failed to answer the charges lodged against her, and is of no precedential value in the case at issue herein.

to students and the community. When it is established that these individuals have failed to fulfill their obligations and have violated the public trust, it is imperative, to assure public confidence in the state's educational system, that they be subject to appropriate penalty for their behavior. Although duly considering respondent's apparently unblemished 13-year record with the District, the Commissioner, nonetheless, determines that the charge established herein, under the particular circumstances of this matter, and when committed by a teaching staff member charged with molding and shaping young minds both academically and by virtue of example, is "sufficiently flagrant" to warrant respondent's dismissal. (See *Redcay v. State Board of Education*, 130 *N.J.L.* 369, 371 (Sup. Ct. 1943); aff'd 131 *N.J.L.* 326 (*E. & A.* 1944).)

Accordingly, for the reasons expressed therein as expounded upon above, the Commissioner affirms the initial decision of the OAL and hereby orders that Jimmy Dykes be dismissed from his tenured teaching position with the State-operated School District of the City of Newark as of the date of this decision. This matter shall be transmitted to the State Board of Examiners, pursuant to *N.J.A.C.* 6:11-3.6, for action, as that body deems appropriate, against respondent's certificate.[3]

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

February 11, 1999
Date of Mailing, February 11, 1999

[3] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

32-99

EDU #1747-97
C # 32-99
SB # 14-99

IN THE MATTER OF THE TENURE :
HEARING OF JIMMY DYKES, STATE- :
OPERATED SCHOOL DISTRICT OF THE :
CITY OF NEWARK, ESSEX COUNTY. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, February 11, 1999

For the Petitioner-Respondent, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Philip E. Stern, Esq., of Counsel)

For the Respondent-Appellant, Balk, Oxfeld, Mandell & Cohen (Nancy I. Oxfeld, Esq., of Counsel)

On February 11, 1999, the Commissioner of Education issued a decision in which he ordered that Jimmy Dykes (hereinafter "appellant") be dismissed from his tenured employment for unbecoming conduct.

On March 5, 1999, the appellant filed a notice of appeal from that decision with the State Board of Education. Pursuant to N.J.A.C. 6:2-1.11(a), the appellant's brief in support of his appeal was due on March 25, 20 days after he filed his notice of appeal. By letter dated March 18, 1999, counsel for the appellant requested a 30-day extension for filing an appeal brief until April 26. Counsel for the appellant stated that she had recently taken over the case and did not yet have copies of all pertinent documents. She indicated that the counsel for the State-operated District had consented to her request for a 30-day extension and had agreed to provide her with copies of those documents.

June 2, 1999

By letter dated March 23, 1999, the Director of the State Board Appeals Office advised counsel for the appellant that her request to extend the deadline for appellant's appeal brief until April 26 had been granted.

Appellant, however, failed to file a brief by that date. Nor did she request leave of the Legal Committee for an additional extension.[1] By letter dated April 28, the Director of the State Board Appeals Office notified counsel for the appellant of her failure to file a brief and informed her that this matter was being referred to the Legal Committee of the State Board for consideration of appellant's failure to perfect the appeal.

By letter dated April 29 and received on April 30, counsel for the appellant requested an additional three-week extension until May 17 for filing an appeal brief. She indicated that counsel for the State-operated District had consented to her request.

By letter dated April 30, the Director of the State Board Appeals Office advised counsel for the appellant that her request had been denied, again informing her that this matter had been referred to the Legal Committee. The Director further advised counsel for the appellant that if she wished to file arguments in support of the appeal, she should do so immediately, along with an affidavit explaining the reasons for her failure to file a brief by the extended due date.

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[1] N.J.A.C. 6:2-1.5 provides, in pertinent part:

> (b) By notice to the Legal Committee of the State Board of Education, extensions with consent of all parties for filing briefs or exceptions to the report of the Legal Committee may be obtained for a period of time not to exceed an accumulated total of 30 days for all extensions in one case.
>
> ....
>
> (d) Extensions of time that are opposed, or a combination of opposed and unopposed, may not exceed an accumulated total of 30 days for all extensions in one case. Further extensions of time may be granted only by leave of the Legal Committee upon a showing of good cause.

On May 6, counsel for the appellant filed a certification in which she averred that "[t]hrough inadvertence, [counsel for the State-operated District] did not provide me with [copies of the requested] documents as of the date the brief was due. In the meantime, I had obtained copies of those documents from Mr. Dykes' counsel before the Commissioner of Education. However, by the time the documents were received, I did not have time to complete the brief by April 26, 1999."

On May 7, the Director of the State Board Appeals Office again informed counsel for the appellant that this matter had been referred to the Legal Committee. The Director noted that the May 6 submission by counsel for the appellant was the first time in which she had mentioned a problem with obtaining the record.

On May 13, counsel for the appellant filed a certification in response to the Director's May 7 letter, pointing out that she had indicated in her initial request for an extension the fact that she did not yet have copies of all pertinent documents.

On May 14, counsel for the appellant filed a brief in support of the appeal.

At its meeting of May 19, 1999, the Legal Committee reviewed the record of this matter, including the certifications filed by counsel for the appellant.

After considering the circumstances, we dismiss the appeal in this matter for failure to perfect. We conclude that counsel for the appellant has failed to provide sufficient justification for her untimely filing. Nor has she demonstrated good cause for granting her an additional extension.

As previously noted, N.J.A.C. 6:2-1.5 provides that extensions with consent of all parties for filing briefs "may be obtained for a period of time not to exceed an accumulated total of 30 days for all extensions in one case." Despite being granted an

extension for the entire 30-day period, counsel for the appellant still failed to file her appeal brief by the extended due date of April 26 or to request leave of the Legal Committee for an additional extension based on good cause prior to that date.[2] Indeed, counsel for the appellant did not indicate any problem with obtaining copies of documents until May 6, ten days after the extended due date,[3] and, even then, she acknowledged having received those documents prior to the April 26 deadline.[4] Although counsel for the appellant had been advised by letter dated April 30 that her request for an additional extension had been denied and that she should file an appeal brief immediately, she did not file a brief in support of the appeal until May 14, nearly three weeks after the extended due date. Ultimately, it was the obligation and responsibility of counsel for the appellant to assure compliance with the regulations, and we find no basis for relaxation in this instance.

Accordingly, we dismiss the appeal in this matter for failure to perfect. N.J.A.C. 6:2-1.12(a). See Paszamant v. Board of Education of the Borough of Highland Park, decided by the State Board, April 1, 1992, aff'd, Docket #A-4812-91-3 (App. Div. 1993).

June 2, 1999

Date of mailing JUN 04 1999

[2] See, supra, n.1.

[3] In her initial request for an extension, counsel for the appellant had indicated only that she did not have all the documents in the record and that the counsel for the State-operated District had agreed to provide them to her. She did not mention any problem with obtaining copies of those documents until May 6, ten days after the extended due date of April 26.

[4] We note that counsel for the appellant did not indicate when she had received the documents from appellant's previous counsel so as to verify her claim that she did not receive them in time to meet the April 26 due date.

33-99

IN THE MATTER OF THE TENURE	:	
HEARING OF VICTORIA JAKUBIAK,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	
_____	:	

SYNOPSIS

District certified tenure charges of unbecoming conduct and corporal punishment against respondent librarian with 35 years of service.

In light of the inconsistencies of the testimony of the student witnesses and the untimely manner in which the incident was investigated by the administrators, the ALJ determined that the District did not prove Charge One relating to corporal punishment being committed against student Z.L. and that Charge Two relating to unbecoming conduct was proven only to the extent that respondent left Z.L. unsupervised for approximately five minutes. ALJ dismissed Charge One and sustained Charge Two only as the charge pertains to Z.L. ALJ ordered respondent reinstated to her former position with penalty of forfeiture of one month's pay ($6,000).

Commissioner concurred with the findings and determination of the ALJ in the initial decision. Commissioner also determined that the penalty of one month's loss of salary was appropriate in that Z.L. was left in an area of the library substantially unsupervised for approximately five minutes and could have been injured or could have damaged school property.

February 11, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3961-97

AGENCY DKT. NO. 85-3/97

STATE OPERATED SCHOOL DISTRICT

OF THE CITY OF NEWARK,

Petitioner,

v.

VICTORIA JAKUBIAK,

Respondent.

Gregory G. Johnson, Esq., for petitioner

Eugene G. Liss, Esq., for respondent

Record Closed: April 15, 1998 Decided: December 22, 1998

BEFORE **DIANA C. SUKOVICH**, ALJ:

PROCEDURAL HISTORY

The State-operated School District of the City of Newark (petitioner or District) certified tenure charges against Victoria Jakubiak (Jakubiak or respondent). Respondent requested a hearing, and the State Department of Education (DOE) transmitted the matter to the Office of Administrative Law on April 21, 1997 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

Conferences were conducted throughout the proceedings. Jakubiak filed a motion to dismiss. This judge reserved decision on the motion. Hearings were conducted on February 11, 13, 17, and 18, 1998. The deadline for the filing of post-hearing briefs was extended at the requests of the parties. Briefs were filed on April 15, 1998, on which date the record was closed. The deadline for the issuance of an initial decision was extended.

NATURE OF THE CASE

Petitioner charged respondent with corporal punishment and conduct unbecoming a teacher. The issues, broadly, are whether petitioner has proven, by a preponderance of the credible evidence, the tenure charges and, if so, what discipline, if any, should be imposed. For the reasons hereinafter discussed, I am persuaded that the District has met this burden only to the extent of demonstrating that Jakubiak left Z.L. unsupervised for approximately five minutes.

ADMISSIONS

Petitioner served requests for admissions upon respondent on or about June 19, 1997. Jakubiak responded on or about July 1, 1997. The following facts were deemed to have been admitted by respondent:

3.[1] During the 1993/94 school year, respondent was assigned to Central High School (Central High).

4. During the 1994/95 and 1995/96 school years, respondent was assigned to University High School (University High).

5. In August 1996, respondent was transferred to the Mount Vernon School (Mount Vernon).

[1] The numbers pertain to the pertinent numbers of the initial requests for admissions.

6. Francisco C. Perez (Perez) is the principal of Mount Vernon.

7. Carol A. Schwartz (Schwartz), Ray Dandridge (Dandridge), and Phillip J. (Resciniti) are vice-principals of Mount Vernon.

8. During the 1996/97 school year, Z.L. was a student in respondent's library class.

9. On October 23, 1996, respondent reported to work and taught her classes in the library.

15. On October 9, 1996, respondent reported to work and taught her classes.

16. During the 1996/97 school year, L.G., who was five years old, was a kindergarten student in respondent's library class.

18. L.G. exited the door, and some students said "Ooo, L. ran out." Respondent saw L.G. leave.

MOTION TO DISMISS

A threshold issue is whether respondent's motion to dismiss should be granted.

FINDINGS

Based upon a review of the motion papers, I **FIND** the following to be facts.

On December 9, 1996, Perez filed tenure charges against Jakubiak, a tenured school librarian employed by the District. Perez also executed, on December 9, 1996, a sworn statement of evidence in support of the tenure charges. The tenure charges were filed with Dr. Beverly L. Hall (Hall), respondent's State District Superintendent.

The tenure charges contained two charges. Charge 1 alleged that Jakubiak committed acts of corporal punishment with the intent to discipline, harm, injure, punish, intimidate, or otherwise embarrass pupils under her charge. The specifications were that on or about October 23, 1996, during class, respondent physically grabbed and

forced Z.L., a fifth-grade student, into a small, secluded area behind the circulation desk, where Z.L. was forced to remain and stand for forty minutes. It was also alleged that on the same date, respondent physically grabbed Z.L. and slapped her in the face with the back of Jakubiak's hand and that Z.L. later reported the incident to administrators, who observed her upset and crying.

Charge 2 charged Jakubiak with conduct unbecoming a teacher based upon the specifications set forth in Charge 1. Additional specifications were that on or about October 9, 1996, during class, respondent neglected her duty by failing to observe or prevent L.G., a pupil, from opening a door and exiting the classroom. Charge 2 also averred that on the same date, Jakubiak observed L.G. outside respondent's class, knocking on the window, while conducting class; that respondent failed to open the door or report the incident to the school administration; that L.G. later reported the incident to the school administration; and that respondent's dereliction of duties risked L.G.'s health and safety.

Respondent was served with the tenure charges and statement of evidence on December 9, 1996, by letter of that date, from Randall N. Canter (Canter), respondent's State District Assistant Superintendent. On December 19, 1996, Jakubiak served petitioner with a certified Statement and Reply to Tenure Charges. Those documents were provided by letter dated December 19, 1996 from respondent's counsel to Hall and the District's counsel.

On February 19, 1997, the District again served respondent with the same tenure charges previously served on December 9, 1996, as well as a Statement of Evidence, both executed by Perez. Service was via a letter of that date from Hall to Jakubiak. The letter stated, in part, that Jakubiak was suspended, with pay, from her duties and assignments as an educational media specialist, pending an investigation. By letter dated March 4, 1996 from petitioner's counsel, the District filed the pertinent tenure charges with the Commissioner of the DOE (Commissioner).

DISCUSSION AND CONCLUSION

A motion for summary decision may be rendered if the papers and discovery, together with any affidavits, show that there is no genuine issue regarding any material fact challenged and that the moving party is entitled to prevail as a matter of law. I am persuaded that petitioner's motion should be denied.

Respondent, relying on *N.J.S.A.* 18A:6-13, argued that the District did not make a determination, within the pertinent deadline, of the initial tenure charges and that the charges must therefore be deemed to be dismissed and no further proceeding nor action can be taken related thereto. Petitioner did not file a reply to the motion to dismiss, relying on the Commissioner's decision in *In the Matter of the Tenure Hearing of Debra Suitt-Green, State-Operated School District of the City of Newark,* OAL Dkt. EDU 7071-96, (Oct. 14, 1997) (*Suitt-Green*).

Any charge made against any employee of a local board of education under tenure during good behavior and efficiency shall be filed with the board, in writing, and a written statement of evidence under oath supporting such charge shall also be presented to the board. The board "shall forthwith" provide the employee copies of the charge and the statement of evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath. *N.J.S.A.* 18A:6-11.

After consideration of the charge, statement of position, and statements of evidence, the board shall determine whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary. The board shall "forthwith" notify the employee of its determination." *Ibid.* If the board finds that probable cause exists and the charge, if credited, is sufficient to warrant a dismissal or reduction of salary, it shall forward the written charge to the Commissioner for a hearing, together with a certificate of such determination. *Ibid.*

The board is required to make such determination within forty-five days of receipt of the written charge:

> If the board does not make such a determination within 45 days after receipt of the written charge, or within 45 days after the expiration of the time for correction of the inefficiency, if the charge is of inefficiency, the charge shall be deemed to be dismissed and no further proceeding or action shall be taken thereon.
>
> [*Id.* at § 6-13.]

The 45-day period is tolled until the teacher exercises his/her statutory right to respond to the charges within 15 days. *In the Matter of the Tenure Hearing of Cowan*, 224 *N.J. Super.* 737 (App. Div. 1988).

Suitt-Green, supra., involved an initial filing of tenure charges pertinent to which the board did not find probable cause to certify the charges to the Commissioner, and the teacher was returned to employment. Subsequent tenure charges were based upon incidents previously considered by the board pertinent to the prior tenure charges, as well as incidents occurring subsequently. *Suitt-Green*, Initial Decision at 22-23.

The presiding administrative law judge (ALJ) denied a motion to dismiss by the employee which was based, in part, upon an argument that the later tenure charges which were based on incidents previously considered and not certified by the board should be dismissed because they were time-barred by *N.J.S.A.* 18A6-13. *Id.* at 26. The ALJ held, regarding the provision in question:

> The statute does not state, nor can it be reasonably implied, that where such charges are not certified, subsequent refiling and reconsideration of the same charges, which may result in certification to the Commissioner, is barred.
>
> [*Id.* at 28.]

The Commissioner affirmed the ALJ's ruling, adopting his reasoning. *Suitt-Green*, Decision at 44-45.

The documents filed by respondent in support of her motion do not indicate whether Perez again formally filed tenure charges against Jakubiak with Hall subsequent to December 9, 1996. In addition, there is no evidence of formal action by the District determining not to certify the charges, subsequent to the service of the December 9, 1996 charges to the Commissioner. In those respects, as well as the fact that respondent was not formally returned to her prior employment, the facts of the current matter differ from those considered in *Suitt-Green*. However, I am persuaded that such differences are not material.

The holding of *Suitt-Green* is applicable in a case in which a local board does not determine whether or not tenure charges constitute probable cause. Respondent cites no authority for the proposition that the same charges cannot thereafter be reconsidered by the board and subsequently certified to the Commissioner.

The initial tenure charges are deemed to have been dismissed, but there is nothing to preclude reconsideration of the matter and certification of the same charges to the Commissioner subsequently. The time period between the initial service of the tenure charges and subsequent certification to the Commissioner was not unduly long.

I **CONCLUDE** that respondent's motion to dismiss should be denied.

TENURE CHARGES

FINDINGS

Based upon a review of the entire record, including credibility assessments of the witnesses, I **FIND** the following to be additional facts.

Respondent has resided in Newark for 48 years. She graduated from West Side High School in Newark and, subsequent to receiving graduate and post-graduate degrees, commenced her education career in 1961, teaching seventh-grade social studies in Hillside, New Jersey. Jakubiak has a permanent teaching certificate and a license to teach secondary English, social studies, and general science in grades 7 through 12. She also has an educational media certificate and a school librarian certificate to work in a public library.

Respondent was employed by the then Newark Board of Education (Board) in 1962 and taught English at a junior high school until 1964. Jakubiak was thereafter employed at a junior high school in Edison, New Jersey, until 1966. In 1968, respondent was reemployed by the Board, as a school librarian at an elementary school, where she was assigned until 1972. In 1973, Jakubiak was employed at the Board's central office as a textbook librarian. The following year she worked at the textbook evaluation library and at an elementary school. She was the textbook coordinator for five years. Jakubiak served as the librarian at Vailsburg High School from 1979 until 1988. She subsequently taught English at Malcolm X Shabazz High School. From approximately 1988 until 1994, appellant was the education media specialist at Central High and, thereafter, at University High. In September 1996, respondent was assigned as the library media specialist at Mount Vernon. Respondent commenced her assignment on September 3, 1996.

From 1976 until the date she was suspended, Jakubiak also taught English as a second language in the Newark Adult Basic Education Program. In addition, she was employed part-time as a reference librarian by the City of Newark Public Library (Public Library).

Upon assignment to Mount Vernon, Jakubiak, on her own time, made efforts to acquaint herself with elementary school books and materials, attended pertinent conferences, and purchased books, with her own money, to read to her students.

Although her physician recommended she be absent during September 1996 because of an apparent sciatic condition, Jakubiak reported to her assignment.

Mount Vernon is an elementary school, housing grades kindergarten through eighth. It is a " . . . very diverse school" of approximately 1,100 students. The students come ". . . from many different countries." (Tr., Feb. 11, 1998, at 10). There are 149 individuals employed at Mount Vernon, including 73 teachers.

Perez has been employed in public schools in New Jersey since 1972. Perez initially commenced employment by respondent in late August or early September 1996. He has been the principal at Mount Vernon since September 1996. He is responsible for all matters pertaining to the school, including the welfare of the children and staff performance. Donald Marinaro (Marinaro) is an Assistant Superintendent in the district. Marinaro is Perez's immediate supervisor.

Schwartz's responsibilities include supervision of some of the staff at Mount Vernon. She is also responsible for ensuring the safety and well-being of students in grades kindergarten through two. Dandridge is responsible for grades six through eight and was respondent's immediate supervisor during the 1996/97 school year.

Resciniti, who has been employed by the district for 25 years, is in charge of grades 3, 4, and 5 at Mount Vernon. He is responsible for the supervision and monitoring of instruction within classrooms and for school records.

The public entrance to Mount Vernon is at the front of the building, via glass doors. Several steps lead to a porch area, a large cement area in front of the building. The front door leads into a foyer area, which contains a desk for security personnel. One or two security personnel are "invariably" ". . . either sitting or mulling around." (*Id.* at 27.) Security personnel are in the lobby ". . . most of the time." (Tr., Feb. 17, 1998, at 73.)

As of October 1996, three or four security personnel were assigned to the school, one purpose being to ensure that anyone entering signed into a book. An individual entering the building via the front door would be required to turn right to enter the library via a corridor entrance to the library. The library is approximately 25 feet from the lobby and is located in ". . . the front of the building," diagonally across from Schwartz's office. (*Id.* at 13.)

The library is accessible by three doors. One is the door at the porch area in front of the school. Another door leads to a corridor within the building. This door contains a small glass pane. Glass panes are also located at both sides of the door. As of October 1996, there was a "bolt" on the bottom of the corridor door. (*Id.* at 76.)

Resciniti's office is located adjacent to the library. A third door leads to his office. That door is not utilized for general access to the library. It is usually ". . . bolted and secured." (*Id.* at 74.) The door is always locked. However, access can be obtained to the library from Resciniti's office. The reverse is not true, that is, access cannot be gained to Resciniti's office from the library. All doors in classrooms at Mount Vernon, including the library corridor door, can be opened from the inside, for safety reasons.

The main office consists of a reception area, which can be accessed via a door from the corridor, and Perez's office. Perez's office can also be accessed via a corridor door. Schwartz's office is to the right of Perez's office. The main office is approximately twenty feet from Resciniti's office.

As of the fall of 1996, the library at Mount Vernon was utilized by the City of Newark as a public library, in addition to a District library. The library functioned as a branch of the Public Library system. The library was open to the public from 2 p.m. every day until evening hours, varying during the week. At certain times, it was utilized by both City of Newark Library personnel as well as by school personnel. Delores

DeLeo (DeLeo) was the City librarian assigned to the Mount Vernon library. The school library has apparently been utilized as a public library for many years.

It was DeLeo's practice, as of October 1996, to post a sign on the inside of the door accessing the school corridor stating: "no exit." It was the intent that any individuals, including students, entering the library after school dismissal, were to use the door leading to the front porch. (*Id.* at 76.) Students are dismissed at 2:45 p.m.

There are round tables in the library, at which students sit during library class. The library is approximately 37 feet by 32 feet. A circulation desk is located in an area to the right of the door accessing the porch area. Students are brought to the library for library instruction by their classroom teachers. They enter the library via the corridor entrance.

As of the fall of 1996, there was an intercom in the library, to the left of the corridor door. The intercom was part of a school-wide system which allowed personnel in the main office to communicate with classes throughout the building. In order to communicate with the main office from the library, personnel had to insert a key into the intercom "switchbox," activating a "signal" in the main office. (*Id.* at 80; *See also*, Tr., Feb. 17, 1998, at 105.)

Upon her assignment to Mount Vernon, Jakubiak, who did not have a key to the library corridor door, requested one. She spoke to Dandridge and the school custodian repeatedly regarding the matter from September until approximately October 10, 1996. Jakubiak also asked DeLeo for a key to the door; DeLeo had a key.

Respondent was unable to open the corridor door to the library without a key, and she regularly entered the library through Resciniti's office. Her only other alternative was to request that a custodian open the corridor door each morning. If a custodian were cleaning the library, the corridor door would be open. In the absence of a custodian, she had to wait for Resciniti's arrival to gain access to the library.

Respondent's practice was to use a piece of wood as a wedge to keep the corridor door open during class. The door opened outward. However, the door, which had a lock in the doorknob on the outside of the door, locked if it were subsequently closed. It was not uncommon during lunch periods, or other times during the day when children were in the hall, for the door to be closed by individuals outside the library. The door would then be locked from the outside. Jakubiak would have to interrupt her lessons to open the door if teachers and students wanted to enter the library. The door could be opened from inside the library. If it were unlocked from the outside, it could also be opened from the corridor, if closed. DeLeo told Jakubiak that the lock on the corridor door was placed as it was because she wanted the door to remain closed and wanted individuals to enter the library via the door at the front of the building, for safety reasons.

Respondent also did not have a key to activate the intercom in the library. She requested one from Schwartz, Dandridge, and Resciniti.

DeLeo kept a telephone in her desk in the library. When she was present, she connected the telephone. However, when not at Mount Vernon, she kept the telephone in a locked drawer. Jakubiak did not have a key to that drawer.

The City librarian's area is approximately six feet by six feet in size. The circulation desk, which is located in front of that area, bends to the south side of the library. Adjacent to the circulation desk are a hallway with windows and a library area. The circulation desk is located between the passageway and the doorway to the librarian's area.

The librarian's area is "built with shelves." (Tr., February 17, 1998, at 96), that is, bookshelves constitute the walls. The "walls" are approximately seven to eight feet high. Audiovisual material, a desk, a sink, a computer, and a telephone are located in the area. It is intended for use by library staff, not students. The entranceway is

approximately three feet wide. One cannot see into the back area unless standing directly in front of the entranceway.

During the 1996/97 school year, L.G. was in the homeroom class of a Mr. Volpe (Volpe). There were approximately 25 students in the class. The class had library instruction from 12:10 p.m. until 1 o'clock p.m.

On October 9, 1996, Volpe escorted the class to the library for library instruction. L.G. initially would not be seated. Jakubiak asked if he wanted to sit in a chair near her desk, which students generally liked to do. L.G. refused. L.G. had a "very serious speech problem" and was "immature." (*Id.* at 64-65.) He was classified as a special education student during the subsequent school year.

Early in the period, Perez escorted a seventh-or eighth-grade student to the library. Perez told Jakubiak that the student was "having a problem" in class and requested that he be allowed to sit and read in the library until the end of the period. (Tr., Feb. 18, 1998, at 40.) Jakubiak responded in the affirmative, and the student remained until the end of the period.

Respondent also told Perez that she was having a "problem" with L.G. and that L.G. was a "handful." Perez told respondent to utilize her "educational skills" in efforts to have L.G. be seated. (*Id.* at 41.)

L.G. eventually sat at a table. Jakubiak instructed the children to turn their chairs so they could face her as she read a story to the class. She was approximately six to seven feet from them. The students seated closest to the library corridor door, including L.G., were approximately five feet from that door.

Consistent with her general practice, respondent had propped open the corridor door. Approximately twenty minutes after the class commenced, L.G. got up from his seat and entered the school hallway, closing the door. L.G. "ran" out of the door "very

fast." (*Id.* at 48.) Jakubiak observed L.G. doing so and immediately walked towards the door. She and Schwartz approached the door at approximately the same time. Schwartz knocked on the door, and Jakubiak opened it.

Schwartz inquired why the door was locked, and Jakubiak told her of the situation regarding the door key. Jakubiak told Schwartz that she had requested a key from Dandridge. Jakubiak also indicated that she had not had a key since her assignment to Mount Vernon. Schwartz told Jakubiak that she would attempt to obtain a key for respondent. Schwartz was aware that if the "lock was left on," an individual would not be able to enter the library via the corridor door. (*Id.* at 59.) Schwartz did not state that L.G. had left the building. After conversing some more, Schwartz "put" L.G. in the class and left. (*Id.* at 45.) To Jakubiak's observation, L.G. was not crying. L.G. remained the balance of the period, behaving appropriately. Jakubiak spoke with L.G., telling him that he should never leave the room without her permission.

Shortly after Schwartz left the library, Schwartz, Resciniti, Perez, and Dandridge came and observed the lock on the corridor door. They turned the doorknob, apparently observing that the door locked when it closed. They did not speak with Jakubiak, who had resumed presenting her lesson to the class.

Schwartz subsequently spoke to Dandridge, who confirmed that Jakubiak had previously requested a key but that he ". . . hadn't been able to take care of it." (Tr., Feb. 11, 1998, at 58.) Schwartz told Dandridge that she would obtain a key for respondent. On October 10, 1996, Resciniti came to the library and gave Jakubiak a key to the corridor door.

Schwartz also subsequently sent a memorandum to Jakubiak dated October 9, 1996. That memorandum read as follows:

> Let this memo serve as critical reminder that legally you are responsible for all children under your supervision. Furthermore, be aware that the correct procedure for

> reporting a child who walks out of class is to call the main office immediately. Dereliction of duty will not be tolerated under any circumstances.
>
> [Exh. P-1.)

Generally, if an emergent situation occurs in the library, a teacher would be expected to ". . . use the intercom or automatically open the door in the corridor" to contact security. (Tr., Feb. 11, 1998, at 27.) In Resciniti's view, a reasonable response by respondent concerning the incident would have been for her to exit the library and alert security to the situation, walk to the main office, or retrieve L.G. herself.

Shirley Key (Key) has been employed by the Board/District for 29 years. She was a fifth-grade teacher at Mount Vernon during the 1996/97 school year. Key was also the Newark Teacher's Union (NTU) representative at Mount Vernon.

There were approximately 25 to 30 students in Key's class. Approximately 85 percent were of African-American background. Z.L., T.T., A.G., D., and R.D.A. were students in Key's class. T.T. and Z.L. had been classmates for three years. A.G. met Z.L.'s parents in early 1997, when they came to the classroom.

Z.L. is the youngest of four children. At least one of the older children, a brother, attended Mount Vernon. M.L. is Z.L.'s mother. M.L., who participated actively in school matters, had had prior contact with Perez, as did her son.

Key spoke with M.L. prior to October 23, 1996, regarding Z.L.'s failure to complete school work, requesting permission to keep Z.L. after school. Z.L. also misbehaved in Key's class, "little pranky things, like hitting someone. . ." ". . . or putting her foot, trying to trip up one of the boys." (Tr., Feb. 17, 1998, at 23.) Key disciplined Z.L. in various ways, including keeping Z.L. after class, giving her additional work, and changing Z.L.'s classroom seat.

Key's class had library instruction from approximately 10:30 a.m. until 11:20 a.m. Between September 3 and October 23, 1996, respondent complained to Key regarding the conduct of Key's students during library instruction. D. was especially "a problem." (Tr., Feb. 18, 1998, at 75.) Jakubiak did not speak with any teachers other than Key regarding problems with student behavior. Respondent taught more than 850 students weekly.

Key's classroom was on the second floor of the building. As was her practice, Key escorted the class to the library on October 23, 1996, for their instruction with Jakubiak. The class was ". . . acting rowdy and noisy. . ." as they walked to the library. (Tr., Feb. 13, 1998, at 26; *see also,* Tr., Feb. 18, 1998, at 61.) Students were "yelling," "hitting their books" on walls, and "dropping their books." (Tr., Feb. 13, 1998, at 28.) In the classroom, D. was "[a]bout to fight" with one of the other students. (*Id.* at 29.) He ". . .always tried to fight with the other students." However, by that time, Jakubiak had ". . . got used to him." She was therefore "prepared" and she "calmed him down." (*Ibid.* *See also,* Tr., Feb. 12, 1998, at 30.) Students talked "real loud" during class. (Tr., Feb. 17, 1998, at 40.)

The lesson for that day, a continuing one, was for the students to work on reports. The purpose was to teach the students to use different resource sources in the library, including the card catalog. The card catalog contains records of all the books in the library, available for both the school and the Public Library. Encyclopedias are located in proximity to the card catalog.

During the period, Z.L. got up from her assigned seat, going to other tables, talking to classmates. Jakubiak spoke to Z.L. several times. Although Z.L. would return to her table, she would then move to other tables.

Towards the end of the period, while assisting one of the students, Jakubiak heard the drawers of the card catalog ". . . being slammed open and slammed shut." (*Id.* at 64.) She turned and observed Z.L. opening and shutting the drawers "very

hard." (*Ibid.*) Jakubiak was concerned that a drawer would break. She asked Z.L. to stop and to go to the "librarian's office" in the library. (*Id.* at 65.) Z.L. did so.

Jakubiak spoke to Z.L. for several minutes, telling her that respondent intended to call Mrs. L. and to ask Key for Mrs. L's telephone number. Respondent told Z.L. to sit at the librarian's desk and continue with her work; Z.L. had not completed her lesson for that day. Jakubiak returned to the class. There were approximately five minutes left to the class period. Bookshelves are located from approximately two to six feet from the librarian's office. Students were utilizing books in proximity to that area. Some students were "running around" the classroom while Z.L. was in the librarian's area. (Tr., Feb. 13, 1998, at 21.)

The class became unruly towards the end of the period. Jakubiak repeatedly told D., who was standing, to sit; and the class, to quiet down. The students eventually did, because R.D.A., who had entered the hall, told the class that Key was coming.

Key returned to the library at the end of the period to escort the students back to their classroom. The class was "noisy. (Tr., Feb. 17, 1998, at 23.) Some of the students were in line; others were not. There was "confusion" in the class. (Tr., Feb. 17, 1998, at 9.)

Jakubiak told Key that the class had been "really acting up" and that they "won't behave." (*Id.* at 8.) Respondent noted that Z.L., especially, had misbehaved. Jakubiak told Key that respondent needed to obtain Ms. L's telephone number because she wanted to contact Mrs. L. The two spoke near the circulation desk, in proximity to the librarian's area.

Key observed that Z.L. was in the librarian's area, standing behind the desk. Key did not ask Jakubiak why Z.L. was there. Z.L. was not crying. Jakubiak told Z.L. to get in line with her class, which Z.L. did. Z.L. made no comments to respondent regarding any events which had transpired during library class. Z.L. did not speak with

Key, neither upon Key's return to the library nor the class's return to their homeroom, regarding any events which had occurred during library class. Z.L., more specifically, did not tell Key that Jakubiak had slapped her. None of the other students said anything to Key regarding events transpiring during library class, nor, specifically, that Jakubiak had slapped Z.L.

Z.L. went to Perez's office shortly after dismissal that day. Resciniti and Schwartz, as well as Perez, were present.

Z.L. was crying and "highly agitated." (Tr., Feb. 17, 1998, at 120.) Z.L. stated that when she was in the library, during library class, ". . . the librarian had taken her and slapped her" on the face. (*Id.* at 120, *see also, id.* at 36.) Z.L. stated that she was alone with Jakubiak when respondent slapped her. Z.L. was "upset, teary-eyed," and "a little shaken." (Tr., Feb. 11, 1998, at 36.) Z.L. also stated that respondent had said that Z.L. was not paying attention and "pulled on her" and brought her "to the back area." (*Id.* at 93.) Z.L. told Perez that Jakubiak had slapped her with the "back of her hands," that the incident had occurred at the beginning of the class period, and that Z.L. stayed in the librarian's area until the end of the period. (Tr., Feb. 17, 1998, at 176.) No one asked Z.L. how she had behaved during class. Z.L. was in Perez's office for approximately 40 minutes.

Perez, Resciniti, and Schwartz thereafter accompanied Z.L. to the library so that she could demonstrate what she had told them. They were in the library for a "few minutes," not more than five to seven minutes. (*Id.* at 90.) Z.L. showed the adults where the alleged incident had occurred. Z.L. indicated where she had been sitting in the library and stated that respondent "pulled her to the back," where she had been "slapped." (*Id.* at 92.) Although "not hysterical," Z.L. was "upset" at that time. (*Ibid.*) She was "teary-eyed." (*Id.* at 93.)

Perez called the Division of Youth and Family Services (DYFS), in the State Department of Human Services, because it is respondent's policy to notify DYFS

whenever there is a report of "child abuse." (Tr., Feb. 17, 1998, at 185.) Perez advised that Z.L. had said a teacher had slapped her and that there were no witnesses, to his knowledge. He was told to handle the matter administratively. Perez attempted to call Z.L.'s parents, but they were unavailable. He spoke to a sibling of Z.L.

At some point, Perez apparently was able to contact M.L. by telephone on October 23, 1996. M.L. subsequently told Z.L. that Perez had called regarding an "incident" at school involving Jakubiak. (Tr., Feb. 13, 1998, at 57-58.) Z.L. told M.L. that respondent had "slapped" her. (*Id.* at 58.) Z.L. stated that she had used several books in the library and then went to the card catalog, that Jakubiak had told Z.L. to be seated, and that as she commenced leaving the book area, Z.L. went to help another student, and Jakubiak, at that point, "came and grabbed her. . ." Z.L. also stated that she told respondent that the latter was hurting her and that Jakubiak then took Z.L. to a room in the back "and slapped her." (*Id.* at 59.)

The next day, October 24, 1996, Mr. and Mrs. L. accompanied Z.L. to school, intending to speak with Jakubiak. Perez was outside the school building. Perez saw M.L. "charging up to the building." She appeared to " . . . have an attitude...." (Tr., Feb. 17, 1998, at 131.) M.L. introduced herself and her husband. Perez told M.L.: "I apologize for what happened because Z. has always been a very good student." (Tr., Feb. 13, 1998, at 61.)

M.L. indicated she wanted to meet with Jakubiak. Perez responded that personnel was handling the matter administratively and would keep her informed. Perez spoke with M.L. for approximately five to seven minutes. M.L. was "very, very hot under the collar," threatening to sue Jakubiak and to take other action. (Tr., Feb. 17, 1998, at 136-137.) Perez asked Mr. and Mrs. L. to wait in his office, where he would talk to them. They did so.

Perez asked Key to come to his office, which she did. Schwartz was also present, as was Z.L. M.L. advised him of what Z.L. had told her parents. M.L.

expressed a desire to meet with respondent and her intention to "press charges." (*Id.* at 62.) M.L. threatened to sue respondent and the District and to call local officials. Referencing his knowledge of Z.L. and her brother, Perez stated that he could not ". . . tolerate this type of behavior . . ." and wondered how such could occur regarding Z.L. (*Id.* at 63-64.) He advised that he could not ensure that M.L. would be able to meet with Jakubiak, noting that the latter was not at Mount Vernon.

Perez advised Mr. and Mrs. L. that administrative personnel were investigating the matter and that there were "always two sides to the story." (Tr., Feb. 17, 1998, at 139.) Perez also advised that he had already contacted his immediate supervisor and DYFS. Perez also indicated that Key was in an awkward position because of her status as an NTU representative as well as a teacher. Z.L. and her parents left Perez's office between 10:30 and 11 o'clock a.m. Perez subsequently learned that M.L. had contacted Hall's office.

Jakubiak reported to school on October 24, 1996. During her second class period, Resciniti accompanied a substitute teacher to her class, advising respondent that she was to attend a conference in Perez's office. She went to the principal's office.

Resciniti, Dandridge, and Key were also present. Consistent with his practice, Perez had requested that Key be present because she was Jakubiak's "NTU representative." (Tr., Feb. 17, 1998, at 122.) Perez believed that Key "was to defend Mrs. Jakubiak's rights." (*Id.* at 147.) Perez advised the others that he had requested that Key be present so that Jakubiak could be represented.

Perez told Jakubiak of Z.L.'s report that respondent had slapped Z.L., that, consistent with policy, he had contacted Mr. and Mrs. L., as well as DYFS, and that Mr. and Mrs. L. were very upset. Perez indicated that M.L. was "very furious" and had stated that she intended to call individuals in the Superintendent's office. (Tr., Feb. 17, 1998, at 183.) Perez also indicated that M.L. was "very upset," had made a complaint against Jakubiak, that "policemen are coming to my house and are going to arrest"

respondent, and that M.L. had called "politicians" regarding the matter. (Tr., Feb. 18, 1998, at 85-86.) He also stated that the purpose of the meeting was to discuss the alleged incident. Perez asked Jakubiak to make a statement regarding the allegations.

Respondent denied slapping Z.L Jakubiak stated that the children, especially Z.L., had misbehaved from the beginning of class. Respondent referenced the card catalog and stated that Z.L. had run about the room. Jakubiak noted that Z.L. had refused to do certain work and was yelling. Respondent stated that she had ". . . separated her from the rest of the class. She took her over in the library area." (*Id.* at 12.) In response to repeated inquiries from Perez regarding why respondent had separated Z.L. and if Jakubiak had touched Z.L., respondent stated that she never touched Z.L. but " . . . only removed her from the rest of the class." (*Ibid.*) Respondent also indicated that she had "punished" Z.L. by placing her in a secluded area. (Tr., Feb. 17, 1998, at 13.) Respondent stated that she had "put her in the back part of the library, behind the circulation desk." (*Id.* at 69.) Respondent also stated that she had previously advised Key of behavioral problems with the class.

Jakubiak stated that Z.L. sat in the librarian's office until Key returned to the library, approximately five minutes. Jakubiak denied shoving, pushing, slapping, hitting, or touching Z.L. in any fashion. Perez "accused" respondent of corporal punishment, and Jakubiak queried what had transpired that could constitute such. (Tr., Feb. 18, 1998, at 84.) Key queried why students in Z.L.'s class behaved for her and not in respondent's class. Jakubiak responded that Key was the "teacher" and the students therefore had to behave for her, noting that respondent was new at the school and that the students did not yet know her. (*Id.* at 85.) Respondent also stated that the "teacher" was supposed to "back up the librarian" and that respondent needed Key's help to maintain discipline. (*Ibid.*) Jakubiak made statements to the effect that she did not have the knowledge nor skills for dealing with students of the age of the youngsters in question and "with this type of kids." (*Ibid.*) Jakubiak also stated that she could not "teach these children" and never had "any experience with these kind of children," referencing prior experience in another school, where "she had done so well." (Tr.,

Feb. 17, 1998, at 14.) Respondent indicated that she "couldn't handle that type of child, that she was from the "high school." (*Id.* at 68.) She was not "trained to handle the students." (*Id.* at 71.) At that point, Key, who was "offended" by Jakubiak's references to the students, left the meeting, effectively ending it. (*Ibid.*) Key was aware that Jakubiak had not previously been assigned to elementary schools. Key interpreted Jakubiak's remarks as referencing the ages and grade levels of students at Mount Vernon, and as ". . . speaking racially as well." (*Id.* at 17.) Jakubiak had previously told Resciniti that she found it difficult to work with younger children. At the end of the meeting which lasted approximately ten minutes, Perez advised respondent that he would be notifying Marinaro of what had transpired.

Subsequently, on October 24, 1996, Jakubiak went to Perez's office, advising him that she did not feel well and requesting permission to go home. Consistent with his practice, Perez asked Jakubiak to write a note regarding her request, which she did. He indicated his approval on the note and returned it to her. Jakubiak was "very upset" by the prior meeting and felt as if she were going to "faint." (Tr., Feb. 18, 1998, at 86-87.) Perez suggested that respondent go to the school nurse's office. Because she did not know where it was, he escorted her there.

The nurse checked petitioner's blood pressure, which was "high," gave respondent a glass of water, and told her to be seated. The nurse then called Perez. After speaking to him, the nurse told Jakubiak that Perez had indicated that respondent should write a statement regarding what had transpired to date, specifically, what had transpired regarding Z.L. Respondent did so. The nurse thereafter left to make a copy of the document, returning to give it to Jakubiak. The statement read as follows:

> Today I was called to a conference by Mr. Perez. He told me that a girl in Mrs. Key's fifth grade class said I hit her yesterday. The student was unruly. She got out of her seat and refused to do her research assignment. She was around the room and would not listen. When she came to the card catalog, she started to open and slam the doors shut. I took her in the library office and reprimanded her and had her stay there to the end of the period which was

> about five more minutes. Not only was this girl unruly but many students did not do their work. Every week so far, there has been a fight in the class involving a student named D. I have reported this to the teacher, Mrs. Key, but no help has been given to me.
>
> [Exh. R-4.]

Jakubiak left Mount Vernon on that day at approximately 12 o'clock p.m. Upon returning home, she called her personal physician, a Dr. Syracuse (Syracuse). Syracuse told respondent, who was "very, very upset" to immediately come to his office, which she did. (Tr., Feb. 18, 1998, at 89.) She also called and spoke with Pietro Pattino, who apparently is an NTU representative.

Perez apprised Marinaro of the situation by memorandum dated October 24, 1996, to alert Marinaro to "an alleged child abuse by a teacher. . ." (Tr., Feb. 17, 1998, at 123.) Perez referenced his communications with Z.L. and M.L., the meetings with M.L. and Jakubiak, his communications with DYFS, and the fact that Jakubiak left school early on October 24, 1996, after being seen by the nurse. Perez summarized Z.L.'s initial communications as follows:

> Upon further fact-finding, Z. communicated to us how Mrs. Jakubiak had called her into a secluded area behind the circulation desk, a cubicle not readily visible from the rest of the library, physically grabbed her closer and slapped her across the face with the back of the hand. Mrs. Schwartz, Mr. Resciniti, and myself spoke with the crying child at length, and tried our best to calm her down and reassure her 'she did the right thing by informing us of the incident.'
>
> [Exh. P-3 at 1.]

He noted, regarding his initial communications with Mr. and Mrs. L, that:

> . . . I informed Mr. and Mrs. L. that I must meet with the teacher involved and ascertain her view of the incident, and depending on information shared, I would take appropriate action . . .
>
> [*Ibid.*]

Perez summarized a statement attributed by him to Jakubiak:

> Mrs. Jakubiak denied slapping the child but did not deny bringing the child over to the secluded area and admonishing her 'for her behavior.' Mrs. Jakubiak claimed the child was unruly and disruptive during class. Mrs. Key interjected that when she picked-up her children, she found Z. was not with the other children. Mrs. Jakubiak stated that she had punished Z. by making her stand in the secluded area. A lively debate ensued about Mrs. Jakubiak's discipline methods, her ability, judgment and skills (or lack thereof) in dealing with class room situations. Mrs. Jakubiak openly claimed not to have any knowledge or skills for dealing with this age youngsters and with 'this type of kids.'
>
> [*Id.* at 2.]

Perez also advised Marinaro that M.L. had indicated she had contacted an attorney, local police officials, Marinaro's and Hall's offices, and other individuals. Perez concluded as follows:

> It should be noted, this is the third 'major' situation involving Mrs. Jakubiak since she was assigned to Mount Vernon less than two months ago. Mrs. Jakubiak does not disguise her displeasure about her present assignment. Furthermore, I have spoken to her on various occasions about her 'negative' approach (unsmiling, apparently moody?) demeanor to the children. To me, she has often responded negatively, she is often argumentative, and at times, even ill-mannered and rude.
>
> I ask that Mrs. Jakubiak be separated from Mount Vernon School immediately.
>
> [*Id.* at 3.]

Perez did not speak to any students, other than Z.L., prior to sending the memorandum. He did not enclose a copy of respondent's October 24, 1996 statement with it. Resciniti saw Perez's memorandum at the time it was written.

Also on October 24, 1996, Perez wrote a formal notification of reprimand to Jakubiak. The reprimand read as follows:

> On Wednesday, October 23, 1996, you were involved in an incident with a 5 grade student. By your own volition and testament, the manner in which you chose to handle the classroom situation was totally incorrect. I found response unprofessional, reprehensible, and totally out of character for someone in public education.
>
> Contrary to NJ State Statutes, local district standing policy and common sense, you chose to utilize corporal punishment as an instructional and/or corrective measure. At best, your judgment was faulty. Consider this communication a formal letter of reprimand.
>
> Also, please be advised, your actions may possibly result in legal proceedings against you by the parents of the student.
>
> [Exh. P-1.]

Perez called M.L. on October 25, 1996. M.L. reiterated that she wanted to speak with Jakubiak. Perez advised that respondent was not at Mount Vernon at that time. M.L. thereafter communicated her desire to speak with Jakubiak until approximately late November 1996. Perez indicated that Jakubiak was ill and still not at Mount Vernon. He eventually told M.L. that Jakubiak was ill, that she was no longer at Mount Vernon and that he did not know when she would return.

M.L. filed a complaint against Jakubiak with local police officials on October 24, 1996.[2] M.L. also communicated, over an extended period of time, with various individuals regarding the matter, including several local councilpersons and/or their staff personnel, a Mrs. Ortiz (Ortiz), in Marinaro's office, and individuals in Hall's office, including Kim Caddy (Caddy), who apparently is Hall's secretary. M.L. called a "list" of individuals, "quite a few names. . ." (Tr., Feb. 18, 1998, at 88.)

[2] That matter was still pending at the time of hearings in the current case.

Caddy called M.L. on October 25, 1996, advising that Hall " . . . was informed of the situation" and inquired what had transpired. M.L. indicated that she had met with Perez and that she wanted to ensure "something was done . . ." Caddy indicated ". . . that it would be handled. It would be taken care of." (*Id.* at 81.) However, Caddy did not reference any specific contemplated action. Approximately one week later, a local councilperson to whom M.L. had previously spoken advised M.L. that Hall was "taking care" of the matter and that it would be "resolved." (*Id.* at 85.)

Z.L. returned to school on October 25, 1996. Jacqueline Blamo (Blamo), a guidance counselor at Mount Vernon, met with Z.L., at Perez's request, a standard procedure in a situation requiring "crisis management." (Tr., Feb. 17, 1998, at 130.) M.L. subsequently spoke to Blamo, who advised that Z.L. was "very frightened" but eventually would be all right. (*Id.* at 110.)

October 24, 1996 was a Thursday. Respondent returned to Mount Vernon the following Monday. She gave a note from Syracuse, dated October 24, 1996, to the school secretary. The secretary made a copy of it at Jakubiak's request. Syracuse's note stated that he had seen respondent because of "an acute stress reaction" and that he had placed her on a medical leave of absence until she recovered, "hopefully" by October 28, 1996. (Exh. R-3.)

Respondent then proceeded to the school library. Resciniti subsequently entered the library and told Jakubiak that Perez wanted to speak with her. Jakubiak, apparently accompanied by Resciniti, went to the principal's office. Perez gave respondent an envelope, addressed to her, advising that "this is your transfer" and that respondent was to report to Marinaro's office as soon as possible so that the latter could complete the transfer. (Tr., Feb. 1998, at 91.) Jakubiak returned to the library, retrieved personal items, and subsequently drove to Marinaro's office, which is at Camden.

Petitioner spoke to a secretary at Camden, indicating why she was present. The secretary responded that she had no knowledge of the matter and escorted Jakubiak to a "little room," "like a little closet with a little table and two chairs," telling respondent to be seated. Another teacher was in the room. (*Id.* at 91.) No one other than the secretary spoke to Jakubiak, and no one returned to the room.

The secretary told Jakubiak to return the next day, and subsequently respondent assumed "that she should." (*Ibid.*) The secretary also told Jakubiak to call her if respondent were to be absent any day. The secretary gave Jakubiak a telephone number and a key to the rest room.

Jakubiak reported to Camden daily until she was suspended. Respondent was required to sign in each morning. Each day, upon leaving Camden, Jakubiak signed out. The other teacher told Jakubiak that they were "allowed 45 minutes for lunch." (*Id.* at 95.) They could do "whatever we wanted" the rest of the time. For example, they read, talked, and periodically took a walk.

While at Camden, Jakubiak would see Marinaro and other personnel, but they never spoke to her. She attempted to speak to them but was advised that they could not talk to her regarding the matter, although all were "cordial" and said hello." (*Id.* at 96.) Respondent attempted to discuss the matter with a "Mrs. Watkins" and a "Maria," whom she believed worked directly with Marinaro, but they told her that they could not speak with her about the matter and that ". . . some people sit there up to two years 'til they decide what the problem is." (*Id.* at 102.)

On December 9, 1996, when respondent returned to Camden from lunch, the school secretary advised Jakubiak that Marinaro wanted to speak with her and escorted Jakubiak to his office. Marinaro informed respondent that "human resources" was sending her a letter, that she "should be on the lookout for this letter when I went home," that he did not know the content of the letter, and that she should call him if it arrived before 6 o'clock p.m. Marinaro gave Jakubiak his office telephone number.

Upon arriving home that day, Jakubiak found no letter in her mailbox, which is locate outside her house. She therefore assumed that someone from the District would bring the letter to her door. When no one did, she subsequently again went to the mail box, between approximately 8:30 and 9 o'clock p.m., finding an envelope.

The envelope contained a letter, dated December 9, 1996, from Canter and a packet of documents. The letter read as follows:

> Please be advised, pursuant to *N.J.S.A.* 18A:6-8.3, you are hereby suspended, with pay from your duties and assignments as an educational media specialist in the Newark School District pending an investigation of inappropriate conduct.
>
> Any school property currently in your possession should be returned to Human Resource Services, Room 813. You are directed to remain off school property until you are notified
>
> Your cooperation in this matter is appreciated.
>
> [Exh. R-24.]

A portion of the letter was designated for respondent to acknowledge, with date, receipt of the notification, which respondent apparently did not do. The letter also contained the following notation: "Hand-delivered by Courier Service." (*Ibid.*) There was an indication that copies were sent to Hall, Perez, Marinaro, counsel for petitioner, and the NTU.

Included with the letter were copies of tenure charges, the December 9, 1996 memorandum from Perez, the memorandum from Schwartz dated October 9, 1996, the October 24, 1996 formal notification of reprimand, and Perez's October 24, 1996 memorandum to Marinaro. The statement of charges was dated December 9, 1996 and was executed by Perez. Neither Marinaro, nor any other individual had discussed the alleged incident with Jakubiak since October 1996.

On December 18, 1996, respondent executed a Statement of Evidence in Opposition to Tenure Charges, denying the allegations. Jakubiak's counsel sent a copy of this document to the Board's counsel.

Resciniti did not see the tenure charges until the hearings in the current matter. Resciniti never spoke to any students in Z.L.'s class, including A.G., R.D.A., or T.T., regarding any incident which occurred in October 1996.

After speaking with Marinaro several times subsequent to October 24, 1998, Perez recommended that disciplinary action be taken against respondent. Marinaro had the final authority to decide whether discipline would be imposed. Perez recommended that the matter be handled "administratively," *i.e.*, by Marinaro, "for whatever disciplinary procedures had to be in place." (Tr., Feb. 17, 1998, at 166.) Perez did not recommend a specific form of discipline, apparently such not being within his authority. Perez did not review Jakubiak's personnel file prior to making his recommendation. He did not know how long respondent had been an employee of the Board/District. Perez sent Jakubiak's file to Marinaro. Perez "lost track" of respondent subsequent to her transfer to Camden, until he learned that Jakubiak had been suspended with pay. (Tr., Feb. 17, 1998, at 144.)

Apparently, Perez interpreted Jakubiak's October 24, 1996, statement, which referenced that Z.L. had been misbehaving from the commencement of library class, to mean that Z.L. was in the librarian's area for almost the whole period, fifty minutes. The tenure charges in that respect therefore referenced the time indicated. The allegations that Jakubiak physically grabbed Z.L. and slapped the latter on her face with the back of respondent's hand were apparently based upon Z.L.'s reports to administrators, including Perez. However, Perez was not involved in preparation of the tenure charges, although he reviewed and agreed with them after they were written and signed them. Perez believed Z.L.'s account of what had transpired, rather than that of Jakubiak.

The L. family moved from Newark in September 1997. M.L. subsequently spoke regarding the matter with several public officials and/or their staff members and other individuals, including Ortiz. M.L. did not communicate with Perez from at least September 1997. M.L. did not speak with any employees of Mount Vernon regarding the matter, other than Perez, and, on one occasion, Resciniti, in a very general manner. Key did not speak with M.L. regarding the matter subsequent to October 23, 1996. Resciniti also did not speak with M.L. regarding the allegations. He had previously had contact the prior year with Z.L.'s brother concerning a school activity.

Perez discussed the matter with students in Z.L.'s class on February 6, 1998, in preparation for hearings in the current matter, at the request of the Board's counsel. Perez spoke with 11 students, those remaining at Mount Vernon. At Perez's direction, the students assembled in the school auditorium. After confirming basic data, Perez asked the following:

> . . . Does anybody remember any teacher last year, when you were with Mrs. Key's homeroom in your fifth grade, does anybody remember any teacher putting a hand on a student, grabbing a student, slapping a student, any--at any time, Any teacher.
>
> [*Id.* at 151.]

T.T. was the only child who raised her hand. Perez spoke with T.T. and allowed the other students to return to their classes. He asked her to indicate what she remembered. T.T. stated that she saw Jakubiak "slap Z. in class." (*Id.* at 150.) T.T. provided no other details regarding the incident. Perez asked T.T. if she were a friend of Z.L., and T.T. replied that they were "close friends." (*Id.* at 194.) Perez did not attempt to ascertain information regarding Z.L. as a student, although at some point, he apparently discussed Z.L.'s academic and behavioral profile with Key.

Perez did not speak to students, other than Z.L., prior to February 1998 regarding the alleged incident because ". . . we didn't want the incident to get out of hand. We wanted to localize the incident." (*Id.* at 195.)

Teachers in the District are provided with some training regarding appropriate forms of discipline. Teachers were given a packet of documents regarding discipline the first day of school in September 1996.

In Perez's view, requiring a student to stand, in any "secluded area constitutes corporal punishment," regardless of the time involved. (Tr., Feb. 17, 1998, at 170.) Any "punishment involving physical standing or physical matters constitutes corporal punishment," including requiring a child to stand alone in the back of a class room. (*Id.* at 171.) However, in Perez's view, a teacher may change a student's seat if he/she is "causing a problem." (*Id.* at 174.)

To Key's perception, there were "many problems" at Mount Vernon, between "staff" and Perez. (*Id.* at 26-28.) In Key's view, requiring Z.L. to stand for five minutes in the librarian's area would be an appropriate form of discipline.

In Resciniti's view, requiring a student to be separated from classmates in the librarian's area would not be appropriate discipline and would constitute corporal punishment. In addition, it would not be appropriate to place a child in an area where he/she could not be seen if the student were a 'discipline problem." (*Id.* at 80.) Concerns would include the fact that there were items, including scissors, with which one could hurt oneself, as well as equipment which could be damaged. Such a situation was not addressed specifically in the packet given to teachers.

Perez did not receive any documents regarding discipline of teachers when he commenced employment with the District. He subsequently learned "in a different

case," in January or February 1997, that the District has a teacher improvement program. (*Id.* at 135.)

Commencing shortly before Perez's employment, Mount Vernon has had a "time out room" in the basement of the school, supervised by a "time out teacher who is certified." (*Id.* at 161-162.) This procedure can only be initiated by an administrator, generally upon the request of a teacher. A student may be in the "time out room for one or two periods, or possibly, for in-school suspension." Such is implemented for students who need to "calm down" or to be "punished for a period or so." The goal is that the child do school work. Such procedure also functions as a "vent" for teachers and students. (*Id.* at 162.) The number of students in the time-out room at any one time can vary, with as many as 17 or 18 students present. The room is on an "organizational chart" distributed to teachers. (*Id.* at 165.) Perez views any separation of a student from his/her instructional process as a suspension, and teachers are advised that only administrators can suspend students.

Jakubiak received satisfactory ratings on observations during her entire professional career, and, more specifically, in the years 1981 through 1996. She generally received satisfactory evaluations on performance criteria, with few exceptions. On the annual evaluation report in 1995, she received an unsatisfactory rating regarding establishment and maintenance of effective discipline and procedures. Comments pertinent to areas needing attention or improvement referenced a need to respond to all student reactions and concerns during instructional activities and to reinforce lessons as needed; to demonstrate "enthusiasm and vitality" while presenting a lesson; and to develop "motivational techniques" to enhance existing library activities for students. (Exh. R-16 at 5.) Comments on the 1996 evaluation, regarding areas needing improvement, referenced a need to demonstrate "personal motivation" to enhance library activities for students. (Exh. R-17 at 3.)

DISCUSSION

The Commissioner generally has jurisdiction to hear and determine controversies and disputes arising under the local school laws. *N.J.S.A.* 18A:6-9 (Supp 1998) A tenured local school employee shall not be dismissed nor reduced in compensation except for inefficiency, incapacity, unbecoming conduct, "or other just cause." *N.J.S.A.* 18A:6-10. The burden of proof in a case such as this is on petitioner by a preponderance of the credible evidence. *Atkinson v. Parsekian*, 37 *N.J.* 143 (1962). Preliminarily, I am not persuaded by the Board's argument that the alleged incidents cannot be the basis of tenure charges because Jakubiak previously received reprimands regarding them.

Jakubiak's testimony regarding the incident with L.G. was extremely detailed and had the ring of truth. I am persuaded by her testimony that L.G. exited the corridor door, not the door to the front porch.

Petitioner was placed in an untenable position as of October 9, 1996. Although she had requested such, she did not have keys to the library corridor door, the intercom in the library, and the telephone. The only manner in which she could have reasonably responded when L.G. left the classroom was to follow him, which she did. I am persuaded that the District has not met its burden of proof regarding Count 2, relevant to C.G.

No person employed or engaged in a school or educational institution shall inflict, or cause to be inflicted, corporal punishment upon a pupil. Any such person may, within the scope of his/her employment, use and employ force reasonable and necessary to "quell a disturbance threatening physical injury to others, to obtain possession of weapons or other dangerous objects, for the purpose of self-defense, or for the protection of persons or property. Any such act shall not be construed to constitute corporal punishment." *N.J.S.A.* 18A:6-1.

The prohibition of corporal punishment precludes 'bodily harm or any impairment' of one's 'physical integrity' 'by the infliction of physical pain by another,' as well as 'offensive bodily touching by another. . .' Teachers are precluded from resorting to 'physical force or violence to maintain discipline or compel obedience.' *In the Matter of the Tenure Hearing of Frederick L. Ostergren* (*Ostergren*), 1966 *S.L.D.* 185, 186 (citations omitted) For the reasons hereinafter discussed, I am persuaded that petitioner has not proven, by a preponderance of the credible evidence, that Jakubiak committed corporal punishment regarding Z.L.

Petitioner substantially relied regarding Charge 2 on the testimonies of students, including Z.L., who were approximately 11 years old at the time of hearings. Material inconsistencies among their testimonies, in my judgment, raise substantial questions regarding the veracity and accuracy of their renditions of what occurred on October 23, 1996. Although Z.L. was found to have met minimum requirements for being allowed to testify, it is not clear if Z.L. fully understood the significance of the proceedings and the importance of testifying truthfully. (*See,* Tr., Feb. 11, 1998, at 112-18.)

Z.L. testified that she had completed her assignment and thereafter went to the card catalog. Upon returning to her seat, she responded to a request for help from another student, C. Z.L. stated that as she was helping C., respondent ". . . came over there, she grabbed me by my clothes" and took her into the "back room." Jakubiak then told Z.L. that the latter had been "running around," and when Z.L. indicated that she did not "do anything," Jakubiak "hit me." (Tr., Feb. 11, 1998, at 121-22.) Z.L. was seated, but not at her proper table when Jakubiak came over. Jakubiak "grabbed" her shirt on the left side. (*Id.* at 123.) She "put her "in the back room" (*Ibid.*) and "slapped her on the left side of her face, *(Id.* at 128.)

Z.L. also testified that she thereafter remained standing in the librarian's area until Key returned. Jakubiak told Key that Z.L. was in the back area. Z.L. indicated she could not look out of the librarian's area to observe other children. However, Z.L. also

testified that she saw two boys, A. and R., looking into the back area, when respondent was speaking with her. Z.L was able to hear Jakubiak speaking to the class. Z.L. testified that she remained in the back area for "five minutes", and Jakubiak told her to return to the classroom when Key returned. Z.L. also testified that she told no one regarding the incident until she went to Perez's office after school.

On cross-examination, Z.L. denied running around the class. She also denied that Jakubiak told her that respondent intended to call Z.L.'s mother, nor that she heard Jakubiak ask Key for her parents' telephone number. Z.L. also denied that respondent spoke with her regarding Z.L.'s behavior in class that day, generally, and specifically, regarding the card catalog. No one ever asked Z.L. to write a statement regarding the incident.

T.T. testified that Z.L. raised her hand during class, requesting assistance from Jakubiak, and respondent went to the table where Z.L. was seated. At some point, Z.L. "cursed" at respondent, and Jakubiak then "hit her" on the right side of the face. (*Id.* at 161.) T.T. was not "very far" from Z.L., approximately "two tables away." (*Id.* at 164-65.) T.T. testified that respondent then "took" Z.L. to the ". . . back" of the library and "put her in back of the desk somewhere." (*Id.* at 165.) Both Z.L. and T.T. testified that Z.L. was crying after Jakubiak hit her. T.T. recollected that the incident occurred at the "beginning" of the class. (*Id.* at 167.) She denied having observed Z.L. speak with other students during class nor having observed Z.L. near the card catalog. T.T. did not know why Z.L. "cursed" at respondent. (*Id.* at 168.) Nor did he know what Jakubiak had said to Z.L.

T.T. reiterated on cross-examination that Z.L. was seated during the incident. T.T. also reemphasized that Jakubiak hit Z.L. in front of the whole class and that Z.L. was seated at her assigned table. T.T. and Z.L. had been classmates for three years. T.T. testified that they did not live near each other but were "friends" at school, seeing each other daily after school. (*Id.* at 172.)

T.T. also testified that in early February 1998, Perez, via the loud speaker, requested that T.T. come to his office, where he spoke to her regarding the alleged incident. (*Id.* at 173.) Two other students, H. and M., were also present. Perez asked T.T. if the students had ". . . ever witnessed anybody get hit by a teacher or anything." (*Id.* at 173-74.) He asked all of them. T.T. testified that H. and M. responded that they did not recollect any such incident, while T.T. responded in the affirmative. She indicated that after her response, H and M then recollected the matter. T.T. testified that Perez again spoke with her regarding the incident the next day, in his office, in the presence of Schwartz and petitioner's counsel. Later that day, Perez called T.T.'s home twice. He spoke to T.T., asking if she remembered ". . . when I talked to you -- I talked to you about what happened with Mrs. Jakubiak"? (*Id.* at 179.) T.T. responded in the affirmative. He later called, asking to speak with T.T.'s mother, who was not home. Perez told T.T. to come to his office to obtain a letter for her parents to read pertinent to her appearance at hearings in the current matter. T.T. never told Perez that Z.L. had cursed at Jakubiak.

Early in February 1998, Schwartz also approached T.T. while she was in a class in the gymnasium. After discussing another matter with her, Schwartz asked if A.G. remembered ". . . any incident happen in the library last year"? (*Id.* at 33.) She did not reference the names of any specific children.

A.G. testified that Z.L. did not know how to complete the assignment on the day in question, that Z.L. got out of her seat, that she sat down when respondent told her to, and that another student, T., went to help Z.L., but that T. ". . . then had to sit down." (Tr., Feb. 13, 1998, at 16.) A.G. also testified that Z.L. then "went to request assistance from respondent, who provided such, but that Z.L. "kept coming up to" Jakubiak, who was seated at a desk towards the front of the library, for assistance, that respondent "got frustrated," and that Jakubiak then "slapped her." (*Id.* at 16 &19.) Z.L. then started crying. Respondent "grabbed" Z.L. and "put her in the back of the library." (*Id.* at 19-20.) A.G. did not know how long Z.L. remained in the librarian's area, nor did he observe if Z.L. were seated or standing.

A.G. testified that the class was "rowdy" and noisy "on the way to the class," (*Id.* at 27-28.) and at the end of the period, they were "[R]owdy," and "noisy." (*Id.* at 23.) A.G. did not recollect when Key returned to the classroom. He confirmed that D. " . . . was about to fight" another student in the class and that respondent spoke to D. regarding the incident. (*Id.* at 29.) He never recollected Z.L. "getting into trouble" during the school year. (*Id.* at 22.)

Schwartz apparently gave A.G. a letter regarding the matter to take home to his parents, regarding testifying. A.G. testified that he was not "called down" to the auditorium by Perez. (*Id.* at 34.) He also testified that subsequent to the meeting in the auditorium, one of the students, J., asked A.G. if he remembered ". . . when Ms. Jakubiak had slapped Z." (*Id.* at 35.)

On cross-examination, A.G. testified that Z.L. never went near the card catalogues. Although he recollected that Jakubiak spoke to her, he did not recollect what was said. He subsequently testified on cross-examination that he did observe Z.L. near the catalogue. A.G. did not recollect that Key spoke with Jakubiak when she returned to the library. He estimated that Z.L. remained in the librarian's area for approximately 10 minutes. A.G. testified that he was not able to see Z.L. while she was there. A.G. also testified that an individual other than Key had initially escorted the class to the library.

R.D.A. testified that individuals were "talking real loud" during library period (Tr., Feb. 17, 1998, at 40.) He also testified that he observed Jakubiak "grabbing" and "shoving" Z.L., while he was seated at his assigned table, "at the front" of the classroom. (*Id.* at 41-42.) He amplified that respondent "grabbed her by the back of her shirt and started pushing her while she was holding her" and that respondent "took" Z.L. to the area of the computer (*Id.* at 45-46.), the librarian's area. Other students began to move around the room and said that Jakubiak was ". . . hitting on Z." (*Id.* at 47.), that is, was "slapping" Z. (*Id.* at 50.)

R.D.A. testified on cross-examination that the first time he was requested to provide testimony regarding the current matter was in school the morning of February 17, 1998. R.D.A. was a student at Camden at that time. He could not recollect who made the request, although referencing that he could not recollect "her name", and testified that Perez, Schwartz, Resciniti or Dandridge had never spoken to him previously regarding the matter. (*Id.* at 51.) However, R.D.A. testified that respondent's counsel did tell him that Jakubiak's job was in question.

R.D.A. also testified that Z.L. went to Mrs. Key at the end of class and spoke to the latter. He assumed that Z.L. told Key what had transpired. Z.L. was "crying . . ." when she returned to her seat but not when Key entered the room. *(Id.* at 55.) He reiterated that he observed Z.L. return to her seat, next to R.D.A. at R.D.A.'s table. Z.L. got up and spoke to Key. R.D.A. also testified that Z.L. had behaved "normally" during class and that Z.L. got up out of her seat once to ask Jakubiak for assistance. *(Id.* at 60.) Jakubiak "started yelling" at Z.L. and told her to sit at her table. (*Id.* at 60-61.) Z.L. stood up and again told Jakubiak that she needed assistance. R.D.A. also noted that D. had behaved "good" during class and that D. "never caused no problems." (*Id.* at 61.) He also testified that the class behaved "good" on their way to the library. (*Id.* at 61.)

Z.L.'s testimony that she had completed her assignment and behaved appropriately on the day in question is inconsistent with the testimony of Jakubiak, as well as the testimony of other students. Her testimony that she left the librarian's area when told to do so by Jakubiak is also inconsistent with respondent's and Key's testimonies. I found her testimony that Jakubiak did not discuss Z.L.'s behavior in class not persuasive.

T.T.'s testimony regarding where the alleged incident occurred was materially different from that of Z.L. In addition, T.T.'s testimony that she only socialized with Z.L. at school was contradicted by her statement to Perez that Z.L. was her close friend.

T.T.'s testimony that Z.L. cursed at Jakubiak apparently without provocation was also inconsistent with Z.L.'s testimony that the latter behaved appropriately and did not have the ring of truth. Nor did T.T.'s denial of observations of Z.L. walking about the room and in proximity to the card catalog. T.T.'s testimony that Z.L. asked for help with the assignment also contradicted Z.L.'s testimony that she had completed it. T.T.'s testimony that she spoke with Perez in his office was contrary to Perez's testimony that he spoke with T.T. in the auditorium.

R.D.A.'s testimony that other students indicated that Jakubiak slapped Z.L. while in the librarian's area was inconsistent with that of other students' testimony. His testimony that Z.L. returned to her seat at the end of class was also inconsistent with the testimony of other witnesses. In addition, R.D.A.'s testimony that Z.L. spoke with Key when the latter returned to the library was inconsistent with the testimony of Key, as well as other witnesses. R.D.A.'s testimony that D. did not behave inappropriately in class that day, nor generally, was also inconsistent with the weight of the evidence. I also note that A.G.'s testimony, that an individual other than Key escorted the class to the library, was contrary to Key's and Jakubiak's testimonies.

In the context of the entire record, respondent's argument that the fact that Z.L. did not immediately report any such incident to Key, nor other students, casts doubt on the credibility of her testimony has merit. The fact that Key did not observe that Z.L. appeared to be upset, nor to have been crying, when Key returned to class on the day in question is also significant.

In addition, the manner in which the incident was investigated by administrators raises questions regarding the credibility of various witnesses. I place some weight on the fact that Perez did not immediately speak to other students after speaking with Z.L. On October 23, 1996, when any occurrences would presumably have been fresh in their minds. The manner in which he presented the subject for discussion some one year later, when he called students to the auditorium, also raises questions regarding the recollection of those students who spoke to him, as does the fact that apparently

only three students recollected any such incident. The fact that Perez did not speak with students who did not respond affirmatively to his queries is also troubling. His explanation of why he did not immediately speak to other students was not, on its face, reasonable. The manner in which Jakubiak was subsequently removed from Mount Vernon, and the manner in which she was served tenure charges, also raise questions regarding the conduct of administrators.

Jakubiak's testimony that Z.L. behaved inappropriately on October 23, 1996, and previously, was credible and was corroborated by Key's testimony, who, as reflected in the above findings of fact, had periodically disciplined Z.L. and spoken to M.L. regarding her school work. Key's testimony in that respect also was contrary to that of M.L., who testified generally that Z.L. was not the type of child to behave inappropriately, neither at home nor in school.

Key's testimony was also somewhat contradictory to that of Perez, who testified that although he would generally know if a student were a behavioral problem, he had no such information regarding Z.L., and, to the contrary, would not have expected her to misbehave in class. Perez testified that Jakubiak had repeatedly told him, prior to October 23, 1996, that she could not deal with elementary school students, contrasting her experience with other students in the District. I found Jakubiak's testimony that she did not do so to be credible. Respondent's testimony in that respect was extremely specific; she recollected three occasions on which she had spoken with Perez. In addition, the fact that Perez apparently did not offer any suggestions to Jakubiak regarding methods for dealing with her students casts doubt on his testimony. In addition, Perez's testimony that Z.L. approached him after school while he was standing in a hallway with Schwartz was not consistent with Schwartz's, Rasciniti's or Z.L.'s testimony. The evidence supports a conclusion that Z.L. went directly to the office on her own volition. Perez's testimony that he did not escort Jakubiak to the nurse's office was contrary to Jakubiak's testimony, as well as Perez's memorandum of October 24, 1996 to Marinaro.

Key testified that there was confusion in the class when she returned to the library on the day in question. She also testified that Jakubiak advised her that students, including Z.L., had behaved inappropriately. She observed that Z.L. was not in line with the other students, but was standing behind the desk in the librarian's area. Key's testimony that at the subsequent meeting with Perez, respondent denied that she touched Z.L. was consistent with Jakubiak's testimony. Perez's testimony, in contrast, that Jakubiak admitted grabbing Z.L. was not consistent with Key's and Jakubiak's testimonies. Key's testimony that she left the meeting because she was offended by certain of Jakubiak's references to the students had the ring of truth. However, I am persuaded, based upon a review of the entire record, that it is not reasonable to infer that Jakubiak intended to reference the racial composition of her class, but apparently, the age and behavior of the students.

Perez's communications with Mr. And Mrs. L. as they approached the school on October 24, 1996, and with M.L. during the meeting in his office, raises troubling questions. It is reasonable to infer that Perez had already decided that Z.L's rendition of the events which had transpired was truthful. Perez apparently did not reconsider that conclusion after meeting with respondent. The fact that he did not further investigate the matter at that time also raises questions, regarding the reasonableness of his conclusions and his subsequent recommendations that respondent be subject to discipline, as did his failure to include a copy of respondent's written statement with his October 24, 1996 memorandum to Marinaro.

The fact that Z.L. was crying while in Perez' office could, based on the record, have been the result of the fact that Jakubiak had told her that respondent intended to contact Z.L.'s parents, and she may have overheard Jakubiak speak to Key in that respect, as well as the fact that M.L. could be expected to be very concerned if one of her children acted inappropriately in school. In that respect, I found Jakubiak's testimony that she did speak to Key regarding contacting Z.L.'s parents to be credible.

Petitioner emphasized the fact that, as found, Jakubiak stated, in her written statement of October 24, 1996, that she "took" Z.L. to the librarian's area, equating that phrase with forcing her, by physically grabbing or shoving her. (Exh. R-4.) I am not persuaded by that analysis. The phraseology utilized by Jakubiak can reasonably have several connotations. In addition, as indicated, respondent's testimony that she did not state she had grabbed nor pulled Z.L. during the meeting with Perez was corroborated by Schwartz's, Rasciniti's and Key's testimonies. Jakubiak's testimony that she was extremely upset when she prepared the statement, because of what had transpired, had the ring of truth and was corroborated by the documentary evidence.

In contrast to the testimonies of other witnesses, I found respondent's testimony to be extremely detailed. Respondent appeared to have excellent recollection of material events, regarding both charges. Her testimony in general had the ring of truth. There is nothing in the record to suggest that respondent had ever acted in a similar manner regarding other students. Respondent was able to deal with D. calmly and in a professional manner, not only on the day in question, but previously.

It is clear from a review of the record, as reflected in the above findings of fact, that respondent left Z.L. unattended in an area of the library substantially unsupervised for a period of approximately five minutes. Z.L. could have injured herself or had an opportunity to destroy school property.

An action by a teacher resulting in a student being unsupervised, even if for disciplinary reasons, constitutes unbecoming conduct. *In the Matter of Alan S. Tenney*, 1983 *S.L.D.* 836 (*Tenney*). I am persuaded that petitioner has proven, by a preponderance of the credible evidence, Charge 2 regarding Z.L. The remaining issue is what discipline, if any, should be imposed upon respondent.

Evaluation of tenure charges is generally a matter of total impression, "based upon observations made over a period of time", *Newark Bd. of Ed. v. Burnside*, 13 *N.J.A.R.* 867 (Oct. 25, 1988), although the need to remove a teacher may be

demonstrated by one incident, "if sufficiently flagrant", *In Re Fulcomer*, 93 *N.J. Super.* 404, 421 (App. Div. 1967). The Commissioner has recognized situations where teachers convicted of tenure charges should receive a penalty less than dismissal. *Ostergren, supra.* I am persuaded that a lesser penalty should be imposed in this case.

Factors relevant to a determination of penalties include the nature and length of a teacher's prior service. *In Re Tyler*, 13 *N.J.A.R.* 297. In determining the appropriate discipline in cases involving unbecoming conduct, relevant factors are the nature and circumstances of the incident in question, provocation regarding the incident, the age of the pupil, the teacher's record, attitude, and prognosis for continued, effective performance and usefulness to the school system, and the likelihood that the behavior in question will recur. *Ostergren, supra.* It has been recognized that:

> . . . each such matter must be judged in the light of its particular circumstances. The kind and degree of penalty will necessarily vary according to the specific problem.
>
> [*In the Matter of the Tenure Hearing of William H. Kittell*, 1972, *S.L.D.* 531]

In *Tenney, supra*, the respondent was found to have committed several actions constituting unbecoming conduct, including two occasions on which he left students unattended. Respondent ordered one of his students to sit outside of the classroom, unsupervised, because of "disruptive behavior." *Ostergren, supra.,* at 838-39. On another occasion, respondent left his class unattended for 23 minutes. The board of education terminated respondent. However, the Commissioner upheld a decision of the presiding ALJ that the teacher be reinstated and that he forfeit three months' pay.

Respondent has essentially had an unblemished record for some 35 years with the Board/District and has not been subject to prior discipline. Although not condoning the fact that she left Z.L. unsupervised for a period of time, I consider the fact that Z.L. had behaved inappropriately and did not respond to prior admonitions by respondent. I

also note Jakubiak's testimony that she had Z.L. go to the librarian's area to speak to her privately. I also give weight to the fact that Z.L. was unsupervised for a *de minimis* period of time. In light of respondent's prior satisfactory performance for many years, I am persuaded that the record does not support a finding that it is reasonable to anticipate similar action by Jakubiak in the future. The record supports a conclusion that respondent's actions on the day in question evidenced a lack of judgment. The ALJ's characterization of the instances of unbecoming conduct reviewed in *Ostergren* are applicable in the current matter: ". . . in the hierarchy of wrongdoings in which a teacher may be involved ". . . the conduct in question ". . . is relatively minor." *Ostergren* at 841. Based upon the circumstances of this case, I am persuaded that a one-month forfeiture of pay is reasonable regarding those charges proven by petitioner.

CONCLUSIONS

I **CONCLUDE** that petitioner has not proven, by a preponderance of the credible evidence, Charge One; that petitioner has proven, by a preponderance of the credible evidence, Charge Two, as such charge relates to Z.L.; that petitioner has not proven, by a preponderance of the credible evidence, Charge Two as such pertains to L.G.; and that a reasonable discipline regarding Charge Two, relevant to Z.L.., is forfeiture of one month's pay.

ORDERS

It is hereby **ORDERED** that respondent's motion for summary decision be and is hereby **DISMISSED**; that Charge One be and is hereby **DISMISSED**; that Charge Two, as such charge pertains to L.G., be and is hereby **DISMISSED**; that Charge Two, as such charge pertains to Z.L., be and is hereby **SUSTAINED**; that respondent be reinstated to her former position; and that respondent be subject to forfeiture of one month's pay, and any associated emoluments; pertinent to Charge 2 relevant to Z.L.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 29, 1998
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

12/31/98
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 04 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

njf

APPENDIX

Witnesses

For Petitioner:

Francisco Perez

Carol Schwartz

Shirley Key

Phillip Resciniti

M.L.

Z.L.

T.T.

A.G.

R.D.A.

For Respondent:

Victoria Jakubiak

Exhibits in Evidence

J-1 Admissions

P-1 Memorandum dated October 9, 1996

P-2 Memorandum dated October 24, 1996 to respondent

P-3 Memorandum dated October 24, 1996 to Marinaro

P-4 Diagram of building

P-5 Chart

P-6 Tenure Charges

P-7 Memorandum dated October 25,1996

R-1 Report dated September 10, 1994

R-2 Report dated September 24, 1996

R-3 Report dated October 24, 1996

R-4 Statement of respondent dated October 24, 1996

R-5 September 18, 1996 class work of Z.L.

R-6 Report dated November 4, 1996

R-7 Report of Dr. John A. Bendo

R-8 Lesson plans for October 9, 1996

R-9 Lesson plans for October 23, 1996

R-10 Annual evaluation, 1981

R-11 Annual evaluation, 1985

R-12 Annual evaluation, 1991

R-13 Annual evaluation, 1992

R-14 Annual evaluation, 1993

R-15 Annual evaluation, 1994

R-16 Annual evaluation, 1995

R-17 Annual evaluation, 1996

R-18 Photograph of library door

R-19 Photograph of bottom of library door

R-20 Photograph of intercom

R-21 Photograph of card catalog

R-22 Photograph of librarian's office

R-23 Photograph of circulation desk

R-24 Letter dated December 9, 1996

R-25 Answers to tenure charges

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
185 Washington Street
Newark, New Jersey 07102
(201) 648-7245

William Speziale
Legal Assistant III

January 13, 1999

Deborah N. Antanaitis, Director
Department of Education
Bureau of Controversies & Disputes
100 RiverView Plaza
4th fl. CN 500
Trenton, New Jersey 08625

Re: In the matter of the Tenure hearing of Victoria Jakubiak,
State Operated School District of the city of Newark, Essex County
OAL Docket No. EDU 3961-97
Agency Dkt. NO. 85-3/97

Dear Ms. Antanaitis:

The Initial Decision issued January 4, 1999, in the above referenced matter contained errors on pages 3 and 4, 9, 33, 36, 43, 44,.

The copy on file with this office has been revised in accordance with the attached. Kindly correct the original decision which has been filed with your agency.

Please note that by copy of this letter, I am requesting that the parties also correct their copies of the decision.

Very truly yours,

William Speziale
Legal Assistant, III

WS/dh
Enclosure
cc: Gregory G. Johnson, Esq
Eugene G. Liss, Esq.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

Memorandum

TO: File

FROM: Diana C. Sukovich, ALJ DCS 1/7/99

DATE: January 7, 1999

RE: *Newark v. Jakubiak*

OAL Dkt. No. EDU 3961-97

The following corrections should be made in the above-referenced decision:

p. 3 (under **FINDINGS**) paragraph 2, 4th line: "... petitioner's [respondent's] ..."

p. 4, paragraph (full) 2, 2nd line: "... petitioner's [respondent's] ..."

p. 9, paragraph (full) 2, 2nd line: "... petitioner [respondent] ... "

p. 33, paragraph 1, 7th line: "respondent's [the Board's] ... "

p. 33, paragraph 3, last line: " ... L.G. [C.G.] ... "

p. 36, paragraph 2, 2nd line: " T.T. [A.G.] ... "

p. 43, paragraph (full) 2, 4th line: " ... *Tenney* [*Ostergren*] ... "

p. 44, 10th line (before **CONCLUSIONS**): " *Tenney* [*Ostergren*] ... "

md

OAL DKT. NO. EDU 3961-97
AGENCY DOCKET NO. 85-3/97

IN THE MATTER OF THE TENURE	:	
HEARING OF VICTORIA JAKUBIAK,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	
	:	

The record of this matter and initial decision of the Office of Administrative Law have been reviewed. Exceptions to the initial decision filed by the State-operated School District of the City of Newark (petitioner), as well as respondent's reply thereto, were timely filed pursuant to *N.J.A.C.* 1:1-18.4. The arguments raised by the parties in these submissions were duly considered by the Commissioner in rendering the decision herein.

Petitioner's exceptions object to the Administrative Law Judge's (ALJ) conclusion that it did not prove Charge One, Corporal Punishment, and Charge Two, Conduct Unbecoming a Teacher as it regards L.G. Petitioner avers, *inter alia,* that the ALJ failed to credit the testimony and evidence presented in support of Charge One involving the pupil Z.L., as well as the testimony of administrator Carol Schwartz and other witnesses with respect to Charge Two, wherein respondent failed to report that pupil L.G. exited her class and was outside of the building. Petitioner urges the Commissioner to sustain the charges and order respondent's dismissal. If, however, the Commissioner determines to affirm the ALJ's ruling, petitioner requests that the Commissioner levy a more severe penalty for Z.L.'s lack of supervision, emphasizing that on October 8, 1996, Vice Principal Schwartz verbally warned respondent about L.G. being outside the class without supervision. This warning was followed up in writing the next day (P-1), making this incident the second time in a month that one of respondent's pupils was left unsupervised. With respect to Charge Two, petitioner urges that it is inexplicable that Ms. Schwartz, an experienced vice principal who was not respondent's supervisor, would fabricate a story that she found L.G. outside the building and that respondent, rather than seeking

to find the student, was reading to the class when Ms. Schwartz brought L.G. back to class. Petitioner further maintains that even if L.G. exited the corridor door and even if respondent did not have a key to the library or no access to the phone, her version of events breaks down because she remained in the library without notifying the office of the problem when the main office is across the hall from the library and the other vice principal's office is next to the library.

Respondent's reply exceptions essentially recast and reiterate the arguments advanced before the ALJ in her post-hearing brief, setting forth at length passages from the transcripts of the four days of hearing which she believes demonstrate the lack of credible testimony and evidence in support of the charges. Respondent also sets forth her exceptions to the penalty levied by the ALJ, urging, *inter alia*, that she had an unblemished educational career of 35 years and that Z.L. was only technically left unattended in that she was never more than 15 feet from respondent who could look in and see her. Respondent further avows that a penalty of $6,000 one (1) month's pay, is severe in light of her good intentions and unblemished career.

Upon a thorough and comprehensive review of the entire record of this matter, including the transcripts and post-hearing submissions of the parties, the Commissioner concurs with the findings and conclusions of the ALJ that Charge One relating to corporal punishment being committed against student Z.L. was not proven by petitioner and that Charge Two was proven only to the extent that respondent left Z.L. unsupervised for approximately five minutes. A reading of the transcripts readily underscores the substantive, material inconsistencies among the testimony of the student witnesses, inconsistencies which, as the ALJ found, raise substantial questions regarding the veracity and accuracy of their renditions of what occurred in the library on October 23, 1996. The Commissioner is also in full agreement with the ALJ's conclusion that the manner in which the incident was investigated by administrators raises questions regarding the credibility of various witnesses. It is, indeed, troubling that Principal Perez did not immediately speak to other students in the class after speaking to Z.L. on October 23, rather than doing so at the behest of petitioner's counsel just a few days before the hearing commenced in this matter, nearly 16 months after the incident was supposed to have occurred.[1] Also of concern is the manner in which Principal Perez called a group of 11 students who still attended Mt. Vernon School to the auditorium one week before this hearing started and asked "***does anybody remember any teacher last year, when you were with Mrs. Key's homeroom, in your

[1] It is noted that in the case of student R.D.A., the student was never even questioned by any administrator about his possible knowledge regarding the October 23, 1996 incident until the morning of the day he testified. (T3:51-52)

fifth grade, does anybody remember any teacher putting a hand on a student, grabbing a student, slapping a student, any-- at any time.***?" (Tr. 3:151) As stated by the ALJ

> ***The manner in which [Perez] presented the subject for discussion some one year later, when he called students to the auditorium, also raises questions regarding the recollection of those students who spoke to him, as does the fact that apparently only three students recollected any such incident. The fact that Perez did not speak with students who did not respond affirmatively to his queries is also troubling. His explanation of why he did not immediately speak to other students was not, on its face, reasonable. The manner in which Jakubiak was subsequently removed from Mount Vernon, and the manner in which she was served tenure charges, also raise questions regarding the conduct of administrators. (Initial Decision at pp. 39-40)

Despite petitioner's arguments to the contrary regarding the ALJ's disposition of the charge of unbecoming conduct as it relates to kindergarten student, L.G., the Commissioner, upon a thorough review of the record, including a full consideration of Ms. Schwartz's testimony, finds insufficient basis to disturb either the credibility determinations of the ALJ, who had the benefit of assessing the testimony firsthand, or her findings and conclusion relative to the L.G. incident.

The Commissioner also determines that the penalty of one month's loss of salary (approximately $6,000), which was assessed by the ALJ, is appropriate in light of the finding and conclusion that respondent left Z.L. in an area of the library substantially unsupervised for approximately five minutes. In such circumstances, a student could be injured or an opportunity created for school property to be damaged or destroyed.

Accordingly, the initial decision of the ALJ, including corrections thereto submitted by the OAL,[2] is adopted for the reasons expressed therein.[3]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 11, 1999
Date of Mailing, February 11, 1999

[2] See attached letter from the OAL delineating corrections to the initial decision.

[3] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 et seq., within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

34-99

IN THE MATTER OF THE TENURE	:	
HEARING OF LINDA PAIS, STATE-	:	
OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
_____	:	

SYNOPSIS

District initially certified tenure charges of unbecoming conduct and chronic and excess tardiness against respondent teaching staff member. Following respondent's contention that the unbecoming conduct charge should have been inefficiency, the District withdrew its charge of unbecoming conduct and filed charges of inefficiency. Respondent filed a motion to dismiss the charge of inefficiency for failure to comply with procedural requirements, which motion was granted. Remaining issues were whether the charge of chronic and excessive tardiness were to be sustained and, is so, whether the circumstances warranted respondent's records. Respondent acknowledged her tardiness as reflected in the District's records.

In light of testimony of witnesses and the record, the ALJ concluded that the charge of chronic and excessive tardiness had a negative impact on her students and, therefore, had to be sustained. However, in that respondent had shown improvement with respect to tardiness in recent years, the ALJ determined that respondent was to be restored to her teaching position but, in view of the large number of late arrivals, as well as the surrounding circumstances, a forfeiture of pay was the appropriate penalty. Thus, the ALJ ordered a penalty of forfeiture of pay for a period of 120 days.

Upon review of the record, including a transcript of the hearing, the Commissioner concurred with the ALJ's determination that the District had carried its burden of proving respondent's tardiness and that the appropriate penalty was forfeiture of the 120 days' salary already withheld.

February 16, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. EDU 3290-97 and
EDU 5447-98
AGENCY DKT. NOS. 36-1/97 and
117-4/98

IN THE MATTER OF THE TENURE HEARING OF LINDA PAIS, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.

Cherie L. Maxwell, Esq., and **Kelly Ann Guariglia,** Esq., for petitioner, State-Operated School District of the City of Newark (Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Eugene M. Liss, Esq., for respondent, Linda Pais

Record Closed: November 9, 1998 Decided: December 22, 1998

BEFORE **RICHARD McGILL**, ALJ:

The State-Operated School District of the City of Newark ("District or "petitioner") filed charges against Linda Pais ("respondent"), whom it employs as a tenured teacher. The District seeks dismissal of respondent based upon charges of chronic and excessive tardiness and inefficiency.

PROCEDURAL HISTORY

The District initially filed charges of conduct unbecoming a teacher and chronic and excessive tardiness with the Commissioner of Education on January 30, 1997. Respondent filed an answer on March 4, 1997, and the matter was transmitted to the Office of Administrative Law on March 11, 1997, for determination as a contested case.

In her answer, respondent contended that the charge of conduct unbecoming a teacher should have been inefficiency and that accordingly she should have been given a period of ninety days at a minimum in which to correct any deficiencies. By letter dated August 15, 1997, the District withdrew the charge of conduct unbecoming a teacher and expressed an intention to return respondent to a teaching position at the beginning of the 1997-98 school year and to implement a notice of inefficiency and a ninety-day improvement period. This action was confirmed by letter dated October 7, 1997.

On October 3, 1997, respondent moved to dismiss the remaining tenure charge for failure to comply with procedural requirements. This motion was denied by Order dated December 3, 1997.

A hearing in regard to the charge of chronic and excessive tardiness was conducted on June 2, 1998, at the Office of Administrative Law in Newark, New Jersey. Counsel advised that the District had filed charges of inefficiency against respondent with the Commissioner of Education on April 27, 1998, and that transmittal of these charges to the Office of Administrative Law was imminent. As a result, the briefing schedule for the charge of chronic and excessive tardiness was held in abeyance, and additional hearing dates were scheduled for the charge of inefficiency.

The charge of inefficiency was transmitted to the Office of Administrative Law on June 11, 1998, for determination as a contested case. On July 24, 1998, respondent filed a motion to dismiss the charge of inefficiency for failure to comply with procedural requirements. An

oral argument in regard to this motion was held on September 9 and 10, 1998, and at the time, limited testimony was taken pursuant to *N.J.A.C.* 1:1-12.4(c) to clarify the facts related to the motion. Respondent's motion to dismiss the charge of inefficiency was granted by Order dated October 5, 1998, and the record closed on November 9, 1998, upon receipt of briefs in regard to the charge of chronic and excessive tardiness.

ISSUES

The remaining issues in this proceeding are whether the charge of chronic and excessive tardiness should be sustained and, if so, whether the circumstances warrant respondent's dismissal. Respondent acknowledges her tardiness as reflected in the District's records. However, respondent maintains that there were reasons for her tardiness, that her lateness had negligible impact on her students and that she has shown significant improvement in recent years.

UNDISPUTED FACTS

The facts in this matter are largely undisputed. Based upon the evidence presented at the hearing, I **FIND** as follows:

1. Respondent began her employment with the District in 1981.

2. Respondent was assigned to the Oliver Street School, until she was transferred to the Branch Brook School for the 1992-93 school year.

3. The grade levels at the Branch Brook School range from pre-K to fourth grade. The pupils were in both special and regular education programs.

4. At the Branch Brook School, respondent was an English as a Second Language (ESL) teacher. Respondent had her own classroom, but she taught the pupils on a pullout basis from their regular classes.

5. Barbara Ervin was the principal at the Branch Brook School from March 1995 to June 1996. Thereafter, William Demetroulakos was the principal at the Branch Brook School.

6. Teachers at the Branch Brook School were considered to be tardy if they did not sign the time book by 8:30 a.m.

7. Pupils were allowed to enter the school building at 8:35 a.m., and the late bell for students sounded at 8:45 a.m.

8. The first period of instruction began at 8:50 a.m.

9. Respondent was tardy eighty-five times during the 1992-93 school year, sixty-seven times during the 1993-94 school year and eighteen times during the 1994-95 school year. The total of 170 days tardy represents thirty-two percent of the school days during these three school years.

10. The number of times that respondent signed the time book between 8:31 a.m. and 8:49 a.m. totaled sixty-three during the 1992-93 school year, fifty during the 1993-94 school year and thirteen during the 1994-95 school year.

11. Respondent signed the time book after 8:49 a.m. twenty-two times during the 1992-93 school year, seventeen times during the 1993-94 school year and five times during the 1994-95 school year.

12. During the 1995-1996 school year, respondent was tardy on ten occasions. On seven of these occasions, she arrived before 8:50 a.m.

13. Respondent received both oral and written warnings concerning her tardiness during the period from 1992 through 1996.

14. Respondent's salary was routinely docked as the result of her lateness, and her increment was withheld for the 1991-92, 1995-96 and 1996-97 school years due to unsatisfactory job performance.

SUMMARY OF EVIDENCE

The District's witnesses included William Demetroulakos and Barbara Ervin. Respondent testified on her own behalf.

a. William Demetroulakos

William Demetroulakos testified that he has been employed by the District for thirty-two years and that he was the principal of the Branch Brook School during the 1996-97 and 1997-98 school years. Most of his testimony was undisputed and is reflected in the above findings of fact.

If a teacher is late, there can be problems related to the orderly entrance of pupils into the school building. During the 1997-98 school year, respondent was supposed to use her first period for preparation. In this situation, lateness can cause loss of preparation time. Demetroulakos has no knowledge of respondent's assignments for the first period during the time period from September 1992 to June 1995. Respondent has not been docked for lateness during the last two years.

b. Barbara Ervin

Barbara Ervin has been employed by the District for twenty-five years. After leaving the Branch Brook School in June 1996, Ervin became the principal at the Sussex Avenue School.

As an ESL teacher, respondent taught six periods per day, and she had three preparation periods per week. Respondent had a maximum of six pupils at a time. Respondent picked up the children and later returned them to their regular classrooms.

Ervin frequently discussed respondent's tardiness with her. Respondent stated that she commuted from Long Island and that she was doing the best that she could. Ervin suggested that respondent leave for work earlier, and respondent said that she would do her best. On various occasions, respondent said that the weather or traffic caused her to be late.

Respondent's tardiness had a disruptive impact on school operations. The classroom teacher prepared the pupils to be picked up by respondent. If respondent did not pick up the pupils, then the classroom teacher had to wait for her. On occasions when the regular teacher commented to respondent about being late, respondent responded in a confrontational manner. Another concern was that the teachers were supposed to monitor the children as they entered the school building. At 8:35 a.m., respondent was supposed to be at her classroom door to make sure that students were moving along. Ervin was not aware of the practice prior to March 1995. Ervin received no complaints from parents concerning respondent's tardiness. Further, chronic tardiness by one teacher can adversely affect school morale.

Parking was a problem for everyone at the Branch Brook School. There were no handicapped spaces, but Ervin arranged for parking by the side of the school.

c. Linda Pais

Respondent acknowledged her latenesses as reflected in the District's records, but she testified that there were reasons for her tardiness and that it had limited impact on her pupils. In regard to the impact on students, respondent stated that she did not have any duties between the time she signed in and the time that she picked up her first pupil. Classroom teachers were required to be at their doors to monitor students as they entered the building, but special teachers did not have this responsibility. Respondent normally waited in the cafeteria before

her first class. During the 1992-93 school year, the prior principal never said anything to her about being in the cafeteria from 8:35 a.m. to 8:45 a.m.

For the first period during the 1992-93 school year, respondent had only one pupil who was in a wheelchair due to muscular dystrophy and cerebral palsy. This pupil often missed first period due to medical appointments or because the bus was late. Similarly during the 1993-94 and 1994-95 school years, respondent had one pupil during the first period. All of those pupils made progress as a result of instruction provided by respondent.

In regard to the reasons for her lateness, respondent testified that she lives in New Hyde Park on Long Island. Her commute could be delayed by traffic or inclement weather, and she often had difficulty finding a parking space near the school.

Respondent has a residual paralysis of her right side due to hemiplegia, which affects her walking and her right hand. This condition contributed to her tardiness because she must walk very slowly on ice or snow. During the 1994-95 school year, respondent reduced her tardiness considerably by renting a parking space in a driveway near the school. Respondent acknowledges that she never requested a handicapped parking space.

During the last two years, tardiness has not been a problem. Due to a change in her routine, respondent now arrives at work between 7:15 a.m. and 7:30 a.m. Prior to this change, respondent could not leave home earlier because she needed time in the morning to care for her daughter. For a time, respondent had to drop her daughter off at the baby-sitter at 7:00 a.m. As a result, respondent began her one and a half hour commute to Newark at 7:00 a.m. Since her daughter is now a teenager and as the result of a change in her husband's work schedule, respondent can begin her commute much earlier.

FINDINGS

All three witnesses were essentially believable. The only specific conflict in the testimony concerns Ervin's testimony to the effect that respondent was supposed to monitor students as they entered the building and respondent's claim that she along with other pullout teachers did not have this responsibility. With respect to this factual issue, Ervin was not the principal at the Branch Brook School during most of the pertinent period of time, and respondent seemed certain as to this point. Therefore, I **FIND** that respondent did not have responsibility to monitor pupils entering the school building between 8:30 a.m. and 8:50 a.m.

Aside from the factual issue related to monitoring the halls, the testimony of the witnesses was credible, and the above summary is **FOUND AS FACT.**

LAW AND ANALYSIS

A tenured teacher holds her position under tenure during good behavior and efficiency and may not be dismissed or reduced in compensation, except for inefficiency, incapacity, unbecoming conduct or other just cause. *N.J.S.A.* 18A:6-10. In the event of a dismissal, suspension or reduction in compensation, the school district must proceed in the manner prescribed in *N.J.S.A.* 18A:6-10 *et seq.* Various procedural safeguards are set forth in *N.J.S.A.* 18A:6-11, including requirements that the charges be set forth in writing and that the employee be given the opportunity to respond thereto. The school district must prove the charges by a preponderance of the believable evidence.

The charge against respondent is chronic and excessive tardiness. In regard to the reasons for respondent's tardiness, her testimony that traffic, inclement weather and difficulty parking contributed to the problem was certainly believable. However, all of these circumstances could readily be anticipated by respondent as recurring problems associated with her daily commute. In view of the large number of latenesses, it is apparent that the real problem was that respondent simply was not leaving for work in a timely manner. Evidently,

respondent felt constrained not to leave for work before 7:00 a.m. due to the family routine at the time. The fact that respondent has now changed her daily routine and is arriving at work on time confirms the view that her departure time was the real problem. Therefore, the circumstances mentioned by respondent do not excuse her tardiness.

Respondent cites *In the Matter of the Tenure Hearing of Monica Meade-Stephens,* 92 *N.J.A.R.*2d (EDU) 550, for the proposition that absenteeism and lateness become chronic and excessive when the performance of students begins to suffer. One difficulty with respondent's reliance on *Meade-Stephens* is that the reference to a situation where the performance of students begins to suffer was never intended to be a minimum standard. Further, in the context of absenteeism, the Commissioner of Education has stated that "[c]ommon sense dictates that a teacher's continued absences must, at some point have a negative impact on her pupils even if a board of education is unable to prove the relationship between a teacher's attendance and pupil progress." *In the Matter of the Tenure Hearing of Sheila Green*, 1991 *S.L.D.* 1103, 1119. Similarly here, respondent's latenesses which continued into the first period could only have a negative impact on the pupils. More importantly, the fact that a teacher does not have teaching responsibilities until a later time does not diminish his or her obligation to report to work at the designated time. *In the Matter of the Tenure Hearing of Walter Campbell*, 1976 *S.L.D.* 65, 70. In regard to the number of latenesses that will support a charge of chronic and excessive tardiness, thirty-four late arrivals over a five-month period were found to be "clearly excessive" in *Hamilton Board of Education v. Linda Kurts*, 1986 *S.L.D.* 2721, 2733. In view of the large number of respondent's latenesses, I **CONCLUDE** that the charge of chronic and excessive tardiness must be sustained.

In regard to the question whether the circumstances warrant respondent's dismissal, the District cites various cases where a charge of chronic or excessive tardiness was sustained and the teacher was dismissed; however, in each case, the dismissal was supported by additional charges. E.g., *In the Matter of the Tenure Hearing of Monica Meade-Stephens, supra* (chronic and excessive absenteeism); *Hamilton Board of Education v. Linda Kurts, supra* (conduct unbecoming a teaching staff member, excessive absenteeism and failure to carry out assigned

duties); and *Board of Education of the City of Newark v. Delia Kind,* 1988 *S.L.D. 2074* (inefficiency, incompetence and unbecoming conduct including absenteeism). In addition to the absence of other charges in this case, another factor in respondent's favor is that she has shown improvement with respect to tardiness in recent years. Under the circumstances, dismissal seems to be an unnecessarily harsh penalty. It follows that respondent should be restored to her teaching position.

On the other hand, respondent's tardiness was grossly excessive, and it persisted over three school years despite repeated oral and written warnings. Additionally, the underlying cause of respondent's excessive tardiness was a refusal to adjust her personal schedule such that she could depart for work in the morning in a timely manner. In view of the large number of latenesses as well as the surrounding circumstances, a forfeiture of pay would be an appropriate penalty. As a result of the charges, respondent was not paid for a period of 120 days in accordance with *N.J.S.A.* 18A:6-14. Based upon the above, I **CONCLUDE** that there should not be a restoration of pay for this period.

Accordingly, it is **ORDERED** that:

1. The charge of chronic and excessive tardiness is sustained.

2. The penalty is forfeiture of pay for a period of 120 days.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is

otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Dec. 22, 1998
DATE

Richard McGill
RICHARD McGILL, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 04 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

APPENDIX

WITNESS LIST

For petitioner:

William Demetroulakos
Barbara Ervin
Maria Elena Suarez

For respondent:

Linda Pais

EXHIBIT LIST

P-1	Tardiness record	Evidence
P-2	Teacher annual evaluation dated May 1992	Evidence
P-3	Letter dated July 1, 1992, from Anthony W. Salters to Linda Pais	Evidence
P-4	Supervisor's log of school visit dated December 9, 1992	Evidence
P-5	Memorandum dated December 22, 1993, from Iris A. Martinez-Arroyo to Linda Pais	Evidence
P-6	Memorandum dated March 7, 1995, from Barbara A. Ervin to Linda Pais	Evidence
P-7	Memorandum dated March 20, 1995, from Barbara A. Ervin to Linda Pais	Evidence

P-8	Letter dated July 11, 1995, from Connie Caponegro to Linda Pais	Evidence
P-9	Memorandum dated November 2, 1995, from Barbara A. Ervin to Linda Pais	Evidence
P-10	Memorandum dated November 2, 1995, from Barbara A. Ervin to Linda Pais	Evidence
P-11	Memorandum dated December 1, 1995, from Barbara A. Ervin to Linda Pais	Evidence
P-12	Memorandum dated January 5, 1996 from Barbara A. Ervin to Linda Pais	Evidence
P-13	Letter from Beverly L. Hall to Linda Pais	Evidence
P-14	Teacher annual evaluation report dated May 31, 1995	Evidence
P-15	Letter dated February 26, 1996, from Dr. Lourdes Mitchel to Linda Pais	Evidence
P-16	Letter dated October 25, 1996, from Dr. Lourdes Z. Mitchel to to Linda Pais	Evidence
P-17	Letter dated November 27, 1996, from Dr. Beverly L. Hall to Ms. Linda Pais with attached statement of charges	Evidence
P-18	Teachers in service dated September 3 & 4, 1997, by Maria Elena Suarez	Evidence
P-19	Teachers in service dated September 3 & 4, 1997, by Mayra Meola	Evidence

P-20	Report of instructional assistance provided to Linda Pais	Evidence
P-21	Memorandum dated February 17, 1998, from William Demetroulakos to Lydia Silva	Evidence
R-1	Letter dated September 19, 1997, from Dr. Beverly L. Hall to Linda Pais with attached Statement of Charges of Inefficiency	Evidence
J-1	Form entitled "School Visitations"	Evidence
J-2	Evaluation of Linda Pais by Daniel Dantas dated January 15, 1998	Evidence

OAL DKT. NOS. EDU 3290-97 AND 5447-98
AGENCY DKT. NOS. 36-1/97 AND 117-4/98

IN THE MATTER OF THE TENURE	:	
HEARING OF LINDA PAIS, STATE-	:	
OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon careful and independent review of the record in this matter, which included a transcript of the hearing conducted at the OAL on June 2, 1999, the Commissioner finds, like the Administrative Law Judge (ALJ), that the District has carried its burden of proving that respondent's tardiness was excessive and was, indeed, disruptive to its operations and educational program. Under these circumstances, however, where respondent has not been "docked" for lateness in the past two years and has, apparently, remedied her tardiness problem, the Commissioner concurs that the appropriate penalty is for respondent to forfeit the 120 days' salary already withheld.

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 16, 1999
Date of Mailing, February 16, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

35-99

PATRICIA A. WALSH,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	
RESPONDENT.	:	
AND	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
PETITIONER,	:	
V.	:	
PATRICIA A. WALSH,	:	
RESPONDENT.	:	
	:	

February 16, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INTERLOCUTORY ORDER GRANTING PARTIAL SUMMARY DECISION
OAL DKT. NO. EDU 04540-98
AGENCY DKT. NO. 116-4/98

PATRICIA A. WALSH,
Petitioner,
v.
MIDDLETOWN TOWNSHIP BOARD OF EDUCATION,
Respondent,

AND

BOARD OF EDUCATION OF MIDDLETOWN TOWNSHIP, MONMOUTH COUNTY,
Petitioner,
v.
PATRICIA A. WALSH,
Respondent.

OAL DKT. NO. EDU 06525-98
AGENCY DKT. NO. 225-7/98
CONSOLIDATED

BEFORE **JEFF S. MASIN**, ALJ:

As part of a now consolidated action, the Middletown Township Board of Education in OAL Docket No. EDU 06525-98 seeks to have Patricia Walsh, a member of the Board, disqualified from service on the Board and removed therefrom because she is currently seeking in OAL Docket No. EDU 04540-98 to have the Board indemnify her for the costs and expenses of defending a legal action brought against her by Thomas Stokes. The details of the events leading to the filing of these consolidated cases are set forth in detail in the Interlocutory Order Denying Cross-Motions for Summary Decision issued by this judge on November 18, 1998. That Order

dealt with motions filed in regard to the dispute over indemnification itself. In seeking to have Ms. Walsh disqualified on a conflict of interest theory, the Board relies upon *N.J.S.A.* 18A:12-2, which provides that "No member of any board . . . shall be interested directly or indirectly in any . . . claim against the board . . . ."

The Board originally filed this matter as an application to the Commissioner of Education, seeking a Declaratory Judgment. The Commissioner declined to rule on the matter as one for declaratory judgment and instead referred it to the Office of Administrative Law as a Petition of Appeal. It was later consolidated with Mrs. Walsh's Petition of Appeal in which she seeks indemnification.

The Board counsel concedes that his application for disqualification is not proper in respect to Ms. Walsh's first theory of recovery from the Board, that is, that the Board is required to indemnify her pursuant to the terms of the so-called indemnification statute, *N.J.S.A.* 18A:12-20. However, he argues that disqualification is proper with respect to her second theory, contained in the second count of her Petition. In this count, Ms. Walsh proceeds upon an argument that the Board could have indemnified her even if the indemnification statute did not mandate that result, and that its failure to exercise its discretion to do so was the result of arbitrary, capricious and unreasonable action or inaction. Counsel contends that while her claim for indemnification from the Board as a statutory mandate under the circumstances present in the case does not require her disqualification, her assertion of a non-statutory basis for indemnification amounts to nothing more than her attempt to advance her own personal financial interests, rather than an attempt to vindicate the public interest, and therefore so long as she maintains the second count of the Petition she must be disqualified from Board membership.

I cannot agree that Ms. Walsh's attempt to obtain indemnification by means of an exercise of Board discretion is necessarily only an attempt to secure her own personal financial interest. It is not yet clear that she cannot sustain her claim under the statute itself, as the Order Denying Cross-Motions for Summary Decision makes clear. If she is unable to justify her claim under the statute, any claim under a theory of discretionary authority may be tenuous. However, as the full facts relevant to the determination of the indemnification claim are not yet apparent, it is not appropriate to conclude that there is no basis whatsoever for either the statutory claim or for a

discretionary claim. To separate these theories of recovery and disqualify Mrs. Walsh for invoking the discretionary claim while at the same time recognizing that disqualification on the basis of the assertion of the statutory claim is improper, would in my judgment raise form over substance. In each count, she seeks to have the Board indemnify her so that she can protect what she asserts is the public interest in her ability to attend Board meetings in safety and security. If the ultimate determination under either theory is that her claim is proper, the public interest is upheld, while her personal financial interest may consequently also be protected. To disqualify her because she has the temerity, or the wisdom, or even the incorrect belief to assert that indemnification is proper under a discretionary act of the Board, would be wrong. The case for indemnification should proceed to hearing on all theories, and since the first theory of statutory right cannot serve to disqualify her, the second theory should not either.

For the reasons stated, it is hereby **ORDERED** that the **application for disqualification from Board membership** pursuant to *N.J.S.A.* 18A:12-2 is **DENIED** and **summary decision** is **GRANTED** to Mrs. Walsh **dismissing the Board's Petition** seeking her disqualification.

As this issue is sufficiently separate from the underlying indemnity claim and the matter is one of sufficient public interest, this Order Granting Partial Summary Decision may be submitted to the Commissioner of Education for immediate review as an initial decision pursuant to *N.J.A.C.* 1:1-18.3(c)12, as provided in *N.J.A.C.* 1:1-12.5 (e).

This order granting partial summary decision is being submitted under *N.J.A.C.* 1:1-12.5(e) for immediate review. This recommended order may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make the final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five (45) days and unless such time limit is otherwise extended, this recommended order shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this order was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 29, 1998
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

PATRICIA A. WALSH,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	
RESPONDENT.	:	
AND	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
PETITIONER,	:	
V.	:	
PATRICIA A. WALSH,	:	
RESPONDENT.	:	
	:	

The Interlocutory Order of the Office of Administrative Law (OAL) granting summary decision to Ms. Walsh and dismissing the Board's application for her disqualification from Board membership pursuant to *N.J.S.A.* 18A:12-2 has been reviewed. The Board's exceptions to the Order and a reply submitted on behalf of Ms. Walsh are duly noted as submitted in accordance with *N.J.A.C.* 1:1-12.5(e) and 1:1-18.4.*

* Along with her reply, Ms. Walsh submitted a document that was not before the ALJ and not previously made a part of the record. However, in accordance with N.J.A.C. 1:1-18.4c, it was not considered by the Commissioner in rendering his decision herein.

In its exceptions, the Board again contends that Ms. Walsh must be disqualified from Board membership pursuant to *N.J.S.A.* 18A:12-2 because she "is challenging a *discretionary* decision by the Board, pitting her own personal financial interest against the discretionary judgment of a majority of the Board ***." (Board's Exceptions at p. 3) The Board continues,

> ***While Walsh's claim to be vindicating a public interest in her ability to attend Board meetings is directly relevant to the application of the standard that exists under the terms of the indemnification statute, the evaluation of this claimed protection of a public interest when balanced against a Board's discretionary decision regarding entitlement and funding requires a different analysis and result.*** (*Id.*)

Thus, the Board reasons that while the analysis with respect to Count One of Walsh's petition will involve whether her acts arose out of and were in the course of the performance of her duties, the analysis pursuant to Count Two of her petition must consider whether the Board's discretionary decision to deny indemnification was arbitrary, capricious or discriminatory. The Board posits that "***the flood gates would open and discretionary board decisions [would be] constantly challenged at the taxpayers' expense" if indemnification were permitted under these circumstances. (*Id.*) The Board, therefore, urges the Commissioner to enter an Order directing that Ms. Walsh be disqualified from continued service as a Board member unless and until she withdraws Count Two of her petition of Appeal.

In reply, Ms. Walsh relies on her brief previously submitted, which affirms, *inter alia*, that, in analyzing cases brought pursuant to *N.J.S.A.* 18A:12-2, "***the Commissioner historically has considered whether, notwithstanding any incidental benefit to the Board member, the primary purpose of the claim is to vindicate some public interest as opposed to merely advancing the individual's personal financial interests." (Walsh's Brief at pp. 4, 5) Walsh reasons that indemnification claims advance important public objectives and it would be an anomalous result if the assertion of such a claim would simultaneously result in the forfeiture of

one's seat. Walsh further finds it noteworthy that the Appellate Division in *Quick v. Bd. Of Educ. of Old Bridge,* 308 *N.J. Super.* 338 (App. Div. 1998), did not raise the issue of indemnification claims posing conflicts under *N.J.S.A.* 18A:12-2. (*Id.* at p. 5) Walsh argues that the relief she seeks under both counts of her petition is the same, and distinguishes her indemnification claim from actions taken by board members seeking punitive or compensatory damages. (*Id.* at p. 6)

Upon careful and independent review of the record in this matter, the Commissioner determines to affirm the initial decision of the ALJ. In so doing, the Commissioner recognizes that

> [o]n its face, *N.J.S.A.* 18A:12-2 mandates that no board member may serve who has filed a claim against the board of education on which he sits. Case law has further established that any such claim must be examined on a case-by-case basis in arriving at a determination as to whether the circumstances in the matter demonstrate that a board member would benefit in a substantial and material way from said claim. If so, the statute should be applied and the board member disqualified from serving on said board. (citations omitted) *Board of Education of the Township of Holmdel v. O'Connell*, 1990 *S.L.D.* 674, 680.

In this analysis, the relevant cases distinguish between those claims against a board which seek to uphold a public interest, as opposed to those claims that support a private, personal interest.

> ***If the goal of the lawsuit is to vindicate the public's interest, as, for example, in an action challenging a contract issued by the board to the school district superintendent, then the board member may retain his or her seat but must abstain from participating in any discussion or vote regarding the litigation. *Scotch Plains-Fanwood Bd. of Ed. v. Syvertsen*, Comm'r decision (June 13, 1990). In contrast, if the lawsuit seeks compensatory or punitive damages that will accrue to the benefit of the board member personally, then there likely exists a substantial and material conflict of interest requiring either withdrawal of the claim or forfeiture of board membership. *Tp. of Holmdel Bd. of Ed., Monmouth County v. O'Connell*, Comm'r decision (May 10, 1990). *Board of Education of the Twp. of Jackson v. Acevedo,* 92 *N.J.A.R.* 2d (EDU) 163, 164.

Like the ALJ, the Commissioner is not persuaded that Ms. Walsh's claim for indemnification under Count Two of her petition "***is necessarily only an attempt to secure her own personal financial interest." (Initial Decision at p. 2) As the ALJ notes, "In each count, she seeks to have the Board indemnify her so that she can protect what she asserts is the public interest in her ability to attend Board meetings in safety and security." (*Id.* at p. 3)

Accordingly, the Interlocutory Order of the ALJ granting summary decision to Ms. Walsh and dismissing the Board's application for her disqualification from Board membership pursuant to *N.J.S.A.* 18A:12-2 is adopted for the reasons expressed therein. The matter of her underlying indemnification claim shall proceed at the OAL, in accordance with the ALJ's decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 16, 1999
Date of Mailing, February 16, 1999

36-99

SYLVIA BROWN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

February 18, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10699-97
AGENCY DKT. NO. 385-10/97

SYLVIA BROWN,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,
Respondent.

Michael B. Berman, Esq., for petitioner (Collins & Berman, attorneys)

James T. Hundley, Esq., for respondent (Hundley & Parry, attorneys)

Record Closed: December 30, 1998 Decided: January 7, 1999

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

This matter was transmitted to the Office of Administrative Law on December 18, 1998, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

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

January 7, 1999
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

Jan. 11/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 12 1999
DATE

Barbara A Harnad
OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
1998 DEC 30 A 10:53

HUNDLEY & PARRY, P.C.
35 Pilgrim Pathway
P.O. Box 488
Ocean Grove, New Jersey 07756
(732) 775-3100
Attorneys for Respondent

SYLVIA BROWN	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
Petitioner,	:	
v.	:	OAL DOCKET NO. EDUOR 10699-97
BOARD OF EDUCATION OF TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY	:	AGENCY REF. NO. 385-10/97
		STIPULATION OF SETTLEMENT
Respondent.	:	

WHEREAS, the Petitioner Sylvia Brown is a teacher employed by Respondent Board of Education; and

WHEREAS, Petitioner filed a Petition of Appeal seeking restoration to her sick leave bank of certain sick days on the grounds that her absences on said days were the result of personal injury caused by an accident arising out of and in the course of her employment within the meaning of N.J.S.A. 18A:30-2.1; and

WHEREAS, the matter is presently pending before the Office of Administrative Law; and

WHEREAS, the parties are desirous of settling the issues in dispute in this matter:

NOW THEREFORE, it is agree between Petitioner and Respondent as follows:

1. On April 19, 1996 Sylvia Brown suffered a personal injury to her left ankle caused by an accident arising out of and in the course of her employment.

2. Petitioner was first absent from her teaching duties as a result of the April 19, 1996 accident on April 23 and April 24, 1996.

3. Respondent paid Petitioner her full salary for her absences on April 23 and 24, 1996 and said absences have not been charged against Petitioner's annual or accumulated sick leave.

4. Respondent was absent from her teaching duties for personal illness on the following seventeen (17) days during the period April 23, 1996 to April 23, 1997:

May 9, 1996
May 10, 1996
May 22, 1996
May 23, 1996
May 24, 1996
June 3, 1996
June 5, 1996
June 6, 1996
June 20, 1996
September 23, 1996
September 28, 1996
December 9, 1996
January 8, 1997
February 3, 1997
February 4, 1997
March 6, 1997
March 24, 1997

5. Respondent has paid Petitioner her full salary for the seventeen (17) days absent during the period April 23, 1996 to April 23, 1997.

6. The seventeen (17) absent days have been charged against Petitioner's annual and accumulated sick bank.

7. Petitioner will supply Respondent with an affidavit setting forth that the seventeen (17) days absent between April 23, 1996 and April 24, 1997 were the result of the injury suffered in the April 19, 1996 accident.

8. Upon receipt of Petitioner's affidavit, Respondent will restore the seventeen (17) days absent to Petitioner's sick leave bank.

9. The terms of this Stipulation of Settlement will not be used as precedent or past practice in any future litigation, arbitration or negotiations between Petitioner, Respondent or Respondent's majority representative. However, this Stipulation of Settlement will constitute a full settlement of a Grievance Arbitration between the parties under P.E.R.C. Dkt. No. AR 97-307.

10. The terms of this Stipulation of Settlement, if acceptable to the Administrative Law Judge, may be incorporated into an Initial Decision and Order approving the settlement and dismissing this matter.

HUNDLEY AND PARRY, P.C.
Attorneys for Respondent
Board of Education of
The Township of Neptune,
Monmouth County

Date: 11-12-98

By: _____
JAMES T. HUNDLEY, ESQ.

Date: 12.29.98

COLLINS AND BERMAN
Attorneys for Petitioner
Sylvia Brown

By: _____
MICHAEL B. BERMAN, ESQ.

OAL DKT. NO. EDU 10699-97
AGENCY DKT. NO. 385-10/97

SYLVIA BROWN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

February 18, 1999
Date of Mailing, February 18, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

37-99

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERTA JOHNSON,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

February 18, 1999

State of New Jersey
Office of Administrative Law

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1277-98

AGENCY DKT. NO. 466-12/97

IN THE MATTER OF THE TENURE HEARING OF ROBERTA JOHNSON

Cherie L. Maxwell, Esq., for petitioner
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Eugene G. Liss, Esq., for respondent

Record Closed: December 31, 1998 Decided: January 4, 1999

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

Statement of Facts

This matter involves tenure charges of unbecoming conduct certified by the State-Operated School District of the City of Newark ("District") against Roberta Johnson under the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 to -18.1.

Roberta Johnson is a tenured eighth-grade teacher employed by the District. By resolution adopted on November 24, 1997, the District found the existence of probable cause to certify tenure charges which, if true, are sufficient to warrant dismissal or reduction in salary. Basically, the District accused Johnson of failing to make a proper accounting of moneys collected from students for the purpose of ordering class rings and caps and gowns during the 1996-97 academic year.

On December 2, 1997, the District filed its written tenure charges with the Commissioner of Education ("Commissioner"). Respondent Johnson filed her answer on December 19, 1997. Subsequently, on January 22, 1998, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for determination as a contested case.

Both parties have agreed to a proposed settlement, subject to approval by the Commissioner. In accordance with the decision of the State Board of Education in *Cardonick v. Brooklawn Bd. of Ed.*, 1983 *S.L.D.* ___ (St. Bd. April 6, 1983), the record of any proposed settlement must include:

> . . . the nature of the charges, circumstances justifying the settlement, consent or authorization by the Board of Education and the teacher to the proposed agreement, the Administrative Law Judge's finding that the teacher entered into the agreement with a full understanding of his rights, and [a finding] that the agreement is consistent with the public interest.

On October 27, 1998, the OAL held a public hearing on the issue of whether or not the proposed settlement should be accepted. Counsel for both parties set forth on the record the reasons why settlement would be in the public interest. Johnson testified that she fully understood and voluntarily agreed to the terms of settlement. In addition, the parties have prepared a stipulation of settlement, which is attached and fully incorporated in this decision.

Based on my review of the record, I **FIND** that the proposed settlement is consistent with the public interest for the following reasons:

1. Roberta Johnson has been employed as a teacher by the District or its predecessor for seventeen years. During this period, she received satisfactory evaluations of her performance as a teacher. She has not been subject to any prior disciplinary actions.

2. While Johnson may be guilty of careless bookkeeping and sloppy money management, she did not have any criminal intent to misappropriate money belonging to her students. Although the local police department conducted an investigation into the circumstances, they found insufficient evidence of illegal conduct to warrant the bringing of a criminal complaint.

3. Events forming the basis of the tenure charges arose in the context of voluntary activities performed by Johnson. She did not receive any extra compensation for collecting money for class rings or caps and gowns.

4. At or about the time she was supposed to turn the cap and gown money over to the supplier, Johnson was distracted by personal circumstances which affected her judgment. In 1997, she devoted much of her energies to caring for her dying mother, who passed away in June. Just before school graduation, Johnson traveled to South Carolina to arrange for her mother's interment.

5. Johnson has made good faith efforts to reimburse all students to whom money is due. Part of the difficulty in accomplishing this task was due to the fact that several students had moved to new addresses.

6. At the hearing, Johnson appeared genuinely contrite and sorry for her behavior. She recognizes that her conduct was wrong.

7. Under the proposed terms of settlement, Johnson will suffer the loss of pay for 120 days and must make full restitution of all moneys collected from students. The Board is not required to make any payment to Johnson.

8. If a hearing is necessary, the District intends to call several young students, who would have to testify against their own teacher.

9. Before entering into this agreement, Johnson fully understood her rights and had an adequate opportunity to consult with legal counsel.

10. Johnson is aware that, pursuant to *N.J.A.C.* 6:11-3.6, the Commissioner may refer this matter to the State Board of Examiners for any licensing action which it may deem appropriate.

11. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that the terms of settlement are in the public interest.

It is **ORDERED** that the parties comply with the settlement terms and that the proceedings are hereby concluded.

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

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

Jan. 4, 1999
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

1-6-99
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 7 1999
DATE

Barbara A Harnett
OFFICE OF ADMINISTRATIVE LAW

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SILLS CUMMIS ZUCKERMAN RADIN
TISCHMAN EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(973) 643-7000
Attorneys for Petitioner, State-Operated
School District of the City of Newark

DEC 31 [illegible] 98

BEFORE THE COMMISSIONER OF EDUCATION
OFFICE OF ADMINISTRATIVE LAW

IN THE MATTER OF THE TENURE HEARING OF ROBERTA JOHNSON	OAL DOCKET NO.: EDUTH 01277-98N AGENCY REFERENCE NO.: 46612/97
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY	**SETTLEMENT AGREEMENT**

The State-Operated School District of the City of Newark ("Newark" or "District") and Roberta Johnson ("Johnson"), agree to the following terms in full resolution of the above matter:

WHEREAS, Johnson disputes the allegations of the tenures charges, as to the alleged misappropriation of funds,

WHEREAS, the matter was referred to the police who conducted an investigation but found insufficient evidence of criminal conduct; and

WHEREAS, all monies have been returned to the students involved; and

WHEREAS, the parties agree that it is in the public interest to enter into this Agreement in resolution of said charges to avoid the uncertainty and expense of litigation; and,

WHEREAS, the parties further agree that the terms of this Agreement will not present any risk of harm to students and/or the safe operation of the school district;

NOW, THEREFORE, the parties agree as follows:

1. Johnson shall receive a four month (One Hundred and Twenty Days) suspension, without pay; provided, however, that any period of suspension without pay already served by Johnson in connection with this matter shall be credited against the four-month suspension referenced in this paragraph.

2. Johnson shall assure that full restitution has occurred with respect to all monies collected from students for the 1996-97 school year.

3. Upon approval of this Agreement by the Commissioner of Education, Johnson shall be reassigned to a teaching position in the District. Every effort will be made to assign Johnson to a school other than the Fifteenth Avenue School if possible.

4. In exchange for the above consideration, Johnson hereby fully releases and forever discharges the District, its representatives, agents, officers and employees, for any and all actions, claims and liabilities that she has had or may have against any of them with respect to subject matter of these tenure charges.

5. Johnson acknowledges as required by *In re Cardonick* that despite the approval of this agreement, the issue of possible revocation of her teaching certificate may be considered by the State Board of Examiners.

6. This Agreement is subject to approval of the State District Superintendent and the Commissioner of Education. Upon approval of this agreement, the District agrees that the tenure charges against Johnson shall be withdrawn.

7. The parties enter this agreement voluntarily and without coercion, after consultation with their respective counsel.

State-Operated School District of the
City of Newark

Roberta Johnson

By: Beverly Hall 11/10/98
Dr. Beverly Hall,
State District Superintendent

Dated: October 27, 1998

Dated: October ____, 1998

SC

OAL DKT. NO. EDU 1277-98
AGENCY DKT. NO. 466-12/97

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERTA JOHNSON,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

February 18, 1999
Date of Mailing, February 19, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

38-99

IN THE MATTER OF THE TENURE	:	
HEARING OF ALAN ROSS,	:	
SCHOOL DISTRICT OF THE BOROUGH	:	COMMISSIONER OF EDUCATION
OF BERGENFIELD, BERGEN COUNTY.	:	DECISION
	:	

February 18, 1999

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3532-98

AGENCY DKT. NO. 56-3/98

IN THE MATTER OF THE TENURE CHARGES AGAINST ALAN ROSS, A TEACHING STAFF MEMBER OF THE BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY

Sidney A. Sayovitz, Esq., for petitioner Bergenfield Board of Education (Schenck, Price, Smith & King, attorneys)

Harold N. Springstead, Esq., for respondent Alan Ross (Springstead & Maurice, attorneys)

Record Closed: December 24, 1998 Decided: January 5, 1999

BEFORE **EDITH KLINGER**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on April 13, 1998 for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and

N.J.S.A. 52:14F-1 to -13. Hearings were scheduled on February 22, 23 and 24, 1999 at the OAL in Newark. Prior to the hearing dates, the parties advised the undersigned that they had amicably resolved this matter.

On December 24, 1998, the parties submitted the attached Certification and Stipulation of Settlement, indicating the terms of agreement which are incorporated herein by reference.

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

1. The parties have voluntarily agreed to the settlement on the record.

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

3. The agreement conforms with the *Cardonick* standards and with the concerns of the Commissioner of Education as set forth in his decision. *In re Cardonick*, decided by Commissioner, April 7, 1982, *affirmed*, State Bd. of Ed., 1990 *S.L.D.* 842, 846 (April 6, 1983).

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

January 5, 1999
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged

1-7-99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 7 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

md

SCHENCK, PRICE, SMITH & KING, LLP
10 Washington Street, P.O. Box 905
Morristown, NJ 07963-0905
(973) 539-1000
Attorneys for the Board of Education of the Borough of Bergenfield, Bergen County

IN THE MATTER OF THE TENURE CHARGES AGAINST ALAN ROSS, A TEACHING STAFF MEMBER OF THE BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DOCKET NO. EDUTH 03532-98N** **AGENCY REFERENCE NO. 56-3/98** **CERTIFICATION OF** **DR. JOHN F. GALISH**

I, Dr. John F. Galish, of full age, hereby certify as follows:

1. At all relevant times, I have been the Superintendent of Schools of the Board of Education of the Borough of Bergenfield, Bergen County (hereinafter "Board").

2. This certification is submitted in support of the Board's request that this Court and the Commissioner of Education approve the proposed settlement in this matter, as described in the attached Stipulation of Settlement (Exhibit A) and further approve the resignation of Alan Ross, effective September 24, 1998, the date of the Board resolution accepting the letter of resignation.

3. On March 3, 1998, I filed tenure charges against the Respondent, Alan Ross (hereinafter "Mr. Ross"), a tenured teacher at Bergenfield High School. These tenure charges were based upon information that I had received regarding certain activities that Mr. Ross had

engaged in while teaching at Bergenfield High School. These charges concerned Mr. Ross's improper viewing of the Internet while in class. Specifically, the charges include the claims of Unbecoming Conduct.

4. The Board has referred the underlying circumstances to the Bergenfield Police Department for further investigation. It is my understanding that the matter was ultimately brought to the attention of the Bergen County Prosecutor's Office. I am attaching a copy of an Agreement executed by the Bergen County Prosecutor and Mr. Ross indicating that criminal charges will not be filed against Mr. Ross.

5. On September 17, 1998, Alan Ross submitted a letter of resignation to me. On September 24, 1998, the Board passed a resolution accepting the letter of resignation of Mr. Ross, effective immediately. The Board's acceptance of the letter of resignation was subject to the Commissioner's approval.

6. The Board believes that acceptance of the letter of resignation is in the public interest as considerable expenditure of public funds would be required to pursue tenure charges herein. Costs for legal fees associated with a tenure hearing and the continuing statutory obligation to provide salary to Mr. Ross could be substantial. There is uncertainty as to when the decision of the Commissioner of Education would be issued. In addition, as I have been informed that the prosecutor's office has fully investigated the charges herein, this matter has been the subject of careful scrutiny by the appropriate police authorities. The determination not to file criminal charges provides assurance to the Board that all issues herein have been properly investigated. Furthermore, the Board of Education has adopted a resolution directing its counsel to file a civil complaint against Mr. Ross seeking to recover salaries improperly paid to him for

those periods that he was not performing his contractual duties. Accordingly, the Board believes that there is no need for a full trial in this matter.

7. The Board also understands that this matter may be referred to the New Jersey Board of Examiners, who will have jurisdiction regarding the teaching certificate of Mr. Ross.

8. The Board has not agreed to provide any financial incentives to Alan Ross and, therefore, believes that Alan Ross will receive no extraordinary benefit as a result of this settlement.

9. After reviewing the factors referenced above, the Board and I have determined that the proposed settlement will be in the public interest and respectfully request that the Commissioner of Education approve the settlement.

JOHN F. GALISH

DATED:

Sworn and subscribed to before me
this 20th day of October, 1998.

Notary Public

MARIE G. ORLANDO
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES JUNE 10, 2000

SCHENCK, PRICE, SMITH & KING, LLP
10 Washington Street, P.O. Box 905
Morristown, NJ 07963-0905
(973) 539-1000
Attorneys for the Board of Education of the Borough of Bergenfield, Bergen County

IN THE MATTER OF THE TENURE CHARGES AGAINST ALAN ROSS, A TEACHING STAFF MEMBER OF THE BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DOCKET NO. EDUTH 03532-98N** **AGENCY REFERENCE NO. 56-3/98** **STIPULATION OF SETTLEMENT**

The parties in the above captioned matter, having resolved their dispute, agree as follows, subject to the approval of this Stipulation of Settlement by the Commissioner of Education:

1. On September 17, 1998, Alan Ross submitted a letter of resignation. The letter of resignation is attached hereto as Exhibit A.

2. On September 24, 1998, the Board of Education of the Borough of Bergenfield, Bergen County, adopted a resolution accepting the letter of resignation of Mr. Alan Ross, effective immediately. The resolution further provided that the resignation was subject to the approval of the Commissioner of Education. A copy of the Board of Education resolution is attached hereto as Exhibit B.

3. Representatives of the Board of Education have supplied documentation regarding Alan Ross to the police. This information formed the basis of the tenure charges. Thereafter, this matter came to the attention of the Bergen County Prosecutor's office. On September 17, 1998, William H. Schmidt, Bergen County Prosecutor, signed an Agreement stipulating that neither the Bergenfield Police Department nor the Bergen County Prosecutor's office would seek any criminal charges against Alan Ross. The September 17, 1998 Agreement between Mr. Ross and the Bergen County Prosecutor is attached hereto as Exhibit C.

4. The Board of Education has made no representation to Alan Ross regarding any other matter, including, but not limited to, the form of reference to potential employers or any potential referral to the New Jersey State Board of Examiners regarding the teaching certificate of Alan Ross. In addition, the Board of Education has made no representation regarding payments to be made to Mr. Ross.

5. All terms of this Agreement are deemed material. This document constitutes the entire understanding of the parties and may not be altered, amended, modified or revoked except by mutual agreement executed in writing by the parties.

6. This Stipulation of Settlement shall be subject to the approval of the Commissioner of Education.

7. Mr. Alan Ross acknowledges that he has been represented by counsel, that he understands the terms and conditions of this Stipulation of Settlement, and that he enters into this Agreement voluntarily. In addition, Mr. Ross acknowledges that he has been advised that the Commissioner may refer tenure determinations to the State Board of Examiners for possible revocation of his teaching certificate.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals as of the date first above written.

WITNESS:

BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY

VERNON COX, BOARD PRESIDENT

WITNESS:

ALAN ROSS

::ODMA\PCDOCS\SPSKLIB1\342688\1

Office of the County Prosecutor

County of Bergen

HACKENSACK, NEW JERSEY 07601

(201) 646-2300

WILLIAM H. SCHMIDT
BERGEN COUNTY PROSECUTOR

FRED L. SCHWANWEDE
FIRST ASSISTANT PROSECUTOR

ROGER W. KANE
CHIEF OF INVESTIGATORS

AGREEMENT

IT IS AGREED that in exchange for your irrevocable resignation, the Bergenfield Police Department and the Bergen County Prosecutor's office will not seek any criminal charges against you, specifically for acts of official misconduct, and endangering the welfare of children involving allegations by C.A., J.L., J.S., G.K., B.O., P.P. and J.S. in 1997 and 1998 while you were their teacher at the Bergenfield High School.

This agreement is not affected by the outcome of any application you may make for retirement or disability benefits with the Division of Pensions and Benefits. This agreement is irrevocable and does not hinge on any future benefit determination.

IT IS ALSO UNDERSTOOD that your letter of resignation is completely voluntary, without any promises or representation other than those set forth above.

WILLIAM H. SCHMIDT
Bergen County Prosecutor

I have read the above and hereby indicate that I understood it and agree to it. I am offering my resignation voluntarily.

ALAN C. ROSS

DATE: 9-17-98

WITNESS: HAROLD SPRINGSTEAD

Bergenfield Public Schools
100 South Prospect Avenue
Bergenfield, New Jersey 07621
(201) 385-8202 Fax: (201) 385-3718

DR. JOHN F. GALISH
Superintendent of Schools

Partnerships
Key to Excellence

VERNON R. COX
President
Board of Education

RESOLUTION OF THE BERGENFIELD BOARD OF EDUCATION

September 24, 1998

BE IT RESOLVED that the Board authorizes and directs its administrators and attorneys to take all reasonable and necessary steps to obtain the approval of the Commissioner of Education to effectuate the resignation of Alan Ross; and

BE IT FURTHER RESOLVED that the Board accepts the letter of resignation of Alan Ross, effective immediately, subject to the receipt of the Commissioner's approval, referenced above.

Motion was made by Trustee Stavrou; and Seconded by Trustee Amara.

On a Roll Call Vote:

Voting "YES":	**Trustees Flagg, Stavrou, Amara, President Cox**
Voting "NO":	**None**
Abstaining:	**Vice-President Driscoll**
Absent:	**None**

The resolution was carried.

I certify that the above is a true copy of the resolution of the Board of Education which was passed at its Special Meeting held on September 24, 1998.

Thomas P. Egan

Thomas P. Egan
Board Secty./Bus. Administrator

OAL DKT. NO. EDU 3532-98
AGENCY DKT. NO. 56-3/98

IN THE MATTER OF THE TENURE	:	
HEARING OF ALAN ROSS,	:	
SCHOOL DISTRICT OF THE BOROUGH	:	COMMISSIONER OF EDUCATION
OF BERGENFIELD, BERGEN COUNTY.	:	DECISION
	:	

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

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement. A copy of the file in this matter will be transmitted to the State Board of Examiners for action as it deems appropriate.*

COMMISSIONER OF EDUCATION

February 18, 1999
Date of Mailing, February 19, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

39-99

C #39-99L
SB #17-99

EDWARD P. ATKIN,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, February 22, 1999

For the Petitioner-Appellant, Edward P. Atkin, pro se

For the Respondent-Respondent, Murray, Murray & Corrigan (Karen A. Murray, Esq., of Counsel)

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

July 7, 1999

Date of mailing JUL 09 1999

SB/39-99

EDU # 8665-98
SBE #433-01/97-192
SB # 39-99

IN THE MATTER OF THE REVOCATION :
OF THE TEACHING CERTIFICATE OF : STATE BOARD OF EDUCATION
ROBERT CRAWFORD BY THE STATE : DECISION
BOARD OF EXAMINERS :

Decided by the State Board of Examiners, June 17, 1999

For the Petitioner-Respondent, Terri A. Cutrera, Deputy Attorney General (John J. Farmer, Jr., Attorney General of New Jersey)

For the Respondent-Appellant, Horn, Goldberg, Gorny, Plackter, Weiss & Perskie (Frederick F. Fitchett, III, Esq.)

This matter involves an appeal from a decision of the State Board of Examiners to revoke the standard certification to serve as a teacher of psychology which it had issued to Robert Crawford (hereinafter "respondent") in May 1995 pursuant to N.J.A.C. 6:11-5.1 et seq.[1] After the respondent's attorney filed his notice of appeal to the State Board of Education, the Director of the State Board Appeals Office requested that the Board of Examiners certify the record to the State Board as required by N.J.A.C. 6:2-1.8.[2] In response, the Board of

[1] The original Order to Show Cause was issued on February 14, 1997, but was amended on February 26, 1998 to detail facts included in an investigative report by the Department of Education's Office of Compliance.

[2] N.J.A.C. 6:2-1.8 provides:

(a) The record on appeal shall include all papers, tape recordings, computer disks and exhibits on file with the Commissioner, Board of Examiners or School Ethics Commission, with all entries

FEB. 2, 2000

Examiners provided 34 items together with a cover memorandum dated December 9, 1996 from the Secretary of the Board of Examiners to its members. Upon further request, the Board of Examiners provided another packet of documents with a similar cover memorandum dated June 2, 1999 to the members of the Board of Examiners. In response to an additional request, the Board of Examiners supplied the record that had been transmitted to it by the Office of Administrative Law ("OAL") after the Administrative Law Judge ("ALJ") had issued his initial decision and recommendation in the matter.

As a result of the Board of Examiners' first response to the State Board of Education's request for the record, the Director of the State Board Appeals Office prepared a statement of the items included in that response.[3] This statement was provided to both parties, as well as transmitted to the Board of Examiners in its quasi-judicial capacity. In response to this memorandum, the Deputy Attorney General representing the Board of Examiners in its prosecutorial role sent copies of the exhibits admitted into evidence in the proceedings at OAL to the State Board of Education. In her accompanying letter of December 28, 1999, the Deputy indicated that not all of the materials that had been supplied by the Board of Examiners had been entered into evidence and that some exhibits had not been

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as to matters made on the record, any stenographic transcript, and all papers filed with or entries made on the records of the State Board.

(b) Upon notice of appeal, the Commissioner or Board of Examiners shall certify the record and remit the record to the State Board, together with the notice and two copies of the decision appealed from.

(c) The record shall be retained by the State Board except that any party may be permitted to use any portion of such record in the State Board's appeals office.

[3] The statement reflected that the Board of Examiners had provided thirty-four items to the State Board of Education in its first response. One of those items was the exhibits to the investigative report, which was comprised of sixteen documents.

included in the Board of Examiners' record. The Deputy also sent a copy of this letter to counsel for respondent.

By letter dated December 29, 1999, respondent's attorney advised the State Board of Education that the items supplied by the Board of Examiners had included documents that were not part of the record before the ALJ and which had not been produced during discovery. Counsel expressed concern that the fact that the Board of Examiners would review additional documents unknown to his client "may suggest an unfair bias in the process which might be violative of a due process review."

In addition, by letter of January 3, 2000, counsel for respondent replied to the Deputy's letter of December 28. In this letter, counsel asserted that:

> I do not believe that you have been properly provided with a certification of the record below by the State Board of Examiners. [The DAG] as representative of the DOE in prosecuting this case, would not appear to be the appropriate person to be correcting the record...since she is clearly in an adversary position to the respondent....

By letter of January 3, 2000 to counsel for respondent, the Deputy sought to "clear any confusion which might exist concerning the record and concerning the appropriateness of my responses to your discovery requests in this case." The Deputy's correspondence set forth a detailed description of the discovery process that had taken place during the OAL proceedings.

In view of the dispute between the parties to the underlying case with respect to exactly which items constitute the record, we remand this matter to the State Board of Examiners for settlement of the record. Cf. R. 2:5-5. Under the

circumstances, we direct the Board of Examiners to transmit the case to the Office of Administrative Law for such proceedings as are necessary to correct the record. See In the Matter of the Petition for Review of Opinion No. 583 of the Advisory Committee on Professional Ethics, 107 N.J. 230 (1987).

February 2, 2000

Date of mailing FEB 04 2000

39-99

EDU # 8665-98
SBE # 433-01/97-192
433-01/97-192M
SB # 39-99

IN THE MATTER OF THE REVOCATION OF :
THE TEACHING CERTIFICATE OF ROBERT :
CRAWFORD BY THE STATE BOARD OF :
EXAMINERS. :

STATE BOARD OF EDUCATION

DECISION

Decision on remand by the State Board of Examiners, May 10, 2001

Remanded by the State Board of Education, February 2, 2000

Decided by the State Board of Examiners, June 17, 1999

For the Petitioner-Respondent, Todd J. Schwartz, Deputy Attorney General (John J. Farmer, Jr., Attorney General of New Jersey)

For the Respondent-Appellant, Cureton Caplan Hunt Scaramella & Clark, P.C. (Frederick F. Fitchett, III, Esq., of Counsel)

After a thorough review of the record on appeal as identified in the Consent Order to Settle the Record, which was approved by the State Board of Examiners on May 10, 2001, we affirm the decision of the Board of Examiners dated June 17, 1999 to revoke the respondent's teaching certificate for the reasons expressed therein.

Kathleen A. Dietz abstained.

January 2, 2002

Date of mailing JAN 0 4 2002

40-99

CHARLES FREYBERGER	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SCOTCH PLAINS-FANWOOD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, teacher of the handicapped and tenured school social worker, challenged Board's decision to withhold his increment for the 1997-98 school year.

ALJ determined that before filing, petitioner waited more than 90 days after receiving the letter advising him of the withholding. ALJ further concluded that the circumstances of this case do not warrant relaxation of the 90-day time limit. Thus, the ALJ ordered the petition dismissed as untimely filed.

Commissioner adopted findings and determination in initial decision as his own.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9513-97
AGENCY DKT. NO. 293-8/97

CHARLES FREYBERGER,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF SCOTCH PLAINS-FANWOOD, UNION COUNTY,

Respondent.

Gail Oxfeld Kanef, Esq., for petitioner,
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Casper P. Boehm, Jr., Esq., for respondent

Record Closed: November 16, 1998 Decided: December 28, 1998

BEFORE **RICHARD McGILL**, ALJ:

Charles Freyberger (petitioner) filed a petition with the Commissioner of Education seeking relief from a determination by the Board of Education of the Township of Scotch Plains-Fanwood (respondent) to withhold his increment for the 1997-98 school year.

Respondent now moves to dismiss on the grounds that the petition is time-barred under the ninety-day limitation set forth at *N.J.A.C.* 6:24-1.2(c).

PROCEDURAL HISTORY

Petitioner filed his petition with the Commissioner of Education on August 7, 1997, pursuant to the Commissioner's authority conferred by *N.J.S.A.* 18A:6-9 to hear and determine controversies and disputes arising under the the school laws. Respondent filed an answer on September 11, 1997, and the matter was transmitted to the Office of Administrative Law on October 1, 1997, for determination as a contested case.

On September 9, 1998, respondent filed the pending motion to dismiss, and responsive papers were received on October 13, 1998. An oral argument in regard to the motion was conducted on November 16, 1998, and at that time, limited testimony was taken pursuant to *N.J.A.*C. 1:1-12.4(c) to clarify the facts related to the motion.

MOTION TO DISMISS

a. Positions of the Parties

In support of the motion to dismiss, respondent contends that petitioner received notice on April 28, 1997, that his increment for the 1997-98 school year would be withheld. Thereafter, petitioner filed his petition with the Commission of Education on August 7, 1997, which was more than ninety days after April 28, 1997. Based upon these facts, respondent moves to dismiss on the grounds that petitioner failed to file his petition within the ninety-day time limit set forth in *N.J.A.*C. 6:24-1.2(c).

Petitioner offers two main arguments in opposition to the motion. First, petitioner maintains that the ninety-day period should begin to run on a date in late May 1997 and that in relation to this date the petition was timely filed on August 7, 1997. Second, petitioner

maintains that the circumstances of this case warrant relaxation of the ninety-day time limit pursuant to *N.J.A.C.* 6:24-1.15.

b. Facts

The various submissions by the parties and the testimony taken during the oral argument establish the following facts. During the 1996-97 school year, respondent employed petitioner as a teacher in an Alternative Program for middle school age students with severe emotional difficulties. On April 25, 1997, Personnel Specialist Robert Raiford issued a letter, which was incorrectly dated April 25, 1996, advising petitioner that respondent had approved a recommendation that his salary for the 1997-98 school year be maintained at the 1996-97 level. It is noteworthy that the letter does not refer to any particular position. School principal, Chester Janusz, hand-delivered this letter to petitioner on April 28, 1997. Petitioner did not thereafter have any discussions with respondent's representatives concerning the increment withholding.

By a second letter dated April 25, 1997, Personnel Specialist Raiford advised petitioner that respondent was unable to offer him a contract for the 1997-98 school year. The letter further stated that it has been possible in some instances in the past to offer employment to similarly situated staff as the result of retirements, resignations and leave requests subsequent to the Board's action.

After receipt of this letter, petitioner started to look for a job. However, at respondent's meeting on May 22, 1997, there was a discussion concerning appointment of petitioner to the position of social worker for the 1997-98 school year. Shortly thereafter, petitioner received a contract as a social worker. When petitioner reviewed the contract, he saw that the increment withholding would affect his salary as a social worker. Thereafter, petitioner contacted his attorney, and his appeal was filed on August 7, 1997.

c. Law and Analysis

One pertinent regulation is *N.J.A.C.* 6:24-1.2(c), which provides as follows:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

The issue with respect to this regulation concerns the starting date for the ninety-day time limit. This question was addressed by our Supreme Court in *Kaprow v. Board of Educ. of Berkeley Tp.*, 131 *N.J.* 572 (1993). The ninety-day period begins when the affected individual has received adequate notice. *Id.*, at 586-587. In order for notice to be adequate, the teacher must have been alerted to the existence of facts which give rise to a cause of action. *Id.*, at 587. Here, the letter advising petitioner of the withholding of his increment was sufficient to alert him to a cause of action. This circumstance is sufficient in itself to trigger the ninety-day time limit. The possibility that the withholding of the increment may have seemed unimportant during the one-month period from the time that petitioner was notified that he would not be offered a contract as a teacher for the next school year until he was given a contract as a social worker does not alter this conclusion. Under the circumstances, I **CONCLUDE** that the filing of the petition in this matter was untimely relative within the ninety-day limit set forth in *N.J.A.C.* 6:24-1.2(c).

The next issue is whether the circumstances of this case warrant relaxation of the time limit set forth in *N.J.A.C.* 6:24-1.2(c). The pertinent regulation is *N.J.A.C.* 6:24-1.15, which provides as follows:

> The rules herein contained shall be considered general rules of practice to govern, expedite and effectuate the procedure before, and the actions of, the Commissioner in connection with the determination of controversies and disputes under the school laws. They may be relaxed or dispensed with by the Commissioner, in his or her discretion, in any case

where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice.

The ninety-day time limit has been relaxed due to equitable considerations such as good faith discussions to resolve a dispute or delay attributable solely to the Board of Education or to consider a substantial constitutional issue or a matter of significant public interest. *LeMee v. Board of Education of the Village of Ridgewood*, 1990 *S.L.D.* 663, 668. In this case, there were no settlement discussions or delay attributable to respondent. Further, while petitioner had reason to believe for a period of approximately one month that he would not be employed by respondent for the 1997-98 school year, he still had two months from the time at which he received his contract to file his appeal. It follows that there are no equitable considerations which warrant relaxation of the ninety-day time limit. Further, this case does not raise a substantial constitutional issue or present a matter of significant public interest. Therefore, I **CONCLUDE** that the circumstances of this case do not warrant relaxation of the ninety-day time limit. It follows that the petition in this matter is time-barred by the ninety-day time limit set forth in *N.J.A.C.* 6:24-1.2(c).

Accordingly, it is **ORDERED** that the petition in this matter is dismissed.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE**

DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Dec. 28, 1998
DATE

Richard McGill
RICHARD McGILL, ALJ

Receipt Acknowledged:

1-6-99
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 7 1999
DATE

Barbara A Harnell
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 9513-97
AGENCY DKT. NO. 293-8/97

CHARLES FREYBERGER	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SCOTCH PLAINS-FANWOOD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon review of the record in this matter, the Commissioner adopts the determination of the Administrative Law Judge as set forth in the initial decision. Consequently, the Petition of Appeal is hereby dismissed.*

COMMISSIONER OF EDUCATION

February 22, 199
Date of Mailing, February 22, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

41-99

IN THE MATTER OF THE TENURE	:	
HEARING OF HENRY ARRINGTON,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
_____	:	

February 22, 1999

OAL DKT. NO EDU 11666-98
AGENCY DKT. NO. 536-11/98

IN THE MATTER OF THE TENURE	:	
HEARING OF HENRY ARRINGTON,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

February 22, 1999
Date of Mailing, February 22, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

42-99

CAROL RIEGEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERKELEY HEIGHTS, UNION COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning school psychologist alleged that an increase in her in-school work year resulted in a reduction in compensation in violation of her tenure rights. Petitioner had been transferred to respondent's employ as a result of the dissolution of the Union County Regional High School District (UCRHSD).

ALJ concluded that the reduction in petitioner's level of compensation was violative of the Tenure Act. ALJ noted that a board has the right to establish hourly rates for supplemental teachers; however, the Court has held that contract terms may not contravene or supersede a specific term or condition of employment set by statute. (*Bassett*) Thus, the ALJ found that there was a reduction in the level of petitioner's compensation as a result of the collective bargaining agreement ratified in November 1997 which required her to work more days than she had been required to work the prior year at UCRHSD. ALJ ordered the restoration of her per diem rate to $409.86 and retroactive reimbursement of the difference between the two rates (1996-97 and 1997-98 school years).

Commissioner adopted findings and determination in initial decision as his own. Citing *Casey* State Board decision, the Commissioner agreed with the ALJ that petitioner's rate of compensation was improperly reduced. Commissioner noted that the matter herein dealt solely with the applicability of the provisions of *N.J.S.A.* 18A:13-64 to the preservation of petitioner's statutory rights as a tenured employee upon the dissolution of a regional school district, in this case UCRHSD.

throughout the State calculated their salary on a *per diem* basis, then, based upon changes in school calendars and renegotiated bargaining agreements, they might claim a reduction in salary because they work an extra day or two in a subsequent year. It is respondent's position that awarding petitioner her requested relief would grossly violate the collective bargaining which took place in the instant matter and overturn precedent in the State of New Jersey.

Petitioner's reply exceptions maintain that respondent is attempting to thwart the ALJ's decision by citing *Breese, supra.* She contends, however, that respondent failed to point out that the decrease in Breese's *per diem* salary came about as a result of his own voluntary selection of a new position of employment. Petitioner also points out that the ALJ in *Breese* specifically stated at page 34 of that decision that the tenure laws had not been enacted to protect Breese from his own actions and noted that the result may have been different if he had been coerced into exchanging positions without receiving adequate remuneration. Further, petitioner supports the ALJ's recognition that the Courts have consistently held that the terms of a collective bargaining agreement, irrespective of its lawful negotiation, may not violate the rights of employees which have been established by statute. In the instant matter this includes her statutory rights, as a tenured teaching staff member under *N.J.S.A.* 18A:25-5, not to be reduced in compensation without proceedings under the Tenure Act. Citing *Bassett, supra,* and *Casey v. Board of Education of the Township of Cinnaminson*, decided by State Board of Education 95 *N.J.A.R.* 2d (EDU) 585, petitioner urges that the ALJ properly concluded that respondent's actions in this matter constituted a reduction in salary and thus violated her tenure rights.

Upon careful and independent review of the record in this matter, the Commissioner adopts as his own the conclusion of the ALJ that, given the factual circumstances presented herein, a violation of the Tenure Act occurred. Contrary to respondent's arguments otherwise, the facts support a conclusion that petitioner experienced a reduction in her rate of compensation when, as a result of the dissolution of the Union County Regional High School District (UCRHSD), she was reassigned/transferred pursuant to the provisions of *N.J.S.A.* 18A:13-64 to respondent's school district whose work year required more work days than the UCRHSD. Consequently, while petitioner's annual salary and monthly salary were not reduced, the Commissioner concurs with the ALJ that petitioner's salary was, nonetheless, reduced because the *per diem* rate was less than she had earned the previous school year as an employee of UCRHSD. As such, the Commissioner agrees with petitioner that the State Board

of Education's decision in *Casey, supra,* is applicable to the matter herein. The fact that the rate of pay in dispute in the instant matter involves a *per diem* rate, as opposed to a monthly rate as in *Casey,* does not serve to thwart petitioner's claim. Also, the Commissioner is in full agreement with petitioner's position that *Breese, supra,* is distinguishable from the instant matter for the reasons stated above.

Lastly, the Commissioner does not agree with respondent's dire predication that this determination will become precedent setting in future collective bargaining negotiations with boards of education throughout the State. The matter herein deals **solely** with the applicability of the provisions of a specific statute, *N.J.S.A.* 18A:13-64, to the preservation of petitioner's statutory rights as a tenured employee upon the dissolution of a regional school district.

Accordingly, the initial decision granting summary decision to petitioner is affirmed.[1]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 22, 1999
Date of Mailing, February 22, 1999

[1] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

43-99

EDU # 9511-97 and 9512-97 (consolidated)
C # 313-99
SB # 43-99

MONTCLAIR EDUCATION ASSOCIATION, on behalf of itself and the member named herein, MOIRA PALISITS,

PETITIONERS-APPELLANTS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY, DEPARTMENT OF HEALTH OF THE TOWNSHIP OF MONTCLAIR, AND THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY,

RESPONDENTS-RESPONDENTS,

AND

CYNTHIA SAMUEL,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY, DEPARTMENT OF HEALTH OF THE TOWNSHIP OF MONTCLAIR, AND THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY,

RESPONDENTS-RESPONDENTS.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, September 30, 1999

For the Petitioners-Appellants, Zazzali, Fagella, Nowak, Kleinbaum & Friedman (Aileen M. O'Driscoll, Esq., of Counsel)

For the Respondent-Respondent Board of Education of the Township of Montclair, Schenck, Price, Smith & King, L.L.P. (Richard H. Bauch, Esq., of Counsel)

For the Respondents-Respondents Department of Health of the Township of Montclair and the Township of Montclair, Robert A. Hoonhout, Esq.

This matter arose on May 5, 1997, when the Board of Education of the Township of Montclair (hereinafter "Board") abolished the positions of two of its six school nurses for reasons of economy effective June 30, 1997. In September 1996, the Board had contracted with the Department of Health of Montclair ("DOH") for the provision of registered nurses to fill the equivalent of 3½ nursing positions. When it executed a new contract with DOH for 1997-98 subsequent to the reduction in staff, it contracted for the provision of registered nurses to fill the equivalent of eight nursing positions. It also contracted with DOH for the provision of registered nurses to fill the equivalent of the same number of positions for 1998-99. Although not all of the nurses provided by DOH possessed an Educational Services Certificate with an endorsement as a School Nurse, all were fully licensed by the New Jersey Board of Nursing.

In July 1997, petitioners challenged the Board's action, alleging that abolishing the two school nursing positions and contracting with DOH for the provision of nursing services was in violation of their tenure rights.[1] In addition to the Board, petitioners named both the DOH and the Township of Montclair as respondents. However, by order of June 5, 1998, the Administrative Law Judge ("ALJ") dismissed the DOH from the case because the Commissioner did not have the jurisdiction to grant relief against

[1] Petitioners Montclair Education Association and Moira Palisits filed their petition on July 23, 1997, and Cynthia Samuel filed a separate petition on July 29, 1997. Following transmittal to the Office of Administrative Law, the matters were consolidated at the request of the parties.

it. On June 30, 1999, as part of her initial decision, the ALJ dismissed the Township for the same reason.

The ALJ rejected petitioners' claim that the contract between the Board and DOH for the provision of nurses was in violation of the Interlocal Services Act, N.J.S.A. 40:8A-1 et seq. Petitioners had argued that N.J.S.A. 18A:40-1 and N.J.S.A. 18A:40-3.1 prohibited a school district from contracting out for nursing services. The ALJ rejected this argument, stressing that prior Commissioner's decisions had held that licensed health care professionals may provide nursing services that do not require educational certification. Hence, the ALJ concluded that as long as the nurses provided by DOH did not render services restricted to certificated nurses and so long as it was empowered to render the contracted services within its own jurisdiction, the contract between the Board and DOH was not in violation of the Interlocal Services Act.

Concluding that scoliosis screening and audiometric screening could be performed by contract nurses, the ALJ found that there was no evidence in the contract between the Board and DOH that some of the duties to be assumed by the contract nurses were restricted to certificated nurses. Further concluding that the individual petitioners had not suffered any injury by virtue of the Board's action and that the Montclair Education Association was entitled only to ensure that contract nurses were not performing duties reserved to certificated nurses under the education laws, the ALJ stressed that petitioners had not pointed to any specific duties assigned to contract nurses that should have been reserved for certificated nurses. In addition, because the contracts in question had already been performed, there was no relief that could have been granted to the Association as a result of the appeal. The ALJ therefore

recommended that summary decision be granted to the Board and that the petitioners' appeals be dismissed with prejudice.

The Commissioner adopted the ALJ's initial decision with modification. Although agreeing with the ALJ that petitioners were not entitled to any relief, the Commissioner stressed that contract nurses could not perform the school nursing services enumerated in Old Bridge Township Education Association v. Board of Education of the Township of Old Bridge, decided by the Commissioner, November 26, 1997, aff'd with clarification by the State Board, April 1, 1998. Accordingly, the Commissioner directed that to the extent the Board had a contract with DOH for the current year, it was to review the contract and attendant job descriptions to ensure that the nursing duties being performed pursuant to the contract did not conflict with duties specifically reserved for certificated school nurses employed by the district. The Commissioner further directed the District to make such revisions as necessitated by the review and to submit the results to the Essex County Superintendent of Schools for review and approval.

Petitioners appealed to the State Board of Education. Petitioners argue that the language of N.J.S.A. 18A:40-3.1 requires that the Board employ, manage, and compensate its school nurses. They further argue that the statute's express provision for the continuance of contracts for school nursing services entered into prior to February 27, 1957 demonstrates the Legislature's intent to prohibit district boards from delegating by contracts initiated after that date the provision of school nursing services to any entity other than the board. They also contend that absent express statutory authority to permit a public entity such as a district board to delegate its obligations to another entity, such public entity cannot delegate a power or duty delegated to it by

statute. Petitioners maintain that contracting with DOH for the provision of nursing services does just that in violation of N.J.S.A. 18A:40-3.1, which both mandates and authorizes district boards to directly employ every person employed as a school nurse or performing any school nursing service in the public schools.

In addition, petitioners argue that the contract between the Board and DOH violates the Interlocal Services Act because although DOH may be authorized to provide general nursing services, it is not statutorily authorized to provide school nursing services. They also contend that even if it is permissible for DOH to provide nursing services to the District, the Commissioner's decision should be modified because it fails to recognize that the job descriptions of the contract nurses are identical to those specifying the duties of the school nurses. Finally, they urge that the DOH nurses be compelled to cease providing services requiring certification as a school nurse and argue that there were not a sufficient number of school nurses employed by the District to ensure that school nursing services were being provided by certified school nurses.

Resolution of this appeal requires a clear understanding of the distinctions between the terms "nurse" and "school nurse" and between "nursing services" and "school nursing services" as those terms are defined by the education laws. The starting point for developing such an understanding is a review of the education statutes pertaining to the provision of nursing services in the public schools.

N.J.S.A. 18A:1-1 defines a "school nurse" as "... any school nurse...or any other nurse performing school nursing services in the public schools." Pursuant to N.J.S.A.

18A:1-1, "school nurses" are teaching staff members. As defined by the statute, a "teaching staff member" is:

> ...a member of the professional staff of any district...holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate appropriate to his office, position or employment, issued by the state board of examiners and includes a school nurse.

Similarly, N.J.S.A. 18A:6-38 provides that the State Board of Examiners must issue appropriate certificates "to render...nursing service to, pupils in public schools operated by boards of education." Consistent with that statute, N.J.S.A. 18A:26-2 provides that "no teaching staff member shall be employed in the public schools...unless he is a holder of a valid certificate to...render...nursing service to pupils in such public school." In addition, N.J.S.A. 18A:28-5, which specifies the requirements for the achievement of tenure by teaching staff members, expressly provides that the services of all school nurses shall be under tenure if they meet the statutory criteria, one of which is to possess an appropriate certificate issued by the State Board of Examiners.

As the Commissioner of Education stressed in his decision in Old Bridge, supra, each school district is required by statute to employ at least one "school nurse" who must be appropriately certified and who is a teaching staff member. Furthermore, under the statutory scheme, it is the "school nurse" who provides "school nursing services." As set forth by the Commissioner in Old Bridge, "school nursing services" encompass those duties expressly reserved to "school nurses" by statute or regulation and include: 1) lecturing teachers on the recognition and prevention of communicable disease and other health concerns (N.J.S.A. 18A:40-3), 2) maintaining pupil health records and

assisting the medical inspector with physical examinations, including vision and hearing examinations (N.J.S.A. 18A:40-4), 3) examining pupils for the presence of scoliosis (N.J.S.A. 18A:40-4.3), 4) recommending exclusion from school due to illness or exposure to disease (N.J.S.A. 18A:40-7 and -8), 5) reporting, receiving reports, and conducting examinations in instances of suspected substance abuse (N.J.S.A. 18A:40A-12), 6) audiometric screening (N.J.S.A. 18A:40-4), and, 7) where assigned, providing instruction to students within the limitations of the "school nurse" endorsement (N.J.S.A. 18A:26-2).

Under the education laws, services other than those specifically reserved for "school nurses" are characterized as "nursing services" rather than "school nursing services." As the Commissioner emphasized in Old Bridge, the education laws do not preclude a district board from employing properly licensed health care professionals who are supervised as required by the Board of Nursing pursuant to N.J.S.A. 45:11-23 to provide "nursing services." Nor is there any prohibition against employing such health care professionals to assist the "school nurse" in providing "school nursing services" so long as they do not actually provide the service except as delegated by the "school nurse." Old Bridge, supra, slip op. at 14-15. Further, effective July 1, 1999, school districts have been expressly authorized to "supplement the services provided by the certified school nurse with non-certified nurses, provided that the non-certified nurse is assigned to the same school building or complex as the certified nurse." N.J.S.A. 18A:40-3.3.

As previously stated, "school nursing services" must be provided by a "school nurse." Pursuant to N.J.S.A. 18A:40-3.1, "every person employed as a school

nurse...or performing any school nursing service...shall be appointed by the board of education having charge of the school or schools in which the services are to be rendered and shall be under the direction of said board...." N.J.S.A. 18A:40-1 mandates that every district board must employ at least one school nurse." Because the "school nursing services" delineated above are required by law and must be provided by a "school nurse," the Commissioner has held that each district board must employ a sufficient number of "school nurses" to ensure the adequate provision of "school nursing services." Old Bridge, supra, slip op. at 14. However, as the Commissioner concluded in Dover Education Association v. Board of Education of the Town of Dover, decided by the Commissioner, December 12, 1997, slip op. at 10, nothing in the education laws precludes a board from contracting for the services of non-certified nurses to perform duties consistent with the dictates of Old Bridge.

Applying these principles to the instant appeal, it is clear that the Commissioner was correct in concluding that the contract between the Board and DOH did not contravene the Interlocal Services Act, N.J.S.A. 40:8A-1 et seq., so long as the role played by the nurses provided pursuant to the contract did not include independently performing functions reserved for the "school nurse" as those functions were delineated in Old Bridge. Therefore, we affirm the Commissioner's decision in that respect. In doing so, we fully concur with the Commissioner that nothing in the Interlocal Services Act precludes local governmental agencies other than school districts from providing nursing services districts other than "school nursing services" to school districts.

We also find that it was appropriate for the Commissioner to direct the Board to review any contract it had with DOH and the attendant job descriptions to ensure that duties being performed by nurses provided by DOH did not conflict with those reserved by law for "school nurses" employed by the Board. Accordingly, we also affirm that directive.

In its Report that was mailed to the parties to this appeal, our Legal Committee concluded that we should reject petitioners' contention that there were an insufficient number of "school nurses" employed by the Board to provide the requisite "school nursing services." In reaching this conclusion, the Report found that petitioners had not shown that this was in fact the case. The Report also found that petitioners had not shown that the nurses provided pursuant to the contract with DOH independently performed functions reserved for the "school nurse" during the relevant period.

In their exceptions to the Legal Committee Report, petitioners point to the fact that following the reduction in staff that is the subject of this appeal the Board employed only three certified school nurses on a full-time basis and that these individuals were assigned to three specific schools. Petitioners argue that these facts demonstrate that the Board did not employ a sufficient number of "school nurses" to provide the District's students with those services which must be provided by certified school nurses employed by the Board. While we are not prepared to accept this conclusion on the basis of these facts alone, we find that the proper course for resolving the issue is to remand the matter to the Commissioner to develop a record that is sufficient to make such a determination. We also find that in order to properly make this determination, the Commissioner must ascertain whether the Board complied with his directive to

review any contract it had with DOH for the 1999-2000 school year and District staffing patterns to insure that the Board's provision of school nursing services was consistent with the parameters established in Old Bridge, supra, and Dover, supra, and that the Board submit the results of its review to the Essex County Superintendent of Schools.

In remanding this matter, we stress that while there is no relief that could be afforded to the Montclair Education Association even if the Commissioner were to find on remand that the Board's action in abolishing the positions of the individual petitioners was improper, the individual petitioners would be entitled to relief for the period relevant to this appeal. We also stress that although N.J.S.A. 18A:40-3.3 is not applicable to this appeal since it was not enacted until 1999, the Board is required to comply with its terms in the event that it is currently supplementing the nursing services provided by its "school nurses" by contracting for the provision of other nurses.[2]

We do not retain jurisdiction.

Attorney exceptions are noted.

November 6, 2002

Date of mailing NOV 08 2002

[2] As previously stated, N.J.S.A. 18A:40-3.3 authorizes a district board to supplement the nursing services provided by its "school nurses" with non-certified nurses provided that any non-certified nurse is assigned to the same school building or school complex as the certified nurse.

45-99

IN THE MATTER OF THE TENURE	:	
HEARING OF DONALD YANDOLINO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION ON REMAND
OF UNION, HUDSON COUNTY.	:	
_____	:	

February 24, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO.: EDU 10779-97
AGENCY DKT. NO. 320-8/96

DONALD YANDOLINO,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF UNION CITY,

Respondent.

Gregory T. Syrek, Esq., represented petitioner
(Bucceri and Pincus, attorneys)

William R. Horwitz, Esq., represented respondent
(Murray, Murray & Corrigan, attorneys)

Record Closed: December 26, 1998 Decided: January 7, 1999

BEFORE: **THOMAS E. CLANCY**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL), on December 19, 1997 for determination as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Settlement Agreement and Resolution.

Having reviewed the contents of the attached Settlement Agreement and Resolution, I **FIND** (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE, in the stead of ALJ Marie P. Simonelli,** that the attached Settlement Agreement and Resolution meet the requirements of *N.J.A.C. 1:1-19.1* and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with their contents and that these public proceedings be (and are hereby) **TERMINATED**.

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

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

1-7-99
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALJ

Jan. 12, 1999
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

JAN 14 1999
DATE

Mailed to Parties:
OFFICE OF ADMINISTRATIVE LAW

/g

SETTLEMENT AGREEMENT

BETWEEN THE UNION CITY BOARD OF EDUCATION

AND

DONALD YANDOLINO

The parties to this Settlement Agreement are the Union City Board of Education ("the Board") and Donald Yandolino ("Yandolino").

This Agreement settles, ends, and discontinues the Tenure Charges filed under O.A.L. Docket Nos. EDU-1951-96N (Agency Ref. No. 298-7/97) and EDUTH-10779-97N (Agency Ref. No. 320-8/96), and captioned In the Matter of the Tenure Hearing of Donald Yandolino and the Board of Education of the City of Union City, on the following terms and conditions:

1. Yandolino agrees to resign from his employment with the Board effective immediately.

2. Yandolino shall be paid for his accrued vacation days. The agreed upon total for such accrued vacation days is forty-two (42) days, which shall be paid as part of regular payroll. Appropriate deductions and withholdings shall be made.

3. Yandolino shall continue to be covered under the Board's health care program until thirty (30) days after the approval of this Agreement by the Commissioner of Education. At such point, Yandolino's rights under COBRA shall be available to him.

4. A letter of reference shall be prepared by the Board and placed in Yandolino's file specifying his years of employment and duties performed. No further information regarding Yandolino's employment history shall be provided to a

potential employer.

5. Yandolino hereby waives and releases all claims that could have been made against the Board of Education, its agents, servants, and employees.

6. Yandolino's resignation and this Agreement are conditioned upon and subject to approval by the Union City Board of Education, Marie P. Simonelli, A.L.J., and the Commissioner of Education.

The parties agree that each was represented by counsel and that each party fully understood all terms and conditions of this Settlement Agreement and entered into the Settlement Agreement voluntarily.

DONALD YANDOLINO

Dated: 9-29-98

CARL JOHNSON
Board Secretary

Dated: 10/8/98

GREGORY T. SYREK
Counsel for Mr. Yandolino

Dated: 9/29/98

WILLIAM R. HORWITZ
Counsel for the Board

Dated: 10/12/98

UNION CITY BOARD OF EDUCATION

RESOLUTION

WHEREAS, tenures charges alleging conduct unbecoming an employee were filed against **DONALD YANDOLINO**, a tenured custodian in the employ of the Union City Board of Education; and

WHEREAS, a copy of the tenure charges and supporting documentation were served on DONALD YANDOLINO on July 9, 1996 , via first class mail and certified mail, return receipt requested, along with a letter providing Mr. YANDOLINO an opportunity to respond to the charges; and

WHEREAS, the Union City Board of Education at its meeting on July 25, 1996, pursuant to N.J.S.A. 18A:6-11, considered the Charges filed against DONALD YANDOLINO as set forth in the Statement of Charges, alleging conduct unbecoming an employee, as well as the supporting evidence with respect to same; and

WHEREAS, the Union City Board of Education has determined that there was probable cause to credit the evidence in support of the Charges and the charges, if credited, were sufficient to warrant the dismissal of DONALD YANDOLINO pursuant to N.J.S.A. 18A:6-11; and

WHEREAS, said tenure charges came to trial before the Hon. Marie P. Simonelli, ALJ on September 16, 1997; and

WHEREAS, following a colloquy between counsel for the Respondent, Gregory Syrek and counsel for the Board, Louis Rosen, and Judge Simonelli, a tentative written agreement resolving the matter was reached in which DONALD YANDOLINO tendered his irrevocable letter of resignation in lieu of termination by the Union City Board of Education and

other terms and conditions mutually agreed upon by the parties; and

WHEREAS, DONALD YANDOLINO and the Board have executed a settlement agreement incorporating the terms of this settlement,

NOW, THEREFORE, BE IT RESOLVED that the Union City board of Education, by recorded roll call majority vote, hereby adopts and approves the agreement resolving this matter, a copy of which is attached hereto and made a part hereof;

AND BE IT FURTHER RESOLVED, that the Board Secretary and counsel are empowered to take all acts and do all things necessary and proper to effectuate the intent of this resolution.

Record of Vote of Board to Approve Agreement

	AYE	NAY	ABSTAIN
(List Names of Board Members) FRANK MONA	X		
CARLOS PEREZ	X		
FELIX DELNOGAL	X		
ADELAIDE LEONE	X		
LEONARD CALVO	X		

Take notice that the foregoing resolution was (approved/not approved) by a recorded roll call majority vote of the membership of the Union City Board of Education at its meeting on December 22, 1998

SEAL

Board Secretary

12/22/98

OAL DKT. NOS. EDU 09057-96 AND EDU 10779-97 (ON REMAND)
AGENCY DKT. NO. 320-8/96

IN THE MATTER OF THE TENURE	:	
HEARING OF DONALD YANDOLINO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION ON REMAND
OF UNION, HUDSON COUNTY.	:	
	:	

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

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement.[1,2]

COMMISSIONER OF EDUCATION

February 24, 1999
Date of Mailing, February 24, 1999

[1] The Commissioner herein notes that his approval is subject to the clarification that nothing in paragraph four of the agreement be read to preclude compliance with Executive Order 11(1974).

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

46-99

IN THE MATTER OF THE TENURE	:	
HEARING OF EDWARD TUMOLO,	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF GLOUCESTER, CAMDEN COUNTY.	:	DECISION
	:	

February 24, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8451-98

AGENCY DKT. NO. 413-9/98

IN THE MATTER OF THE TENURE HEARING OF EDWARD TUMOLO, BOARD OF EDUCATION OF THE TOWNSHIP OF GLOUCESTER, CAMDEN COUNTY

John D. Wade, Esq., for petitioner

Keith Waldman, Esq., for respondent (Selikoff & Cohen, attorneys)

Record Closed: January 11, 1999 Decided: January 11, 1999

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

This matter concerns the tenure charges brought against the respondent, Edward Tumolo, by the petitioner, Board of Education of the Township of Gloucester, Camden County, alleging incapacity, chronic absenteeism, unbecoming conduct and insubordination. The respondent requested a hearing, and the matter was transmitted to the Office of Administrative Law on September 25, 1998, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

After several settlement conferences, the matter settled. On January 11, 1999, I received a fully signed stipulation of settlement, which sets forth the terms of the settlement. This settlement is attached and is incorporated herein.

The respondent acknowledges that he had an alcohol dependency in the past but represents that he is now a recovering alcoholic and that he no longer drinks. He denies the allegations in the tenure charges, and alleges that the tenure charges are vague, ambiguous and not sufficiently specific so as to give him a meaningful opportunity to put forth a defense. Additionally, the respondent alleges violations of the New Jersey Law Against Discrimination, the Family Leave Act and the Americans With Disabilities Act.

In view of the substantive issues in this matter and the possibility of additional litigation between the parties, a settlement of all the issues is both appropriate and in the public interest. Further, since the petitioner has many years of public service, and this settlement will preserve his full pension rights and allow him to retire.

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

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

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

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

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 11, 1999
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

Jan. 12, 1999
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 13 1999
DATE

Barbara A. Harnash
OFFICE OF ADMINISTRATIVE LAW

ml

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

1999 JAN 11 A 10:28

SELIKOFF & COHEN, P.A.
307 Fellowship Road, Suite 314
Mt. Laurel, New Jersey 08054-1233
(609) 778-6055
Counsel for Respondent,
Edward Tumolo

IN THE MATTER OF THE TENURE HEARING OF EDWARD TUMOLO, BOARD OF EDUCATION OF GLOUCESTER TOWNSHIP, CAMDEN COUNTY

BEFORE THE OFFICE OF OF ADMINISTRATIVE LAW OF THE STATE OF NEW JERSEY

DOCKET NO. EDU-8451
AGENCY REF. NO. 413-9/98

STIPULATION OF SETTLEMENT

THIS STIPULATION OF SETTLEMENT is entered into by and between the Petitioner BOARD OF EDUCATION OF GLOUCESTER TOWNSHIP, CAMDEN COUNTY (hereinafter "BOARD") and Respondent ED TUMOLO (hereinafter referred as "TUMOLO") (the BOARD and TUMOLO are hereinafter referred to jointly as the "Parties" and each may be referred to severally as a "Party");

WHEREAS, TUMOLO has been employed by the Board as a teaching staff member from September 1, 1965 through June 30, 1970 and continuously from September 1, 1974 to present;

WHEREAS, the Parties have engaged in protracted negotiations concerning TUMOLO's employment rights since August of 1998;

INITIALS: ____

INITIALS: ____

WHEREAS, on or about September 1, 1998, in the absence of a negotiated settlement of TUMOLO's employment rights, the BOARD certified to the Commissioner of Education ("Commissioner") charges against TUMOLO;

WHEREAS, on or about September 4, 1998, TUMOLO filed an Answer to the charges denying the allegations as stated;

WHEREAS, the Parties identified a number of substantial factual and legal issues which would have to be litigated for the full and final adjudication of this case, including but not limited to the issues of: (a) whether the charges were true; (b) if so, what discipline should be imposed; (c) whether the BOARD violated TUMOLO's rights under the New Jersey Law Against Discrimination, the federal Family Medical Leave Act and the federal Americans with Disabilities Act; (d) whether the BOARD's request that TUMOL submit to alcohol testing was in compliance with his statutory and constitutional rights and (e) whether the prehearing/discovery provisions set forth in P.L. 1998, c.42 comport with TUMOLO's rights to procedural and substantive due process;

WHEREAS, this matter was listed for hearing before the Honorable Beatrice S. Tylutki, ALJ, on January 11 through 14, 1999;

WHEREAS, TUMOLO will be 55 years old on January 29, 1999;

WHEREAS, as a result of the Parties' continuing negotiations, they have agreed to terminate amicably TUMOLO'S employment and/or affiliation with BOARD as of January 31, 1999 through TUMOLO'S resignation to retire, and to settle and terminate any and all disputes between them in a manner consonant with the public interest; and

INITIALS: _____

INITIALS: _____

WHEREAS TUMOLO and the BOARD have entered into this Stipulation with a full understanding of their rights, recognizing that this Stipulation and any obligations or duties created thereby are subject to the review and final approval of the Commissioner, and with TUMOLO's further understanding that pursuant to N.J.A.C. 6:11-3.6(a)1 any determination made by the Commissioner may be referred to the State Board of Examiners for determination of possible revocation or suspension of teaching certificate;

NOW THEREFORE, the matter in difference having been amicably adjusted by and between the Parties,

IT IS HEREBY STIPULATED AND AGREED AS FOLLOWS:

1. The Parties incorporate the above recitals by reference.

2. TUMOLO, for and in consideration of the undertakings of BOARD set forth in Paragraph 5 herein, and intending to be legally bound, does hereby remise, release and forever discharge BOARD and its officers, members, employees and agents, its and their respective successors and assigns, heirs, executors and administrators, of and from any and all manner of actions and causes of actions, suits, debts, claims and demands whatsoever in law or in equity, which he ever had, now has, or hereafter may have, or which his heirs, executors or administrators hereafter may have by reason of any matter, cause or thing whatsoever, from the beginning of his employment with BOARD to the date of these presents, and particularly, but without limitation, of the

INITIALS: _____

INITIALS: _____

foregoing general terms, any claims arising from or relating in any way to his employment relationship and/or the termination of his employment relationship and/or affiliation with BOARD, including but not limited to, any claims which have been asserted or could have been asserted or could be asserted now or in the future under any and all federal, state or local laws and any common law claims now or hereafter recognized, and any and all claims arising out of his employment with BOARD. Nothing in this paragraph is intended to operate as a release, waiver, or forfeiture of TUMOLO's rights, and the BOARD's obligations under: (a) any state worker's compensation act or statute, or (b) any State of New Jersey retirement, pension, savings, or 401(k) plan in which TUMOLO is a participant.

3. BOARD, for and in consideration of the undertakings of TUMOLO set forth herein, and intending to be legally bound, does hereby remise, release and forever discharge TUMOLO and his heirs, executors and administrators, of and from any and all manner of actions and causes of actions, suits, debts, claims and demands whatsoever in law or in equity, which it ever had, now has, or hereafter may have, or which its officers, members, employees and/or agents, its and their respective successors and assigns, heirs, executors or administrators hereafter may have by reason of any matter, cause or thing whatsoever, from the beginning of his employment with BOARD to the date of these presents, and particularly, but without limitation, of the foregoing general

INITIALS: _____

INITIALS: _____

terms, any claims arising from or relating in any way to his employment relationship and/or the termination of his employment relationship and/or affiliation with BOARD, including but not limited to, any claims which have been asserted or could have been asserted or could be asserted now or in the future under any and all federal, state or local laws and any common law claims now or hereafter recognized, and any and all claims arising out of his employment with BOARD.

4. Subject to the final approval of this Stipulation by the Commissioner, TUMOLO agrees that: (a) he shall tender to BOARD a letter of resignation to be effective at the close of business on January 31, 1999; (b) that he shall no longer be employed by BOARD thereafter and (c) that his signature on this Stipulation constitutes an acknowledgement that he is relinquishing all present and future rights to tenure, employment and reemployment with BOARD as of the close of business on January 31, 1999.

5. In full consideration of the mutual execution of this Stipulation, and the mutual agreement to be legally bound by its terms, in a timely fashion, BOARD will:

(a) reinstate TUMOLO to payroll and pay TUMOLO's salary for the pay period from January 16, 1999 through January 31, 1999 in the gross amount of $3,013.50 less customary and ordinary deductions;

INITIALS: _____

INITIALS: _____

(b) provide TUMOLO with all benefits and emolument to which he would otherwise be entitled for the time period from January 16, 1999 through January 31, 1999;

(c) agrees to pay TUMOLO the lump sum of forty-eight thousand two hundred thirty-six dollars and fifty cents ($48,236.50) on or before January 16, 1999. Since this sum is paid in consideration for the settlement of all actual or potential litigation claims by TUMOLO, the BOARD is not withholding any pension contributions, or federal or state taxes. It will be the sole obligation of TUMOLO to pay any federal or state taxes which may be associated with his receipt of this sum. TUMOLO agrees to indemnify and hold the BOARD harmless from any claim that federal or state taxes are due on this sum;

(d) will place TUMOLO on an unpaid medical leave of absence from September 1, 1998 to January 15, 1999 and on a paid medical leave of absence from January 16 through 31, 1999, inclusive, with salary and benefits as provided in Paragraph 5(a) and (b) above.

(e) The Parties agree that TUMOLO must use all or such portion of the sum specified in paragraph 5(c) as is necessary to repay all loans against his pension and to buy back five (5) years pension credit so as to be eligible for retirement at age 55. The Parties acknowledge that without the additional years of pension credit, TUMOLO would not have the twenty-five years credit necessary to qualify for such a pension. The Parties further

INITIALS: _____

INITIALS: _____

acknowledge that unless TUMOLO repays the loans before he applies for the pension, the loans will have to be repaid from the pension. Lastly, the Parties acknowledge that to be eligible to buy back the pension credit, repay the loans and apply for the pension, TUMOLO must be restored to payroll and be employed by the BOARD. Accordingly, time is of the essence in the BOARD's reinstatement of TUMOLO to payroll in accordance with Paragraph 5(a) and (b) and in the BOARD's payment of the sums set forth in Paragraph 5(c).

(f) The BOARD and its administrators will promptly take such other and further actions, will promptly respond to all inquiries by the Teachers' Pension and Annuity Fund ("TPAF") (including but not limited to verification that TUMOLO is an employee being paid on the Board's payroll for the purpose of facilitating his buying back pension credit and repayment of loans) and will promptly complete such forms as are necessary to facilitate TUMOLO's receipt of his pension. The Parties understand that, in this context "promptly" means within 24 hours of receipt of such request or form. In the event that the schools are closed for any reason when the request or form is received, the BOARD will respond within 24 hours of the time the schools reopen.

(g) The BOARD agrees that TUMOLO has been "terminated (other than by reason of gross misconduct)" within the meaning of 29 U.S.C. § 1163(2) as of January 31, 1999, so as to qualify TUMOLO for continued health care coverage under the Consolidated Omnibus Budget Reconciliation Act, ("COBRA"), 29

INITIALS: _____

INITIALS: _____

U.S.C. §§1161-1168, should he elect such coverage. BOARD agrees t cooperate with TUMOLO to the extent necessary for him to be eligible for and receive COBRA benefits;

6. It is expressly agreed and understood that BOARD does not have and will not have any obligation to provide TUMOLO at any time in the future with any payments, benefits or considerations other than those recited in Paragraph 5 above.

7. TUMOLO further agrees and covenants that neither he, nor any person, organization or other entity on his behalf, will file, charge, claim, sue or cause or permit to be filed, charged or claimed any action for legal or equitable relief (including damages, injunctive, declaratory, monetary or other relief) involving any matter occurring at any time in the past up to the date of this Stipulation.

8. BOARD agrees and covenants that neither it nor anyone on its behalf will file, charge, claim, sue or cause or permit to be filed, charged, or claimed any action for legal or equitable relief (including damages, injunctive, declaratory, monetary or other relief) involving any matter occurring at any time in the past up to the date of this Stipulation or involving any continuing effects or any acts or practices which may have arisen or occurred prior to the date of this Stipulation.

9. TUMOLO hereby agrees and recognizes that his employment relationship with BOARD will be permanently and irrevocably severed as of the close of business on January 31,

INITIALS: _____

INITIALS: _____

1999, and that BOARD does not have any obligation, statutory, contractual or otherwise, to hire, rehire, or re-employ him in the future.

10. TUMOLO agrees and acknowledges that the agreement by BOARD described herein and the settlement and termination of any claims against BOARD as set forth herein, are not and shall not be construed to be an admission of any violation of any federal, state or local statute or regulation, or of any duty owed by BOARD to him. TUMOLO further agrees and acknowledges that he has consented to the termination of his employment with BOARD through resignation effective at the close of business on January 31, 1999 and to the execution of this Stipulation to provide an amicable conclusion of his employment relationship with BOARD.

11. In the event that the Commissioner fails to give final approval to this Stipulation, the Parties agree to reform it to effectuate its purposes. Should reformation prove impossible, TUMOLO will repay to the BOARD all sums paid to him by the BOARD pursuant to this Stipulation less such sums which would have been due and owing from the 120th day following the BOARD's certification of the tenure charges until the date reformation has proven impossible and the case shall be listed for hearing on such dates as are mandated by the Commissioner on remand.

INITIALS

INITIALS:

12. Should BOARD fail to pay all monies owed to TUMOL directly or to be paid on his behalf under this Stipulation as said monies become due, TUMOLO shall be entitled to have any arrearages thereon reduced to a judgment against BOARD upon the filing of appropriate documents with any tribunal having jurisdiction.

13. Should TUMOLO fail to pay any money he may become obligated to repay to the BOARD as said monies become due, the BOARD shall be entitled to have any arrearages thereon reduced to a judgment against TUMOLO upon the filing of appropriate documents with any tribunal having jurisdiction.

14. The Parties acknowledge that TPAF is not a party to this Stipulation and nothing in this Stipulation binds TPAF to grant TUMOLO a pension. In the event that TPAF takes any action to deny TUMOLO's pension, the BOARD covenants to cooperate fully to take such other and further acts as are necessary to assist TUMOLO in any supplemental application and/or appeal from TPAF's initial action.

15. This Stipulation is a bilateral agreement and is the product of joint negotiation and drafting. In the event of a dispute as to a term of this Stipulation, the Stipulation will not be construed against either Party as the party who drafted it.

16. The Parties agree that they and their officers, agents, and administrators will be bound by a covenant of good faith and fair dealing with respect to performance under this Stipulation and that neither will do anything to deprive the other of the benefit of the bargain.

INITIALS: _____

INITIALS: _____

17. The Parties hereby certify that they have read the terms of this Stipulation, that they have had an opportunity to discuss it with their attorneys and pension consultants and that they understand its terms and effects. TUMOLO acknowledges further that he is executing this Stipulation of his own volition, with full understanding of its terms and effects, and with the intention of releasing all claims recited herein, which he acknowledges is adequate and satisfactory to him. Neither BOARD nor its agents, representatives, or attorneys have made any representations to him concerning the terms or effects of this Stipulation other than those contained herein.

18. By signing this Stipulation, each signatory represents that she or he is a Party or has been duly authorized by a Party to sign on that Party's behalf.

19. The Parties agree that this Stipulation may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

Intending to be legally bound hereby, TUMOLO and BOARD execute the foregoing Stipulation this _____ day of _____, 1999.

WITNESS:

Kathleen A. Zieger

Edward D. Tumolo
ED TUMOLO

WITNESS:

_____, BOARD SECRETARY

William D. Collins
Vice President, BOARD PRESIDENT

Edward Tumolo
731-D Graisbury Avenue
Blenheim, New Jersey 08012

January 31, 1999

Gloucester Township Board of Education
17 Erial Road
Blackwood, NJ 08102

Attention: Ralph Carter, Jr., Board Secretary

Dear Mr. Carter:

I hereby tender to the Gloucester Township Board of Education my resignation from employment effective January 31, 1999.

Very truly yours,

COPY

Edward A. Tumolo

ED TUMOLO

INITIALS:

INITIALS:

OAL DKT. NO. EDU 8451-98
AGENCY DKT. NO. 413-9/98

IN THE MATTER OF THE TENURE	:	
HEARING OF EDWARD TUMOLO,	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF GLOUCESTER, CAMDEN COUNTY.	:	DECISION
	:	

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

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement and shall be referred to the State Board of Examiners pursuant to *N.J.A.C.* 6:11-3.6 for action against his certificate as it deems appropriate.*

COMMISSIONER OF EDUCATION

February 24, 1999
Date of Mailing, February 24, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

47-99

TARANTO BUS COMPANY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK, BERGEN COUNTY, AND BOARD OF EDUCATION OF THE SOUTH BERGEN JOINTURE COMMISSION, BERGEN COUNTY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning bus company alleged respondents failed to comply with public bidding laws and regulations and wrongfully awarded contract to another bus company.

ALJ found that the Board initially decided not to renew its existing contract with Laidlaw and decided to publicly bid the route. Board subsequently determined that it would be less expensive to renew the existing contract. Thus, the Board rejected all bids, including petitioner's, and renewed Laidlaw's contract. ALJ concluded that the Board rejected the lowest bid because it was attempting to comply with recently enacted N.J.S.A. 18A:39-11.1 and save the taxpayers money. ALJ further concluded that the Board acted within its authority and that the Board did not violate the bidding laws when it decided to renew the existing contract, after it had already taken bids. ALJ granted summary decision to respondent Jointure Commission; petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 11244-97
AGENCY DKT. NO. 378-10/97

TARANTO BUS CORPORATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK, BERGEN COUNTY, AND SOUTH BERGEN JOINTURE COMMISSION, BERGEN COUNTY,

Respondents.

Rose Marie Manger, Esq., for petitioner
(Manger and Thal, attorneys)

Anthony N. Gallina, Esq., for respondent Saddle Brook Board of Education

Ellen Walsh, Esq., for respondent South Bergen Jointure Commission
(Fogarty and Hara, attorneys)

Record Closed and Decided: January 7, 1999

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

Petitioner Taranto Bus Co. (Taranto or petitioner) contends that respondents, Board of Education of the Township of Saddle Brook (Saddle

Brook or Board) and South Bergen Jointure Commission (Commission), violated the public bidding laws. Specifically, respondents prevented Taranto from providing bus transportation services, Route 450, to Saddle Brook students. Petitioner seeks damages and other relief. The matter was transmitted to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A hearing was scheduled for January 25-26, 1999. Prior to the hearing, the Commission moved for summary decision.

FACTS

Respondent South Bergen Jointure Commission, a public entity organized pursuant to *N.J.S.A.* 18A:46-25 to -28, provides special education services, including transportation services, to its member districts. The Commission also provides nonpublic school transportation for school districts. For the 1997-98 school year, the Commission contracted with school districts to publicly bid and provide their transportation routes.

Saddle Brook, a member of the Commission, requested that the Commission bid on a transportation route for Saddle Brook students who attend Paramus Catholic High School. The Bid Specifications and Notice stated that the Board reserved the right to reject any and all bids. Laidlaw Transit, Inc., (Laidlaw) provided transportation services to these students in the previous school year, 1996-97.

On July 22, 1997, the Commission opened bids for routes including Route 450. On July 23, 1997, Ernest Turner, board secretary/business administrator for the Commission, sent a notice entitled "Bid Results" to the successful bidders, which stated: "Please prepare to begin these [routes] accordingly. We

will be contacting you within the next week to finalize the stops on the routes." Taranto was the lowest bidder for Route 450.

Thereafter, Anthony D'Achille, board secretary/business administrator for the Saddle Brook Board of Education, notified Turner that Saddle Brook would not be using the Commission's services for Route 450.

On August 8, 1997, Turner sent Taranto a letter stating:

> Please be advised that Route #N0450 to Paramus Catholic has been canceled. This route was comprised entirely of Saddle Brook students. The Saddle Brook Board of Education has decided to arrange for the transportation, and has therefore withdrawn these students from the Commission.
>
> [Turner Aff., Exhibit C.]

ARGUMENTS

The Commission

The Commission contends that a board of education should look for the lowest possible cost in providing for the transportation of its pupils. Moreover, recent legislation requires boards to bid for nonpublic routes to see if the bids come in lower than the district's obligation to pay aid in lieu of transportation. *N.J.S.A.* 18A:39-11.1(c). Commission Brief at 8-9. Further, the Commissioner of Education has also approved the use of speculative bidding. In *Tri-R Bus Service, Inc. v. Board of Education of the City of Plainfield*, 1978 *S.L.D.* 585, the Commissioner concluded that a local board of education that had advertised for bids on local bus routes for the transportation of school pupils lawfully exercised its discretionary authority to reject the bids and operate its own vehicles.

In addition, the Commission asserts that its joint transportation agreement with Saddle Brook only requires that the Commission provide certain transportation services through another contractor. Assuming *arguendo* the existence of a principal-agency relationship, the Commission argues that the relationship terminated when Saddle Brook withdrew its request for transportation services on Route 450. Further, the Commission avers that it did not have the authority to award a transportation contract to Taranto until the bid was approved at a public meeting. Therefore, the Commission's letter to Taranto was merely notification that Taranto was the lowest bidder.

Finally, the Commission maintains that if the bidding laws were violated, petitioner has no remedy because the contract has already been completed. Further, public bodies cannot be awarded monetary damages for violations of the bidding laws. Therefore, the Commission asserts that the case is moot and urges this tribunal to dismiss the petition.

Saddle Brook

Saddle Brook contends that it had the authority to reject all bids because it could secure the transportation service at a lower price by another provider. Specifically, on June 2, 1997, Saddle Brook received from Laidlaw an offer to renew transportation services for Route 450 at a 1.5 percent cost increase over the prior year. Simultaneously, Route 450 was contained in a bulk transportation bid with the Commission. In July 1997, Saddle Brook reviewed the bid results and determined that it could provide the transportation services for Route 450 at a lower cost than the bids submitted. Therefore, Saddle Brook voted to renew its nonpublic transportation contract with Laidlaw and notified the Commission of its decision.

Further, Saddle Brook maintains that it was required to submit its nonpublic transportation routes for public bidding through the Commission. *N.J.S.A.* 18A:39-11.1. Indeed, recent legislation requires that Saddle Brook use a cooperative transportation services agency (CTSA) identified by the Commissioner, "except when the local district can provide transportation to pupils at the lowest cost or at a cost lower than that which can be obtained through a CTSA." Saddle Brook Brief at 4. Thus, Saddle Brook compared the bid submitted by Taranto to the cost quoted by Laidlaw, its transportation provider from the prior year, and chose the latter. Saddle Brook further maintains that after it exercised its right to reject all bids, it simply renewed the existing contract with Laidlaw, at a cost that was less than the lowest bid obtained through CSTA.

Taranto

Petitioner argues that when Saddle Brook decided to publicly bid Route 450, Saddle Brook and the Commission had to comply with the public bidding laws and award the contract to the lowest responsible bidder. Further, petitioner maintains that Turner's July 23, 1997 letter was an acceptance of Taranto's bid and that an implied contract was created.

DISCUSSION

Pupil Transportation:

Boards of education are obligated to provide transportation to public school pupils who live two or more miles from their school. *N.J.S.A.* 18A:39-1. Additionally, boards of education must provide nonpublic school transportation to pupils who live no more than twenty miles from the nonpublic school. If, however, the costs for the nonpublic school transportation exceed a maximum

amount per pupil to be determined by the Department of Education, the parents shall be entitled to payments in lieu of transportation. *Ibid.*

Transportation obligations may be accomplished by buses owned by the school district or through a contract with another party. *N.J.S.A.* 18A:39-2. The board of education must publicly advertise for bids, and the contract shall be awarded to the lowest responsible bidder. *N.J.S.A.* 18A:39-3. However, a board of education shall always have the right to reject all bids. *N.J.S.A.* 18A:39-5. Moreover, when a contract expires, a board of education has the option to renew the contract or to publicly advertise for bids. *N.J.S.A.* 18:39-3; *N.J.A.C.* 6:21-16.8.

Effective April 1, 1997, the Legislature enacted *N.J.S.A.* 18A:39-11.1, a law that encourages school districts to provide transportation through cooperative transportation services agencies. The Commissioner of Education will publish a list of agencies that provide cooperative transportation services. If a school district is responsible to provide transportation for pupils to and from a county vocational school or for classified pupils, the school district shall use one of the agencies on the Commissioner's list. *N.J.S.A.* 18A:39-11.1(b). However, a school district is not required to use one of the agencies if it can provide for the transportation at a cost lower than the agencies. *Ibid.* For example, "[b]efore considering a renewal in the following year, the district board of education must be satisfied that this contract is less costly than transportation provided by the CTSA." Implementation Guidelines for Coordinated Pupil Transportation Services at 4.

Also, *N.J.S.A.* 18A:39-11.1(c) provides that school districts responsible for nonpublic school transportation which provided aid in lieu of transportation in previous years or which cannot provide transportation in the ensuing school year, shall attempt to provide for the transportation through a cooperative transportation services agency prior to paying aid in lieu of transportation. If it is

determined that the cost of the transportation provided by the cooperative transportation services agency is less than the aid-in-lieu-of transportation, then the transportation must be provided rather than the payment. *Ibid.* Otherwise, the district may continue to provide aid-in-lieu-of transportation. *Ibid.* Regardless, a board of education always has the option to enter into joint transportation agreements. *N.J.S.A.* 18A:39-11.

Guidelines accompanying *N.J.S.A.* 18A:39-11.1 provide, in part:

> Chapter 53, P.L. 1997 requires the coordination of transportation services of students going to a special education or vocational school located outside the district; and nonpublic school students whose parents receive aid in lieu of transportation.
>
> To comply with the requirement of the law, boards of education must evaluate the method of transporting these students to determine whether services could be more economically provided through a coordination of transportation services agency (CTSA). This provision does not require the immediate re-bid of existing contracts or bidding by both the CSTA and district board of education for the purpose of comparing costs. Boards of education may use any method of providing services. As an example, the cost of existing contracts and joint agreements may be compared to the CTSA per pupil cost of transporting students to the same location.

Here, Saddle Brook initially decided not to renew the existing contract with Laidlaw and decided to publicly bid the route. Once the bids were opened, Saddle Brook determined that it would be less expensive to renew the existing contract with Laidlaw. In an effort to comply with the new law, *N.J.S.A.* 18A:39-11.1 and save the taxpayers money, Saddle Brook rejected all bids and renewed Laidlaw's contract. Thus, the pivotal issue is whether Saddle Brook's decision to reject Taranto's bid violated the bidding laws.

Bidding Laws

In *Terminal Construction Corp. v. Atlantic County Sewerage Authority*, 67 *N.J.* 403, 409-10 (1975), the Supreme Court stated:

> Bidding statutes are for the benefit of the taxpayers and are construed as nearly as possible with sole reference to the public good. Their objects are to guard against favoritism, improvidence, extravagance and corruption; their aim is to secure for the public the benefits of unfettered competition. To achieve these purposes all bidding practices which are capable of being used to further corrupt ends or which are likely to affect adversely the bidding process are prohibited, and all awards made or contracts entered into where any such practice may have played a part, will be set aside. This is so even though it is evident that in fact there was no corruption or any actual adverse effect upon the bidding process.

The courts rigidly adhere to the bidding laws. *Hall Constr. Co., Inc. v. New Jersey Sports & Exhibition Auth.*, 295 *N.J. Super.* 629, 634-35 (App. Div. 1996). However, under proper circumstances a government body has the power to reject all bids. *Cardell, Inc. v. Township of Woodbridge*, 115 *N.J. Super.* 442, 450 (App. Div. 1971), *certif. denied*, 60 *N.J.* 236 (1972). The right to reject bids promotes competitive bidding because it "serves as a strong inducement to bidders to keep their bids as low as circumstances permit." *Id.* at 450-51. Nonetheless, the discretionary privilege to reject bids is not without limit. *Bodies By Lembo v. County of Middlesex*, 286 *N.J. Super.* 298, 308 (App. Div. 1996). The unbridled power to reject bids, even when reserved in the invitation for bidding, would violate public policy, contravene the Legislature's intention in enacting the competitive bidding statute and afford a means by which "the statute can be evaded under color of the rejection of 'any and all bids.'" *Miller v. Passaic Valley Water Comm'n*, 259 *N.J. Super.* 1, 13 (App. Div. 1992). Thus, the decision to reject all bids must not be arbitrary or capricious and must be free from fraud, collusion and bad faith. *Marvec Constr. Corp. v. Township of Belleville*, 254 *N.J. Super.* 282, 288 (Law Div. 1992). The decision to reject bids

is appropriate where motivated by good faith without consideration of eliminating an "unfavored bidder." *Princeton Disposal Serv., Inc. v. Township of N. Brunswick*, 154 *N.J. Super.* 488, 490 (App. Div. 1977), *certif. denied*, 75 *N.J.* 608 (1978). Moreover, where all "bids have already been opened and each bidder's competitive position has been exposed, rejection of all bids should only occur for cogent or compelling reasons." *Marvec Constr. Corp., supra*, 254 *N.J. Super.* at 288 (quoting Cushman & Doyle, *Construction Bidding Law* § 1.7 at 9 (1990)). "[T]here must be evidence of such a character as would cause reasonable men to believe that it was not in the best interests of the municipality to award the contract to the lowest bidder." *Poling v. Roman*, 86 *N.J. Super.* 484, 489 (Law Div. 1965). Clearly, competitive bidding statutes are for the benefit of taxpayers, not the bidder. *Trap Rock Indus. v. Kohl*, 59 *N.J.* 471, 479 (1971). Thus, they must be construed with sole reference to the public good.

Here, Saddle Brook had the authority to award an annual extension of the existing transportation contract or publicly bid the route. *N.J.S.A.* 18A:39-3; *N.J.A.C.* 6:21-15.1(a). Once the Board determined that it was not going to award the extension, it advertised for bids. However, once all of the bids were opened, Saddle Brook realized that it could save money by renewing the existing contract.

The Commission's Letter to Taranto

I have considered whether the Commission's July 23, 1997 letter to Taranto constituted an acceptance of Taranto's bid. If a reasonable person is led to believe an offer has been made, then the "offeror" may have conferred upon the offeree the power to create a contract by the latter's acceptance of the "offer." *Creek Ranch, Inc. v. New Jersey Turnpike Auth.*, 75 *N.J.* 421, 428 (1978). Whether an offer, capable of acceptance, has been made depends upon "what meaning the words should have conveyed to a reasonable person

cognizant of the relationship between the parties and all of the antecedent and surrounding facts and circumstances." *Esslinger's Inc. v. Alachnowicz*, 68 *N.J. Super.* 339, 344 (App. Div. 1961).

The certification of Taranto's president, Frederick A. Howard, described the company's relationship to the Commission and its past dealings. Howard stated:

> [T]he Commission prepares the contract with the vendor and signs same, then sends the contract to the Superintendent of Schools and the vendor for signature. The local board of education does not sign the transportation contract. Usually, Taranto does not receive the actual written contract from the Commission until November or December in any given year, even through the contract for said transportation routes commences in September. In some cases because of technical errors contained in the initial contracts, there are contracts that are not finalized until the Spring of the following year. Thus `Taranto prepares and performs the work based on the public bid and the memo sent to us by the Commission after the opening of the public bids.
>
> [Howard Aff. at ¶ 7.]

Petitioner submits that Taranto relied on the results of public bidding and the letter from the Commission to determine that it had a contract to provide transportation services for Route 450. Therefore, Taranto prepared the scheduling "of vehicles and drivers accordingly to ensure that Taranto had the capability of fulfilling its obligations as set forth in the public bids, including Route 450." *Ibid.*

The Commission maintains that no contract existed between Taranto and Saddle Brook based on implied contract theory or agency. The Commission argues that Turner had no authority to contract on behalf of the Commission. Thus, the letter sent by Turner did not create an implied contract. In any event, sixteen days after Turner sent the letter to Taranto he notified the company that

Route 450 had been canceled. The Commission avers that any work done by Taranto was minor. Indeed, no transportation services were ever performed for Route 450.

The Commission acknowledged that it acted as agent for Saddle Brook. After the Commission announced the results of the bid, Saddle Brook informed the Commission that it was arranging for its own transportation. Thus, the Commission did not award a contract to Taranto for Route 450 because the authority given to the Commission regarding Route 450 had been renounced when Saddle Brook properly exercised its right to withdraw the bid.

Moreover, the Commission acknowledged its prior practice of performing services and receiving reimbursement prior to receiving a written contract. However, it contends that no enforceable agreement exists until the Commission acts in a public meeting to award a route to a contractor. This did not occur for Route 450. The Commission maintains that its past actions and the action of Turner in July 1997 do not constitute an implied contract regarding the bid for Route 450.

Based on the circumstances underlying the facts presented, I am persuaded by the Commission's arguments. No contract existed between Taranto and Saddle Brook based on implied contract theory or agency. Any implication based on the July 23 letter that the contract for Route 450 would be awarded was dispelled sixteen days later by the notice that Route 450 had been canceled. Taranto ignored that notice of cancellation, pupil transportation laws and the applicable bidding laws for boards of education and, instead, relied only on the July 17 letter. Taranto's reliance was unreasonable.

CONCLUSIONS

Based on the whole of the record, I **CONCLUDE** that Saddle Brook rejected the lowest bid because it was attempting to comply with recently enacted *N.J.S.A.* 18A:39-11.1 and save the taxpayers money. I **CONCLUDE** that the decision by Saddle Brook to reject the bids was not arbitrary or capricious and was free from fraud, collusion and bad faith. I **CONCLUDE** that Saddle Brook acted within its authority granted by *N.J.S.A.* 18A:39-3 and *N.J.A.C.* 6:21-15.1(a) when it renewed the existing contract. Therefore, I **CONCLUDE** that Saddle Brook did not violate the bidding laws when it decided to renew the existing contract, after it had already taken bids. I **CONCLUDE** that once Saddle Brook informed the Commission that it was withdrawing Route 450 and providing its own transportation, the Commission's authority regarding Route 450 had been renounced. Thereafter, the Commission had no authority to contract with Taranto on behalf of Saddle Brook. Further, I **CONCLUDE** that no contract existed between Taranto and Saddle Brook or the Commission based on implied contract theory or agency. I have considered the remaining issues raised by the parties and I **CONCLUDE** that they need not be addressed.

SUMMARY DECISION

Pursuant to *N.J.A.C.* 1:1-12.5(b), summary decision is appropriate:

> if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.

Summary decision in administrative proceedings parallels summary judgment in the courts. Summary judgment is:

> designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at a trial.
>
> [*Judson v. Peoples Bank and Trust Co. of Westfield*, 17 *N.J.* 67, 74 (1954).]

In administrative proceedings, as in the courts, it is "the movant's burden to exclude any reasonable doubt as to the existence of any genuine issue of material fact." *Id.* at 74. Thus, "[a]ll inferences of doubt are drawn against the movant in favor of the opponent of the motion. The papers supporting the motion are closely scrutinized and the opposing papers indulgently treated." *Id.* at 75.

The New Jersey Supreme Court in *Brill v. Guardian Life Insurance Co.*, 142 *N.J.* 520, 539-40 (1995), applied the summary judgment standard employed by the federal courts. Under *Brill*, once the movant has presented competent evidence tending to show the absence of any genuine issue for trial, the nonmovant must do more than simply create some doubts as to the material facts. Moreover, the nonmoving party cannot rely on disputed issues of fact that are insubstantial. Rather, *Brill* requires the nonmovant to raise a factual issue substantial enough to sustain a reasonable conclusion in the nonmovant's favor if a hearing were held. If the evidence, along with reasonable inferences, could sustain a judgment in favor of the nonmovant the motion must be denied.

Here, respondent South Bergen Jointure Commission moved for summary decision. I have considered and I reject Taranto's assertions that there exist genuine issues as to material facts. Based on the whole of the record, I **CONCLUDE** that no genuine issues of material fact exist.

It is **ORDERED** that the motion for summary decision filed by respondent South Bergen Jointure Commission is **GRANTED** and the petition is **DISMISSED**.

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

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

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

January 7, 1999
DATE

Mumtaz Bari Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

Jan. 12, 1999
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 14 1999
DATE

Barbara A Harnett
OFFICE OF ADMINISTRATIVE LAW

cb

OAL DKT. NO. EDU 11244-97
AGENCY DKT. NO. 378-10/97

TARANTO BUS COMPANY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK, BERGEN COUNTY, AND BOARD OF EDUCATION OF THE SOUTH BERGEN JOINTURE COMMISSION, BERGEN COUNTY,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Jointure Commission's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in rendering the within decision.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge.

Accordingly, the initial decision is adopted for the reasons expressed therein.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 24, 1999
Date of Mailing, February 24, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

48-99

IN THE MATTER OF THE TENURE	:	
HEARING OF LUCY LESTER,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL	:	DECISION
DISTRICT OF THE CITY OF NEWARK,	:	
ESSEX COUNTY.	:	
	:	

SYNOPSIS

District certified tenure charges of unbecoming conduct against respondent middle school teacher for allegedly participating in a scheme to defraud the State Health Benefits Program (SHBP) by conspiring with a doctor to submit claims and receive checks (finders' fees and kickbacks) for psychological services purportedly rendered.

ALJ determined that the record clearly supported a conclusion that respondent was aware of the improprieties and she knowingly and willingly engaged in conduct intended to defraud the SHBP by providing information to the doctor to enable him to submit claims to her insurance company for services never rendered to her or her family, by accepting payment, which represented a "kickback" of a portion of the moneys improperly collected for these claims and "finders' fees" for referring colleagues to the fraudulent scheme. Thus, the ALJ concluded that the District sustained its burden of proving the charges by a preponderance of evidence. Moreover, because of the seriousness of the charges, the ALJ concluded that dismissal was warranted. ALJ ordered respondent terminated from her tenured employment.

Upon careful and independent examination and study of the record, including the parties' exception arguments and the transcripts of the hearing, the Commissioner determined to affirm the conclusion of the ALJ that the District established its charge of unbecoming conduct on the part of the within respondent necessitating her removal from her tenured position. Commissioner concluded that the District established said charge as the quality of the evidence herein leads a cautious mind to the conclusion that respondent was not, as she claimed, a "duped victim," but engaged in knowing and intentional participation in conduct with a purpose to defraud and introduced others to the fraudulent scheme. Moreover, despite respondent's apparently unblemished record, the Commissioner determined that the charge established herein, under the particular circumstances of this matter, was sufficiently flagrant to warrant respondent's dismissal. (*Redcay*) Commissioner ordered respondent dismissed from her tenured position as of the date of this decision and transmitted the matter to the State Board of Examiners for action, as that body deems appropriate.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3173-97

AGENCY DKT. NO. 552-11/96

STATE OPERATED SCHOOL DISTRICT

OF THE CITY OF NEWARK,

Petitioner,

v.

LUCY LESTER,

Respondent.

Philip E. Stern, Esq., appearing for Petitioner
(Sills, Cummis, Zuckerman, Tischman, Epstein & Gross, attorneys)

Richard S. Lehrich, Esq., appearing for Respondent

Record Closed: November 25, 1998 Decided: January 8, 1999

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

Petitioner, the State Operated School District of the City of Newark, (the District) filed charges alleging conduct unbecoming a public school teacher, against

Respondent, Lucy Lester, on October 30, 1996. Respondent was served, on the same day, with a copy of the charges, the supporting documentation, and written notice of her right to submit a written State of Position and State of Evidence relative to the charges within 15 days of receipt.

On November 15, 1996,[1] the State District Superintendent executed a Certificate of Determination, pursuant to *N.J.S.A.* 18A:6-11, noting that there was probable cause to credit the evidence and that the charges, if sustained, were sufficient to warrant the dismissal of Respondent.

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on March 3, 1997, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

After several adjournments requested by the parties, each with the consent of the other, the hearing commenced on June 4, 1998. A second day of hearing was scheduled for July 8, 1998, at which time the parties indicated they had stipulated to certain facts and both rested. The parties also indicated that they wished to order a transcript and to submit written summation. Consequently, a briefing scheduled was established and the record closed, pursuant to that schedule, on November 25, 1998.

FINDINGS OF FACT

Stipulated

The parties have stipulated to the following facts which are incorporated herein as findings of fact.

[1] At the time the Certificate of Determination was issued, Respondent had not filed a response to the charges; however, a letter of appearance had been submitted by counsel.

1. Respondent has been continuously employed by the District since 1970. She had earned an instructional certificate with an endorsement in elementary education and has always been employed as an elementary grade teacher. From 1970 to 1973, she was assigned to the Horton Elementary School; from 1973 to the time of her suspension, she was assigned to the Camden Middle School.

2. Respondent was suspended in October 1996, pending the determination of the charges which are the subject of this action.

3. There have been no prior disciplinary proceedings against Respondent during the course of her employment.

Undisputed

Based on the evidence presented at the hearing, as well as on the opportunity to observe the witnesses and assess their credibility, I make the following findings of fact, which are essentially undisputed, in this matter.

4. Respondent provided her name, address and possibly her social security number to Carl H. Lichtman who was a psychologist licensed to practice in the State of New Jersey. Respondent also provided her son's name to Lichtman.

5. Lichtman admitted to involvement in a scheme to defraud insurance carriers, including the State Health Benefits Program (SHBP) by submitting false claims for psychological services purportedly rendered to insureds and/or their dependents.

6. Respondent was one of the insureds and her son was one of the dependents for whom Lichtman submitted false claims for services rendered.

7. No psychological services were ever rendered to either Respondent to her son by Lichtman.

8. Respondent received checks totaling over $5585 from Lichtman. A portion the moneys received represented 25% of the total fees collect by Lichtman from SHBP for services he represented he performed for Respondent. A portion of the moneys Respondent received from Lichtman represented a finder's fee for other employees to whom she referred Lichtman.

9. The checks received by Respondent were personal checks signed and issued by Lichtman, who, upon receiving payment for fraudulent claims directly from the carrier, deposited the carrier's checks and then issued his own check to the insured.

10. Respondent spoke to Lichtman, or someone purporting to be Lichtman on only two occasions. The first time was to assess the service he was purportedly offering; at this time she provided her personal information. The second time was soon after she received the first check from him. She did not speak or attempt to speak to him again, despite the fact that she received large sums of money from him.

11. All of the checks issued by Lichtman to Respondent were negotiated by Lester.

DISCUSSION AND CONCLUSIONS

The issues to be determined in this matter are whether Respondent engaged in conduct unbecoming a teacher and, if so, whether such conduct warrants termination. Petitioner bears the burden of proving, by a preponderance of competent, credible evidence, that Respondent should no longer be allowed to teach.

At the outset, it is necessary to note that there are several serious weaknesses in the testimony of Respondent's prime witness, Lichtman. He was testifying as a result of a provision in his pleas agreement; he could only testify as to the general procedures he followed in gathering information, filing claims, and issuing finders' fees and kickbacks. He had no specific recollection of conversations or dealings with Respondent. Consequently, his testimony, standing alone, cannot be dispositive of the ultimate issue in this matter.

From the factual findings set forth above, it is clear that Respondent contacted Lichtman, spoke with him or someone purporting to be him on two occasions; she never met him in person, presumably until after the scheme was uncovered. It is equally clear that she provided personal information to the person to whom she spoke, despite never having met him or having had services performed for her; in addition, she received several checks from him for substantial amounts of money, despite neither receiving services or performing services for him; moreover, she endorsed and negotiated the checks.

The documentary evidence demonstrates that Respondent received several checks with the notation of names of individuals which Respondent identified as colleagues in the Newark public school system. According to the testimony of Lichtman, he paid a $750 "finder's" fee to insureds who referred colleagues to him and notations of names of individuals on the memo line of checks indicates payment of the finder's fee. Not only is this testimony unrebutted in the record, it is uncontroverted. There is no other explanation of why such notations would have been made on checks to Respondent.

Moreover, Respondent's testimony that she never received any Explanation of Benefits (EOB) communications from her carrier is just not credible, in light of her further testimony that she has always received such information in the past. Several of

the EOBs in evidence are a portion of entire statements. For example, the EOB for claim number 1-93277-40-15141-00000 on behalf of Anthony Hooper, Respondent's son, indicates that it consists of nine pages in its entirety; the EOB for claim number 1-93272-40-03549-00000 also indicates that it consist of nine pages in its entirety. In both cases, however, only a few pages of the entire document was produced at the hearing. It strains credulity to believe that, of all the EOBs sent to Respondent over the course of her years as an insured, these EOBs, or, even portions of them, which were extensive documents and which would have provided a strong basis from which to draw an inference of knowledge of the scheme, were not sent to her.

I note, as well, that Respondent's testimony with respect to the special program, presumably funded by grants, according to her testimony, addresses her relationship with Lichtman and her belief that she, as a seeker of help for a stress related condition, was a participant in such a program. There is nothing in the record, even after she received a check with her son's name on the memo, that she attempted to find out how and why she was sent a check for her child.

Turning now to the evidence in the record, Petitioner has presented the checks which Lester acknowledges negotiating; Lester testified that she, indeed, did provide certain personal information to Lichtman; she also testified that she provided that information over the telephone to someone whom she had never met and with whom she never treated; she also acknowledged that she never received any service from Lichtman, nor was she asked to provide any further information or participation which would have supported her assertion that she believed she was participating in a special program of some sort.

In addition, while it may have been possible that, before she received any money from Lichtman, Respondent was under the impression that she was participating in a special program under Lichtman's direction, the record is clear that she made no attempt to find out what she was being paid for after she began receiving substantial

checks from Lichtman. It *defies* credulity to believe that a professional person who provided personal information to a person whom she had never met would simply accept substantial sums of money without questioning why she was receiving them.

Based on Respondent's own testimony that she did not seek information from Lichtman notwithstanding receiving over $5000 from him for doing nothing other than providing personal information and notwithstanding that her child was implicated by Lichtman's payment, I **CONCLUDE** that Respondent had knowledge and understanding of how Lichtman's scheme worked.

I further **CONCLUDE** that she provided Lichtman with the name and other personal information about her child. I also **CONCLUDE** that Respondent accepted payment for providing such information to Lichtman and for referring colleagues to him and that such payment resulted in the theft of and improper payment of public moneys. Accordingly, I **CONCLUDE** that Petitioner has sustained the burden of proving by a preponderance of competent evidence that Respondent engaged in conduct unbecoming a public school teacher.

With respect to the appropriate penalty to be imposed, Petitioner seeks termination of employment. Respondent, on the other hand, asserts that she has never before been subjected to disciplinary action and her evaluations since 1980 have been satisfactory. These two factor, she argues, should inure to her benefit in the assessment of penalty.

The ultimate factor to be weighted, however, in determining penalty, is the seriousness of the charges which have been sustained. In this case, Respondent has breached the public trust. The Commissioner of Education has commented on the seriousness of charges which arise from a teacher's breach of public trust:

> Teachers are public employees who hold positions demanding public trust, and in such position, they teach, inform, and mold habits and attitudes and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience and learn about the teacher. When a teacher deliberately and willfully violates the . . . public trust placed in him, he must expect dismissal . . . .

I/M/O Tenure Hearing of Ernest Tordo, School District of Jackson, Ocean County, 1974 *S.L.D.* 97, 98-99. *See, also, I/M/O Tenure Hearing of Jacques, L. Sammons, School District of Black Horse Pike Regional, Camden County,* 1972 *S.L.D.* 302, 321; and *I/M/O Tenure Hearing of Kenneth Henderek, School District of the Township of East Brunswick, Middlesex County, 94 N.J.A.R.* (EDU) 268 at 275.

Moreover, it is well established that a single incident may be sufficiently egregious in nature to warrant termination. In this case, the breach of trust is such an incident, the fact that the breach of trust is predicated on the theft of public money further enhances the egregious nature of the incident. I **CONCLUDE**, therefore, that the Respondent is unfit to remain a teacher and must be **DISMISSED.**

It is so **ORDERED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 8, 1998
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 14 1999
DATE

OFFICE OF ADMINISTRATIVE [illegible]

jb

APPENDIX

EXHIBITS

P-1 Affidavit of Carl H. Lichtman

P-2 Packet of EOB (12 pages)

P-3 Medical Expense Claim dated October 1, 1993

P-4 Medical Expense Claim dated September 28, 1993

P-5 Voluntary Sworn Statement of Taft Reed dated May 12, 1997

R-1 thru 37 Teacher Annual Evaluation Report

OAL DKT. NO. EDU 3173-97
AGENCY DKT. NO. 552-11/96

IN THE MATTER OF THE TENURE	:	
HEARING OF LUCY LESTER,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL	:	DECISION
DISTRICT OF THE CITY OF NEWARK,	:	
ESSEX COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and the District's reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Respondent's exceptions contend, *inter alia*, that the decision of the Administrative Law Judge (ALJ) herein fails to comply with *N.J.S.A.* 52:14B-10, requiring that an initial decision "set forth separate findings of fact and conclusions of law, as well as the 'underlying facts supporting the findings.'" (Respondent's Exceptions at p. 2) Specifically, she urges

> ***While the initial decision contains a summary of testimony from the witnesses presented in this case, there is no real discussion of the evidence contrary to the recommended conclusions or any indication of the basis for rejecting this contrary evidence. In essence, the initial decision rejects evidence from the respondent merely by stating that it involves a credibility decision and that respondent could not be believed. Respondent submits that this is an insufficient discussion and analysis of the evidence presented in this case and, as a result, the initial decision fails to comply with the requirements established by *N.J.S.A.* 52:14B-10***. (*Id.* at pp. 3-4)

Respondent maintains that the remedy for such deficiency is reversal and remand.

Respondent next advances that the ALJ erred when she found that the District has met its burden of proof on the charges against her. With respect to the first charge, that she knowingly and intentionally participated in fraudulent conduct, respondent contends that there is absolutely no evidence in support of such charge. Rather, she advances that the evidence establishes that the responsibility for a perpetration of a fraud in this matter was solely attributable to Lichtman, arguing

> ***The evidence *** establishes that Lester sought to have Lichtman treat her for stress and possible panic problems. (T1 56) She was told that he had a program for her and he requested information from her, such as family information, employment, possibly a social security number, etc. (T1 85-86) ***Lichtman had no recollection of Lester at all. Without Lester's knowledge or action, Lichtman then used the information she provided for purposes of possible treatment, to fabricate bills, insurance claims, treatment schedules and the like. (T1 32-34) (P-4) (T1 36-37) (P-3) He forged her name on payment authorizations and other insurance forms. (T1 34). In short, the District's star witness is a liar, a forger, a thief and a convicted criminal who provided no evidence of any wrongdoing by Lester. She sought his professional help and he took complete advantage of her. The District did not present any competent evidence of a knowing and intentional participation in a fraudulent scheme. If anything, she was duped and set up by a criminal who is now being used by the District to destroy her. (Respondent's Exceptions at pp. 5-6)

She further avows that the initial decision effectively, impermissibly, reverses the burden of proof herein when it finds that she "had knowledge and understanding of how Lichtman's scheme worked because she did not adequately interrogate Lichtman as to what he was doing. (Initial Decision, page 7)." (Respondent's Exceptions at p. 6) She maintains that

> ***This analysis will simply result in the conviction of naïve and easily duped individuals who sought professional help from someone who turned out to be a criminal who stole state insurance money without their knowledge or participation. Lichtman

> admitted he did everything from forging names, to certifying false information to fabricating bills. Yet none of this information was ever given to the respondent by him. (*Id.*)

With reference to the second charge, that she provided Lichtman with names of other employees willing to participate in his fraudulent scheme, respondent asserts that the record is similarly devoid of any evidence that she "gave Lichtman the names of any employees, let alone for the intended purpose of defrauding an insurance company." (Respondent's Exceptions at p. 5) Rather, she argues, the record confirms

> Lichtman had no specific recollection of any conversations with Lester or dealing with her in any way. (T1 12, 22, 31-32, 38-39, 41-42) He offered no testimony indicating that he received the names of any other employees from Lester. Lester, called as a witness by the District, was apparently never asked if she provided the name of other employees to Lichtman for participation in illegal conduct. She credibly acknowledged providing Lichtman's name to two colleagues suffering from personal problems because she had heard he was a reputable counselor. (T1 49-50, 55) Even Binn, the State's lead investigator, offered no testimony suggesting that Lester provided the names of fellow employees to Lichtman.***
>
> Despite this complete lack of evidence, the initial decision concludes that based solely on the appearance of names on checks, the respondent knowingly brought others into a criminal scheme with Lichtman.*** (*Id.*)

In conclusion, respondent urges, it is clear that the presentation advanced by the District has not satisfied its burden of proving the charges against her by a preponderance of the believable evidence and, therefore, such charges must be dismissed.[1] (*Id.* at p. 6)

[1]Respondent's exceptions herein additionally allege that the ALJ utilized and relied on an exhibit, the Voluntary Sworn Statement of Taft Reed dated May 12, 1997, (Exhibit P-5), which was specifically precluded from being entered into evidence in this case. (Respondent's Exceptions at p. 2) The Commissioner notes that Exhibit P-5 was neither reviewed nor considered in his determination of this case.

Finally, in the alternative, respondent asks that, if any portion of the charges is deemed established by the Commissioner, he impose some penalty less than dismissal in light of her long, unblemished service in the Newark public schools. (Respondent's Exceptions at p. 9)

In reply, the District, citing *Benjamin Moore & Company v. City of Newark*, 133 *N.J. Super.* (App. Div. 1975) and *N.J.S.A.* 52:14B-10(d), maintains that the ALJ's decision must be affirmed because, contrary to respondent's advanced argument, "it reflects factual findings, supported by specific reasoning and underlying facts, which led the ALJ to discredit Ms. Lester." (District's Reply Exceptions at p. 5) Specifically, the District contends that the ALJ went to great length to explain why she was discrediting respondent's testimony, obviously indicating that she had considered respondent's explanations in light of the evidence and found them to be unbelievable. (*Id.* at pp. 5-6) By way of example, the District lists each of the ALJ's undisputed findings of fact (Initial Decision at pp. 3-4) and offers

> Before deciding whether Ms. Lester engaged in unbecoming conduct, the ALJ examined Ms. Lester's explanation for her involvement with Lichtman. Ms. Lester testified that she thought she was participating in some sort of special program. The ALJ weighed this explanation against the record and properly discredited Lester's testimony.
> In explaining her credibility determination, the ALJ first pointed to the documentary evidence: checks from Lichtman to Ms. Lester with the notation of names of individuals which Ms. Lester identified as colleagues in the Newark public school system. Opinion P. 5. The ALJ then cited Lichtman's testimony that he paid a $750 referral fee to insureds who referred colleagues to him, and made notations of these referrals on the memo line of checks to indicate payment of the finder's fee. Opinion P. 5. The ALJ concluded that, "Not only is this testimony unrebutted in the record, it's uncontroverted. There is no other explanation of why such notations would have been made on checks to Respondent." Opinion P. 5. This finding is also bolstered by the testimony of Inspector Binn and by Ms. Lester's allegation that she never received an Explanation of Benefits from her insurance company. The ALJ cited Lester's own testimony where Lester claimed that she always received Explanation of Benefits in the past. Opinion

P. 5. Based on this record the ALJ discredited this testimony.
***(District's Reply Exceptions at pp. 6-7)

As such, the District argues that, notwithstanding respondent's protestation to the contrary, the initial decision, on its face, clearly demonstrates that the reasoning of the ALJ was not arbitrary or capricious. Rather, it shows that she considered all of respondent's explanations and found them to be implausible. (*Id.* at p. 8)

Next, the District urges that it has met its burden of proof with respect to each of the within charges. In considering the first charge, respondent's knowing and intentional participation in the fraudulent scheme, the District advances that the testimony adduced at hearing and the evidentiary proofs in the within record fully establish this charge. In this regard, it cites selected hearing testimony, exhibits, and documentation here which it avers demonstrate: Lichtman admitted he conducted a scheme intended to defraud the State Health Benefits Program and implicated Lester; he submitted false claims for psychological services purportedly rendered to insureds and their dependents and when reimbursed for these services, he returned approximately 25% in a "kickback" to the insured; he additionally paid a $750 "referral fee" to scheme participants who referred another individual to the scheme; in his conversations with these individuals he never discussed treating them; and it was his belief that the individuals he spoke to understood they were participating in such a "scheme." (District's Reply Exceptions at pp. 2-3) Further buttressing these proofs, the District asserts, is Lichtman's affidavit and testimony which attests to respondent's participation in the scheme; Lichtman's issuance of $5,585 in checks to respondent representing her 25% kickbacks and referral fees; both Lichtman's and respondent's testimony that Lichtman never provided respondent with services of any kind; that respondent supplied Lichtman with information necessary for him to complete the insurance claim forms, *i.e.*, name, address, employer, possibly her social security number,

and her son's name; and subsequent to her provision of this information, respondent received checks from Lichtman each of which she endorsed and deposited. (*Id.* at pp. 3-4) The District urges that respondent's account of these events, and her rationalization that "maybe she was receiving money from a special grant, for which she never applied *** [o]r she was enrolled in some sort of 'special project'" ***(*id.* at p. 4), was an incredulous explanation for her receipt of "over $5,000.00 from a doctor that never counseled, treated nor provided services to her." (*Id.*)

In further substantiation of the establishment of this charge, the District next advances that Rita Binn, investigator for the New Jersey Division of Criminal Justice, credibly testified that she took a voluntary, sworn statement from an individual who was an admitted participant in Lichtman's "scheme," Taft Reed, who implicated the respondent and, indeed admitted to encouraging her participation. (District's Reply Exceptions at p. 4) Moreover, it maintains, Ms. Binn further testified

> Mr. Reed said to me that he – it was clear from his conversation with Ms. Lester that she know (sic) that Dr. Lichtman would be submitting fraudulent insurance claim forms and from the proceeds that he received from the carrier, that she would be receiving a portion of that. T98, L 9-13. (*Id.* at pp. 4-5)

In conclusion here, the District advances that it has met its burden of proof with respect to this charge as "[t]he weight of the evidence as a whole, including Ms. Lester's implausible excuses, is against Lucy Lester.***" (District's Reply Exceptions at p. 11)

As to the second charge, that respondent received payment for referring others to the scheme, the District avers that the checks, copies of which are included in the record here, speak for themselves in that

> ***On the memo line, the checks indicate the name of the person Ms. Lester referred into the scheme. These checks were made payable to Ms. Lester. Ms. Lester negotiated each check.

> Furthermore, Lichtman testified that when paying the insured referral fees, he indicated the name of the person referred on the memo line. Lichtman's affidavit also states that he paid Ms. Lester referral fees and made notations as such on the checks he issued to her. (District's Reply Exceptions at p. 11)

Further strengthening this evidence, the District contends, again, is the credible hearing testimony of investigator Rita Binn who testified that she took a voluntary, sworn statement from an individual named Claude Moses wherein "Moses admitted that Ms. Lester referred him to Lichtman, so that he could also participate in the scheme. T99, L 23-25." (District's Reply Exceptions at p. 5) Her testimony further reported

> Mr. Moses told me that he was having a conversation with Ms. Lester regarding financial problems. She told him that he could contact this Dr. Lichtman and he could receive a quarter of the insurance claims and he could also receive – further receive referral fees from this doctor. T101, L24-25; T 102, L 1-3. (*Id.*)

In support of such testimony, the District points out, a check, made payable to respondent, having Mr. Moses' name written on the memo line, is part of the evidentiary record in this matter. (District's Reply Exceptions at p. 11)

Finally, as to the penalty which should be imposed herein the District urges that the State Board's October 3, 1997 decision in *In the Matter of the Tenure Hearing of Alyce Stewart, State-operated School District of the City of Newark, Essex County*, wherein "the State Board held that participation in the Lichtman insurance fraud scheme constitutes unbecoming conduct warranting dismissal," is controlling in the instant case. (District's Reply Exceptions at p. 13) It declares that this decision, along with the egregious nature of the conduct involved in this matter, the far reaching effects of this fraud, and the fact that respondent's behavior here is diametrically opposed to that which should be expected of a teacher entrusted

with shaping young minds, *i.e.*, honesty, integrity and truthfulness, definitively confirms that termination from her position is the only possible result in this case. (*Id.* at pp. 12-13)

Upon a careful and independent review of the record in this matter, which included a transcript of the hearing conducted at the OAL on June 4, 1998,[2] the Commissioner, finding respondent's exceptions without merit, determines to affirm the initial decision of the ALJ, for the reasons articulated therein, as he finds that the record before him amply establishes that the District has established its charges of unbecoming conduct against the within respondent by a preponderance of the credible evidence, necessitating her dismissal from her tenured position.

In reaching his determination that the within charges have been established, the Commissioner gave full consideration to all evidentiary proofs which comprise the record and was cognizant that of particular importance here is the plausibility of the ALJ's factual findings and her weighing of the evidence and the credibility of the witnesses. In this regard, the Commissioner is satisfied, based on the record as a whole, that the ALJ considered all testimony and evidence and weighed it according to the credibility of the witnesses and the plausibility of its content and he finds no basis whatsoever in the record before him for overturning such findings or credibility assessments of the ALJ who had the benefit of observing the witnesses firsthand. In so concluding, the Commissioner was especially mindful that

> ***Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances.*** (*In re Perrone*, 5 *N.J.* 514, 522 (1950))

[2]Also contained herein is a transcript of proceedings conducted at the OAL on October 20, 1998, dealing with a request by respondent for dismissal of the charges and presentation with respect to respondent's past record in the District and admission to the record of a number of respondent's formal evaluations conducted during such period.

Particularly illustrative in this regard is respondent's testimony with respect to her receipt of checks totaling $5,585 from Lichtman, which she negotiated and deposited

> **Q**. Okay. why did you get money from Dr. Lichtman?
> **A**. I -- there was no explanation as to why Dr. Lichtman sent me the checks. I received checks and there was no explanation.
> **Q**. And -- as you testified before, you deposited those checks, correct?
> **A**.. I deposited those checks.
> **Q**. Okay. And you have no -- you have no idea whatsoever as to why you received those checks?
> **A**. Well, I expected Dr. Lichtman to get back to me. Since he wrote the checks, I expected that he would get back to me explaining his reasoning for sending the checks.
> **Q**. Did you call him to ask him why he was sending you the checks?
> **A**. I call -- I -- I spoke to him after receiving a check. I didn't mention a check. Since he had sent the check, I felt -- since he sent a check -- a personal check, it was his responsibility to say to me why he had sent it.
> (Tr. 6/4/98, p. 60, L. 7-23)

and

> **Q**. Did you think you were entitled to the checks that you received from Dr. Lichtman?
> **A**. I'm not clear. I don't understand the question.
> **Q**. Well, did you do anything to earn over $5,000 that you received from Dr. Lichtman?
> **A**. I wasn't-- I -- and I'm not now -- I wasn't sure then and I'm not sure the reason for the check.
> **Q**. Well, let -- my question is did you do anything to earn the money that you received from Dr. Lichtman?
> **A**. I'm -- I'm not sure you could -- you always have to do something to earn -- something to earn -- earn something. People get money and I don't -- I'm not sure --
> **THE COURT**: The question was, whether you ever did anything to earn the checks -- the money. And that's -- either you did or you didn't.
> **THE WITNESS**: No.
> (Tr. 6/4/98, p. 68, L. 13-25; p. 69, L. 1-3)

Upon his reasoned review of this discourse, the Commissioner is in full accord with the ALJ that it "*defies* credulity to believe that a professional person who provided personal information to a

person whom she had never met would simply accept substantial sums of money without questioning why she was receiving them" (emphasis in text) (initial decision at p. 7), and he further finds respondent's contention that such a determination improperly shifts the burden of proof in this matter untenable. This and the remaining testimony adduced at hearing, along with the other significant documentation clearly present in the record, persuades the Commissioner that respondent's attempts to portray herself as a "duped victim" in this matter are utterly devoid of any logical or reasonable inference from the record before him. Rather, he concludes that the quality of evidence here leads a reasonably cautious mind to the conclusion that respondent engaged in knowing and intentional participation in conduct with a purpose to defraud and introduced others to the fraudulent scheme.

In considering the appropriate penalty in this matter, the Commissioner is compelled to reiterate his long-standing belief that educators, by virtue of the unique position they occupy, must be held to an enhanced standard of behavior and must continually realize that they serve as role models to students and the community. When it is established that these individuals have failed to fulfill their obligations and have violated the public trust, it is imperative, to assure public confidence in the state's educational system, that they be subject to appropriate penalty for their behavior. Although duly considering respondent's lengthy, apparently unblemished record with the District, the Commissioner, nonetheless, determines that the charges established herein, under the particular circumstances of this matter, and when committed by a teaching staff member charged with molding and shaping young minds both academically and by virtue of example, is "sufficiently flagrant" to warrant respondent's

dismissal. (See *Redcay v. State Board of Education*, 130 *N.J.L.* 369, 371 (Sup. Ct. 1943); aff'd 131 *N.J.L.* 326 (*E. & A.* 1944).)[3]

Accordingly, for the reasons expressed therein, the Commissioner affirms the initial decision of the OAL and hereby orders that Lucy Lester be dismissed from her tenured teaching position with the State-operated School District of the City of Newark as of the date of this decision. This matter shall be transmitted to the State Board of Examiners, pursuant to *N.J.A.C.* 6:11-3.6, for action, as that body deems appropriate, against respondent's certificate.[4]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 25, 1999
Date of Mailing, February 25, 1999

[3]Notwithstanding the Commissioner's determination herein, he is compelled to clarify that the District's reliance on *In the Matter of the Tenure Hearing of Alyce Stewart, State-operated School District of the City of Newark, Essex County* as dispositive in this matter is misplaced. This cited case was decided on a summary basis, in that respondent failed to answer the charges lodged against her, and is of no precedential value in the instant matter.

[4] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

48-99

EDU #3173-97
C # 48-99
SB # 18-99

IN THE MATTER OF THE TENURE :

HEARING OF LUCY LESTER, STATE- : STATE BOARD OF EDUCATION

OPERATED SCHOOL DISTRICT OF THE : DECISION

CITY OF NEWARK, ESSEX COUNTY. :

Decided by the Commissioner of Education, March 25, 1999

For the Petitioner-Respondent, Sills, Cummis, Zuckerman, Tischman, Epstein & Gross (Louis E. Franzese, Esq., of Counsel)

For the Respondent-Appellant, Bucceri & Pincus (Gregory T. Syrek, Esq., of Counsel)

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

July 7, 1999

Date of mailing JUL 09 1999

(SB) 48-99

SB #48-99

IN THE MATTER OF THE WAIVER	:	
GRANTED TO THE BOARD OF	:	STATE BOARD OF EDUCATION
EDUCATION OF THE TOWNSHIP OF	:	DECISION
MIDDLETOWN, MONMOUTH COUNTY.	:	

Waiver granted by the Commissioner of Education, October 8, 1999

For the Appellant, Balk, Oxfeld, Mandell & Cohen (Sanford R. Oxfeld, Esq., of Counsel)

For the Respondent, Kenney & Gross (Malachi J. Kenney, Esq., of Counsel)

This appeal was filed by the Middletown Education Association (hereinafter "appellant") from the grant of a waiver to the Board of Education of the Township of Middletown (hereinafter "Board") by the Commissioner of Education pursuant to N.J.A.C. 6:3A-1.1 et seq.[1] Specifically, the Board had applied for a waiver from N.J.A.C. 11-4.5(c) so as to employ individuals possessing a certificate of eligibility with advanced standing to serve as a substitute teacher for up to sixty days in the same assignment. The Board indicated in its waiver application that it was seeking to employ

[1] N.J.A.C. 6:3A-1.1 provides, in pertinent part, that:

> The purpose of this chapter is to provide regulatory flexibility for school districts to meet the requirements of rules contained in the New Jersey Administrative Code Title 6....
>
> Regulatory flexibility may be granted as a waiver to a specific rule so that school districts can provide effective and efficient educational programs. The Commissioner, with authority delegated by the State Board, may on

MAY 3, 2000

such individuals as substitutes without initiating the process of securing provisional certification since that process "requires time and paperwork on the part of the district and the certification office at the state level."

N.J.A.C. 11-4.5 provides in pertinent part that:

> (a) Persons who do not hold a standard instructional certificate issued by the State Board of Examiners but who can present a minimum of 60 semester-hour credits completed in an accredited college, may be granted a county substitute certificate for day-to-day substitute teaching in the county which grants the certificate.
>
> .....
>
> (c) The certificate will be issued for a three-year period, but the holder may serve for no more than 20 consecutive days in the same position in one school district during the school year....

N.J.A.C. 6:11-4.4 provides that:

> (a) A certificate of eligibility is a permanent certificate that may be issued to persons who meet academic degree and examination requirements for provisional employment. Holders of certificates of eligibility shall not assume responsibility for a job assignment until they have been issued provisional certificates.
>
> (b) A certificate of eligibility with advanced standing is a permanent certificate issued to candidates for standard certificates who have completed certain requirements of a State-approved district training or residency program through advance completion of an approved college preparation program.

The regulations further provide that in order for a candidate to be eligible for the standard certificate in instructional fields, except vocational areas, the candidate must possess a provisional certificate. N.J.A.C. 6:11-5.2(a). In order to be eligible for the provisional certificate, the candidate must obtain and accept an offer of employment in a

---

a case-by-case basis, approve a waiver or an equivalency to a specific rule.

position that requires instructional certification. N.J.A.C. 6:11-5.1(a)(4). A candidate who completes the requirements set forth in the regulations shall be issued a certificate of eligibility, which permits him or her to seek provisional employment requiring instructional certification. N.J.A.C. 6:11-5.1(b).

Certificates of eligibility shall be issued to all candidates who hold a bachelor's degree, have completed at least 30 credits in a coherent major appropriate to a given instructional field, and have passed the applicable State test. N.J.A.C. 6:11-5.1. In contrast, certificates of eligibility with advanced standing shall be issued to those persons who meet the test requirement and who have completed one of the programs of teacher preparation specified in the regulations. N.J.A.C. 6:11-5.1(c).

The appellant contends that the Board's waiver application misconstrued the regulation from which a waiver was sought and that the Commissioner's grant of a waiver was improper under the State Board's recent decision in Guttenberg Education Association v. Leo Klagholz, Commissioner of Education, and Board of Education of the Borough of Guttenberg, decided by the State Board of Education, March 3, 1999.

We agree. As set forth above, under the applicable regulations, an individual who holds a certificate of eligibility must possess a provisional certificate in order to serve in an assignment requiring instructional certification. Issuing a waiver from the rule that limits the service of individuals possessing a county substitute certificate issued by a county superintendent does nothing to alter the character of an assignment that requires instructional certification in order to be qualified to serve in that assignment. Nor can it authorize an individual to serve under a certificate of eligibility for any length of time without also possessing a provisional certificate.

Hence, waiving the requirement that an individual's service as a daily substitute under a county substitute certificate must be limited to twenty days in a given assignment constitutes a waiver of the certification rules which would otherwise apply. Guttenberg, supra. In this respect, we again stress that county substitute certificates are not teaching certificates. Guttenberg, supra, slip op. at 5. Accordingly, as detailed in our decision in Guttenberg, such a waiver cannot properly be granted.

Moreover, sustaining the Commissioner's grant of this waiver would sanction a waiver of N.J.A.C. 6:11-5.1 so as to permit holders of certificates of eligibility to fill assignments requiring instructional certification for up to 60 days without possessing the attending provisional certificate. This would also constitute a waiver of the certification rules. Again, such a waiver cannot properly be granted. Guttenberg, supra.

We stress that:

> certification requirements establish the threshold qualifications for teaching staff members employed in the public school system throughout the state. N.J.S.A. 18A:1-1; N.J.S.A. 18A:26-2. As such, and under the current statutory framework embodied in Title 18A, the certification process is critical to assuring the provision of a thorough and efficient education. [Hence], an equivalency or waiver cannot properly be granted under N.J.A.C. 6:3A-1.1 et seq. when the provision of a thorough and efficient education might be compromised. Commissioner's Brief, at 4. Since certification requirements are at the core of the current structure governing the delivery of all education programs under our jurisdiction, setting aside the standards embodied in our certification rules necessarily risks such a compromise.
>
> It was not our intention to create such a risk when we adopted N.J.A.C. 6:3A-1.1 et seq.

Guttenberg, supra, slip op. at 7.

Consequently, we did not contemplate that the Commissioner would exercise the authority we had delegated to him in N.J.A.C. 6:3A-1.1 et seq. to grant waivers or equivalencies like the one involved herein. Therefore, by our decision, we invalidate the waiver granted by the Commissioner in this case.

May 3, 2000

Date of mailing MAY 05 2000

49-99

DR. BARBARA ANDERSON, ASSISTANT COMMISSIONER, NEW JERSEY STATE DEPARTMENT OF EDUCATION, PETITIONER,	:	COMMISSIONER OF EDUCATION DECISION
V.	:	
ARCHWAY PROGRAMS, INC., CAMDEN AND GLOUCESTER COUNTIES, RESPONDENT.	:	

February 26, 1999

INTERIM SETTLEMENT AGREEMENT

This interim agreement executed this 18th day of February, 1999 between the parties, New Jersey Department of Education (hereinafter "Department") and Archway Programs, Inc. (hereinafter "Archway"), represents a partial settlement of several matters which are currently on appeal before the Commissioner of Education.

WHEREAS, on November 6, 1998, the Department of Education, Office of Compliance, issued a fiscal monitoring review report of Archway's financial records for the school year 1994-1995 and pursuant thereto directed Archway to refund the sum of $2,533,402.18 to the sending school districts and to submit a Corrective Action Plan or a Notice of Appeal within forty-five days; and

WHEREAS, Petitioner, Dr. Barbara Anderson, Assistant Commissioner, New Jersey Department of Education, notified Archway by letter dated November 9, 1998 that, due to chronic and systemic noncompliance with Departmental regulations, Archway was immediately being placed on conditional approval status and that its operating approval would be revoked effective June 30, 1999; and

WHEREAS, on November 13, 1998, Petitioner filed an Order to Show Cause with the Commissioner of Education requesting the immediate appointment of a fiscal monitor to oversee the financial

operations of Archway for the remainder of the 1998-1999 school year; and

WHEREAS, on November 30, 1998, Archway filed an opposition to the order to show cause, an application for emergent relief seeking a stay of the conditional approval status and the June 30, 1999 revocation action, and a cross-petition appealing the Department's actions; and

WHEREAS, on December 9, 1998, the Commissioner of Education transmitted the show cause proceedings and the cross-petition with application for emergent relief to the Office of Administrative Law for a hearing; and

WHEREAS, on December 28, 1998, Judge Solomon Metzger rendered an initial decision on the order to show cause and application for emergent relief, wherein he recommended that the conditional approval and June 30, 1999 license revocation should be stayed and that the Department's application for a fiscal monitor should be denied; and

WHEREAS, the order to show cause and application for emergent relief are now before the Commissioner of Education for final determination; and

WHEREAS, Archway has submitted to the Department a Statement of Assurances stating changes it has made in the management and practices of Archway since the issuance of the fiscal monitoring report; and

WHEREAS, the Department has verified that Archway has undertaken a good faith effort to remedy deficiencies identified in the fiscal monitoring report; and

WHEREAS, the Department has determined that a fiscal monitor will insure that Archway continues to address the deficiencies identified in the fiscal monitoring report; and

WHEREAS, Archway has submitted a detailed statement of those items in the 1994-1995 fiscal monitoring review that it disputes; and

THE PARTIES HAVE AGREED to amicably resolve the issues pertaining to the order to show cause, the revocation action and the fiscal monitoring report. Archway has also raised issues regarding certain allocations contained in the fiscal monitoring report which give rise to further review and discussion. The parties have also agreed that further discussions are necessary to resolve the remaining issues related to the 1994-1995 fiscal monitoring review and the implementation by Archway of a fiscal corrective action plan.

IT IS HEREBY AGREED AND STIPULATED by the parties that the issues pertaining to the order to show cause and revocation are settled in accordance with the following terms:

1. The Department shall appoint Gary Pagliughi to serve as a fiscal monitor at Archway through December 30, 1999, unless in the Department's sole discretion it determines to terminate the

appointment of the fiscal monitor at an earlier date. The fiscal monitor shall perform the following duties:

(a) Examine, under the direction of Assistant Commissioner, John Sherry, on an ongoing basis, all financial and operational records of Archway, including but not limited to cash receipts journal, cash disbursements journal, general ledger, tuition ledger, payroll journal, and fixed asset inventory, as they relate to the approved private school for the disabled in accordance with N.J.A.C. 6:20-4.1 et seq.;

(b) Review all adjusting entries, purchase orders, cash disbursements and payroll disbursements of the approved private school for the disabled prior to issuance and preliminarily determine if costs charged to the tuition program are allowable in accordance with N.J.A.C. 6:20-4.1 et seq.;

(c) Exercise his discretion in determining how and when to raise, with Archway officials, any issues regarding Archway's compliance or lack thereof with N.J.A.C. 6:20-4.1 et seq.; and

(d) Determine that all professional staff members are properly certified for the position in which they serve in accordance with N.J.A.C. 6:11 and that the salaries are properly charged to the program which benefited;

(e) Determine, in accordance with the regulations, whether a cost is a direct cost of the approved private school for the disabled or an agency indirect cost that benefits the private

school for the disabled and should be allocated to the tuition program;

(f) Prepare periodic reports for Assistant Commissioner, John Sherry, outlining items reviewed, those in conformity and not in conformity with regulations. Such reports shall be promptly provided to Archway unless the fiscal monitor determines there is a need to communicate confidentially with Assistant Commissioner Sherry;

(g) Review all documentation that relates to the operations of the private school for the disabled program, provided that the fiscal monitor may also review financial records and operations of other Archway programs to the extent necessary to determine the proper allocation of costs to the private school for the disabled program;

(h) Approve any interim reimbursements to the sending school districts;

(i) Monitor all board meetings of Archway Education, Inc. (the private school for the disabled) and those portions of board meetings of Archway Programs, Inc. (the parent board) relating to the programs for the school for the disabled, except in the circumstance where the discussions fall within the attorney client privilege.

2. The salary of the fiscal monitor shall be based on DOE allowable consulting fees and shall be reimbursed to the Department by Archway and shall be an allowable cost.

3. The June 30, 1999 operating approval revocation is hereby rescinded without prejudice and the conditional approval status issued to Archway on November 9, 1998 is hereby withdrawn without prejudice.

4. The process for considering Archway's appeal of the results of the 1994-1995 fiscal monitoring review shall include:

(a) A meeting between representatives of Archway and the Department of Education, Office of Compliance, within one week of execution of this agreement; and

(b) Additional meetings as deemed necessary by the Office of Compliance; and

(c) Issuance of a final notice of determination by the Department of Education, Office of Compliance, no later than 20 days following the last meeting as deemed necessary by the Office of Compliance; and

(d) Appeal to the Commissioner of Education in the event that Archway disagrees with such final audit determination, pursuant to N.J.A.C. 6:24-1.2 and in accordance with the Administrative Procedures Act.

5. Archway shall submit a fiscal Corrective Action Plan to the Department within twenty days of the final notice of determination by the Office of Compliance, except with respect to those items in the final notice of determination from which an appeal is filed in which case the fiscal Corrective Action Plan shall be submitted withing twenty days of the conclusion of the appeals process.

6. Archway shall cooperate fully with any Department personnel in reviews of Archway records for all fiscal years subsequent to 1994-1995 and the Department shall periodically communicate with Archway to address issues, and attempt to resolve them, as appropriate during such reviews.

7. The Department will issue a notice, as it deems appropriate, advising affected school districts of this agreement.

The undersigned hereby agree to the terms of this interim settlement agreement.

New Jersey Department of Education
100 Riverview Plaza
P.O. Box 500
Trenton, New Jersey 08625

By: _____ 2/25/99
DOUGLAS B. GROFF
Assistant Commissioner for Executive Services

Dated:

Archway Programs, Inc.
197 Jackson Road
Atco, New Jersey 08004

By: _____
Dr. Robert Scanlon
President

Dated:

PETER VERNIERO
Attorney General of New Jersey
Attorney for New Jersey Department of Education
Richard J. Hughes Justice Complex
P.O. Box 112
Trenton, New Jersey 08625

By: Robert H. Stoloff
Assistant Attorney General
(609) 292-8577

Terri A. Cutrera
Deputy Attorney General
(609) 292-4776

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DOCKET NO. EDU 10632-98

DR. BARBARA ANDERSON, ASSISTANT COMMISSIONER, NEW JERSEY DEPARTMENT OF EDUCATION	)	
Petitioner/Cross-Respondent,	)	Civil Action
v.	)	CONSENT ORDER DISMISSING PETITIONER'S ORDER TO SHOW CAUSE AND RESPONDENT'S CROSS-PETITION AND EMERGENT APPLICATION
ARCHWAY PROGRAMS, INC. CAMDEN AND GLOUCESTER COUNTIES	)	
Respondent/Cross-Petitioner.	)	

The parties to the above captioned action, in accordance with the Interim Settlement Agreement executed between the parties this 18th day of February, 1999, agree that the application for emergent relief filed by Archway Programs, Inc. and the cross-petition for review of conditional approval status and revocation are hereby dismissed, without prejudice. It is further agreed that petitioner's order to show cause is dismissed without prejudice and

the revocation order is withdrawn, without prejudice to petitioner's right to reinstate the order under appropriate circumstances.

PETER VERNIERO
ATTORNEY GENERAL OF NEW JERSEY
Attorney for New Jersey
Department of Education

By: _____
ROBERT H. STOLOFF
Assistant Attorney General

Dated: Jan 11, 1999

BLANK, ROME, COMISKY & McCAULEY, LLP
Attorney for Archway Programs, Inc.

By: _____
STEVEN D. WEINSTEN, ESQ.

Dated: Jan 12, 1999

OAL DKT. NO. EDU 10632-98
AGENCY DKT. NO. 507-11/98

DR. BARBARA ANDERSON, ASSISTANT COMMISSIONER, NEW JERSEY STATE DEPARTMENT OF EDUCATION, PETITIONER,	:	COMMISSIONER OF EDUCATION DECISION
V.	:	
ARCHWAY PROGRAMS, INC., CAMDEN AND GLOUCESTER COUNTIES, RESPONDENT.	:	

For Petitioner, Terri A. Cutrera, DAG (Peter Verniero, Attorney General of New Jersey)
For Respondent, Steven D. Weinstein, Esq. (Blank, Rome, Comisky & McCauley)

The record of this matter and the decision of the Office of Administrative Law on motion for emergent relief were duly filed with the Commissioner on December 30, 1998. Prior to the date by which the Commissioner was required to rule on the motion, the parties jointly requested that the time for the Commissioner's decision be extended so as to permit them to conclude discussions toward possible settlement. On February 23, 1999, a duly executed joint stipulation of settlement with consent order was submitted to the Commissioner.

Upon review, the Commissioner adopts the settlement agreement as the final decision in this matter, noting that, by its express terms, the settlement resolves all pending disputes, including the Assistant Commissioner's order to show cause and respondent's cross-petition and application for emergent relief, which are hereby dismissed without prejudice, and the Assistant Commissioner's order of revocation, which is hereby withdrawn without prejudice.

Accordingly, this matter is no longer deemed to be a contested case before the Commissioner, and, no further proceedings being necessary at the Office of Administrative Law, the file is hereby requested to be returned to the agency pursuant to *N.J.A.C.* 1:1-3.3(a).*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 26, 1999
Date of Mailing, February 26, 1999

*This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

(SB) 49-99

SB #49-99

JOSHUA KEAVENEY, minor, by and through his guardian ad litem, SANDRA KEAVENEY; SHAWN RILEY, by and through his guardian ad litem, EDIE RILEY; CHRISTOPHER RIDGEWAY, ANTHONY RIDGEWAY, JONATHAN GLASS, FEASHAL GLASS AND DANIELLE GLASS, by their guardian ad litem, ARNETTA RIDGEWAY AND CHRISTOPHER GLASS; LOUIS GRACIA, TINA GRACIA AND ZACHARY GRACIA, by and through their guardian ad litem, DAWN GRACIA; on behalf of themselves and all the children in a class of very poor "A" and "B" non-Abbott, special needs districts listed below: BUENA REGIONAL, CLAYTON, COMMERCIAL TOWNSHIP, EGG HARBOR CITY, FAIRFIELD TOWNSHIP, HAMMONTON, LAKEHURST, LAKEWOOD, LAWRENCE TOWNSHIP, LITTLE EGG HARBOR, LOWER TOWNSHIP, LOWER CAPE MAY REGIONAL, MAURICE RIVER TOWNSHIP, OCEAN TOWNSHIP, QUINTON, SALEM CITY, SOUTH RIVER, UPPER DEERFIELD, WALLINGTON AND WOODBINE SCHOOL DISTRICTS, which are also Plaintiffs in their own right, except for the constitutional allegations in Counts ONE AND TWO,	:	STATE BOARD OF EDUCATION
	:	DECISION
PETITIONERS-APPELLANTS,	:	
V.	:	
NEW JERSEY DEPARTMENT OF EDUCATION, LEO KLAGHOLZ, COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF EDUCATION, ELIZABETH L. PUGH, NEW JERSEY DIRECTOR OF MANAGEMENT AND BUDGET, JAMES DIELEUTORIO, NEW JERSEY STATE TREASURER AND CHRISTINE TODD WHITMAN, GOVERNOR,	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, February 24, 2000

July 5, 2000

For the Petitioners-Appellants, Jacob & Ferrigno (Frederick A. Jacob, Esq., of Counsel)

For the Respondent-Respondent, Arlene G. Lutz, Deputy Attorney General (John J. Farmer, Attorney General of New Jersey)

In a petition filed with the Commissioner of Education, 20 school districts and ten students attending school in those districts sought to have the Comprehensive Educational Improvement and Financing Act of 1996 ("CEIFA") declared unconstitutional as applied to them. The petitioning districts, characterizing themselves as "very poor DFG 'A' or 'B' non-Abbott 'special needs' districts," alleged that CEIFA did not provide them with sufficient funds so as to enable them to provide a thorough and efficient education.

On or about July 8, 1998, the respondent filed a motion with the Commissioner seeking dismissal of that petition. The petitioners filed a response thereto on or about July 24, 1998.

On November 19, 1999, the petitioners filed the instant motion with the State Board of Education, seeking an order compelling the Commissioner to issue a decision on the respondent's motion. Shortly thereafter, the petitioners requested that their motion be placed in abeyance.

On February 24, 2000, the Commissioner issued a letter decision denying the respondent's motion to dismiss with respect to those petitioners not previously addressed in his previous decision in this matter and directing that the case be transmitted to the Office of Administrative Law for further proceedings.

By letter dated May 17, 2000, the Director of the State Board Appeals Office, observing that the Commissioner had issued his decision on the respondent's motion to

dismiss, advised the petitioners that "in view of this fact and in the absence of objection from the parties, the Legal Committee intends to recommend that the State Board dismiss the matter as moot." The petitioners did not respond or otherwise object to the Legal Committee's recommendation.

In view of the fact that the Commissioner has now issued a decision on the respondent's motion to dismiss the petition, we dismiss the petitioners' motion to compel such a decision as moot.

Arnold G. Hyndman abstained.

July 5, 2000

Date of mailing JUL 07 2000

50-99 E

DR. H. BENJAMIN WILLIAMS, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF ATLANTIC CITY, ATLANTIC COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION
DECISION ON MOTION

March 1, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING MOTION TO DISMISS TENURE CHARGES
OAL DKT. NO. EDU 6460-98
AGENCY DKT. NO. 351-7/98

DR. H. BENJAMIN WILLIAMS,
Petitioner,
v.
BOARD OF EDUCATION OF THE ATLANTIC CITY PUBLIC SCHOOLS, ET AL.,
Respondents.

Gregory G. Johnson, Esq., for petitioner

George G. Frino, Esq., and **Michael C. Epps,** Esq., for respondents

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

STATEMENT OF THE CASE

The within matter was commenced on July 29, 1998, when attorney for petitioner filed a motion for emergency relief seeking the reinstatement of petitioner and an order directing respondents to cease and desist from making any further comments about any prospective disciplinary action against petitioner. As a result of discussions between the parties, these issues were settled, and by an Order entered by Hon. Beatrice S. Tylutki, ALJ, on August 4, 1998, a

Consent Order of the parties was approved and the parties were ordered to comply with the settlement terms as contained in the Consent Order. The Consent Order provided:

> Ordered that, effective immediately, the respondents, Board of Education of the City of Atlantic City and each individual Board member are directed to cease and desist from making public comments about any disciplinary actions, tenure charges, or removal of petitioner and to act solely in accordance with the provisions of *N.J.S.A.* 18A:6-11 *et seq.* in any action to seek such removal.

Following this, in a letter application of attorney for petitioner dated August 19, 1998, petitioner asserted that the respondents' Answer and Cross Petition for Declaratory Relief filed in this matter on August 18, 1998, directly violated the terms of the Consent Order in that it referred to tenure charges and contained allegations which attorney for petitioner asserted are virtually identical with the tenure charges against petitioner which were *under consideration* at that time by the Board of Education. The foregoing Answer and Cross Petition for Declaratory Relief referred to the tenure charges in paragraph 3 under the heading, Affirmative Defenses, wherein it is stated that the filing of tenure charges on July 28, 1998, rendered the matter moot and required a dismissal of the petition. Respondents asserted that the petitioner is the Superintendent pursuant to a contract of employment, that he breached his employment agreement based on the facts asserted therein, and they sought a judgment declaring that petitioner's tenure as Superintendent be terminated. The Cross Petition for Declaratory Relief essentially mirrored the tenure charges filed with the Board of Education on July 28, 1998, for its consideration.

As a result of my review of the Cross Petition for Declaratory Relief, I found that this document violated the Consent Order, I concluded that the relief being sought by respondents in the Cross Petition for Declaratory Relief may only be achieved after the procedures of the Tenure Employees Hearing Law have been followed and that the factual allegations set forth in the Cross Petition for Declaratory Relief are irrelevant for the purpose of the present proceeding. I found that the factual assertions of respondents' Cross Petition for Declaratory Relief, which sets forth the factual basis for the tenure charge which had been under consideration by the Board of Education, violated the Consent Order of August 4, 1998, violated the mandate of *N.J.S.A.* 18A:6-11 that consideration and actions of the Board as to any tenure charge shall not take place

in public, and violated the provisions of *N.J.S.A.* 10:4-12(b)8 of the Open Public Meetings Act which recognizes a tenured employee's privacy rights. Therefore, I entered an Order on September 2, 1998, requiring full compliance with the Consent Order and imposing the appropriate case-related sanction pursuant to *N.J.A.C.* 1:1-14.14 of dismissing and striking of respondents' Cross Petition for Declaratory Relief as a violation of the Consent Order, a violation of the provisions of *N.J.S.A.* 18A:6-11, and a violation of the Open Public Meetings Act. Petitioner was also seeking the dismissal of the Answer, the holding in contempt of respondents for violating the terms of the Consent Order, and the dismissal of the pending tenure charges. However, I indicated that I was unaware of any authority which would permit the Commissioner or the OAL to exercise contempt powers or the authority to dismiss pending tenure charges without a hearing.

It is not disputed that following the foregoing, on September 14, 1998, the Atlantic City Board of Education held a special meeting, and during the course of that meeting, the Board adopted a resolution to permit discussion of certain matters in closed session. It is undisputed that during that closed session, the Board of Education reviewed and discussed certain proposed tenure charges against Dr. Williams which had been prepared by special counsel. Following this closed session, the Board voted to return to open session. The Board then adopted resolution No. 98 9S 1 by a *public* roll call vote wherein it certified tenure charges against Dr. Benjamin Williams, effective September 15, 1998, and forwarded same to the Commissioner of Education. The resolution further provided for Dr. Williams to be suspended without pay and to be directed to return all property belonging to the Board of Education. The vote on the resolution was seven Board members in favor and two opposed.

It should be noted that the tenure charges against petitioner were transmitted to the Office of Administrative Law (OAL) on October 2, 1998, having OAL Docket No. EDU 8601-98, and was assigned to the undersigned. In that matter petitioner, Board of Education of the City of Atlantic City, alleged that respondent, Dr. H. Benjamin Williams, school district Superintendent of Schools did the following: (a) he permitted expenditures be made in violation of Board policy and education law; (b) he installed, perpetuated and failed to stop a system of purchasing that violated education law and regulations and that had insufficient controls in order to prevent theft and other losses; (c) he failed to adequately and carefully supervise and monitor the expenditure

of public funds through the purchase order system; (d) he made a false and misleading statement; (e) these actions constitute a purposeful and/or reckless disregard of respondent's acknowledged duty to steward public funds, oversee and supervise the fiscal and financial affairs of the district in a manner that would comply with his Contract of Employment and the education laws; (f) these actions constitute a breach of respondent's duty to render competent and careful guidance and advice to the Board insofar as reasonably prudent financial practices that would safeguard public funds; (g) he purposely and knowingly solicited and caused the Board to incur obligations in excess of the limit of expenditures provided by applicable law, and to disburse funds in excess of appropriated and budgeted amounts in violation of his responsibility for the general supervision and control over district finances and fiscal practices. As a result of the adoption of P.L. 1998, Ch. 42, effective June 30, 1998, there is a legislative mandate that tenure hearings be handled in an expeditious and timely manner and a very tight schedule was ordered to be implemented for processing the case. The hearing on these charges is currently on-going.

In the foregoing tenure charge matter respondent moved to dismiss the tenure charges because the Board took public action with respect to the charges in violation of *N.J.S.A.* 18A:6-11. Respondent therein argued that these actions are blatantly inconsistent with any semblance of due process. However, it was observed that due process requires notice of the charges and an opportunity for a hearing, and that public discussion of the charges is not a violation of due process rights, but is a violation of a statutory provision. It was observed that nowhere in the statute is there any indication of the remedy for its violation. In view of the lack of authority for dismissal of the charges as a sanction for violating *N.J.S.A.* 18A:6-11, respondent's request for dismissal of the tenure charges on this basis was denied.

LEGAL DISCUSSION

N.J.S.A. 18A:6-11 provides that the consideration and actions of the Board as to any [tenure] charge shall not take place at a public meeting. In addition, the Open Public Meetings Act, *N.J.S.A.* 10:4-12(b)8 permits public bodies to exclude from public discussion any matter involving the employment, termination, evaluation or disciplining of an employee. In *Oliveri v. Carlstadt-East Rutherford Board of Ed.*, 160 *N.J. Super.* 131 (App. Div. 1978), it was indicated that this provision recognizes an employee's privacy rights.

In the present matter, the Board of Education had before it certain tenure charges against petitioner, to which the petitioner had 15 days to formulate a written statement referred to in *N.J.S.A.* 18A:6-11 responding to such charges. After consideration of the charge and response, the Board is required to determine whether there is probable cause to credit the evidence in support of the charge. If so, the tenure charge is certified and is forwarded to the Commissioner for a hearing pursuant to *N.J.S.A.* 18A:6-16. As was previously indicated the Board then adopted a resolution by a public roll call vote to certify tenure charges against Dr. Williams and forwarded same to the Commissioner of Education.

It was my original intention to hold in abeyance any actions on the within matter and to deal first with the tenure charges in view of the Legislative mandate to hear and decide tenure charge matters in an expeditious manner. However, attorney for petitioner pointed out that he seeks a determination on the issue whether the public action taken by the respondent Board of Education to certify tenure charges against Dr. Williams causes the tenure charges to be void as a matter of law, and this will have a direct impact on the hearing on the tenure charges

In support of petitioner's contention that the charges are void, petitioner relies upon *Davis v. Board of Education of the Lower Camden County Regional High School District*, OAL Dkt. No. EDU 4941-97; Agency Dkt. No. 177-6/97 (Commissioner decision 94-98, February 27, 1998). In *Davis*, it was held that a Board of Education did not act properly when it voted to suspend a teacher without pay by reason of his indictment because the Board failed to obtain a majority vote of its full membership as required by *N.J.S.A.* 18A:25-6. Attorney for petitioner herein argues that, by analogy, the holding in the *Davis* case should apply and that the tenure charges should be dismissed because the Board took action in public in violation of *N.J.S.A.* 18A:6-11. Attorney for petitioner points out that *N.J.S.A.* 18A:25-6 does not contain any language that provides a remedy if there is no compliance. Yet, the decision in *Davis* invalidates the action of the Board despite the absence of a statutory remedy. However, the statutory provision in *Davis* clearly requires that the suspension action be taken by a majority vote of the full membership. In the absence of a vote complying with this requirement, it is clear that there is no suspension and the alleged suspension was void *ab initio*.

With respect to *N.J.S.A.* 18A:6-11, it is unclear what occurs if the tenure charge action is taken at a public meeting. I have reviewed Title 18A and can find no provision which indicates that a violation of *N.J.S.A.* 18A:6-11 requires a dismissal of any tenure charges which result from a public action. Compare this with the provisions of the Open Public Meetings Act (commonly referred to as the Sunshine Law), *N.J.S.A.* 10:4-1 to -21. This act generally provides that all actions of public bodies must be taken at public meetings, and that no public body shall exclude the public from any meeting unless a resolution is first adopted indicating that the close session shall deal with certain specific items. *N.J.S.A.* 10:4-13. Significantly, the Open Public Meetings Act provides at *N.J.S.A.* 10:4-15, that any action taken by a public body at a meeting which does not conform with the provisions of the Act shall be voidable in a proceeding in lieu of prerogative writ in the Superior Court. In addition, *N.J.S.A.* 10:4-16 provides for injunctive relief or other remedies to insure compliance with the Act, and *N.J.S.A.* 10:4-17 provides for fines as a penalty for violating the Act. There is no such similar provision relating to the requirements of *N.J.S.A.* 18A:6-11 and there is no indication that any action taken by a Board of Education at a public meeting is somehow void or voidable. In fact, once a Board of Education certifies tenure charges, the matter then becomes subject to public scrutiny since the hearing before the Commissioner or designee is a public hearing. See, *Cirangele v. Maywood Board of Education*, 164 *N.J. Super.* 595, 602 (Law Div. 1979).

In *In the Matter of Tenure Hearing of Cowan*, 224 *N.J.* Super. 737 (App. Div. 1988), the Appellate Division discussed the apparent failure of the local board to follow the procedures prescribed by *N.J.S.A.* 18A:6-11 and -13 for processing disciplinary charges against tenured public school employees. These alleged improprieties included failing to comply with the 45-day requirement of *N.J.S.A.* 18A:6-11, providing a written statement of evidence under oath by individuals who relied upon hearsay statements of other individuals, and submitting a certification signed by the board secretary four days after the jurat was signed and dated by the Board attorney. The Appellate Division rejected these contentions. It was observed in *In the Matter of the Tenure Hearing of Beam*, 93 *N.J.A.R.2d* (EDU) 320, 321 that the dismissal of tenure charges is not required for technical, insubstantial failures to follow *N.J.S.A.* 18A:6-10 to -14 if they are insufficient to render the process unfair and contrary to the statutory intendments.

In the present matter, the fact remains that the Board of Education considered the tenure charges and the statement of evidence in a closed meeting and then publicly made the determination to certify these charges to the Commissioner of Education for hearing. Once the tenure charges became certified, the matter becomes a matter of public record. The taking of the action to certify these charges at a public meeting does not render the process unfair or contrary to the statutory intent to require that the Board deliberate whether to certify tenure charges in a closed session Therefore, taking final action to certify the tenure charges at a public meeting amounts to no more than a technical violation for which there is no statutory or court-established remedy.

ORDER

Based on the foregoing, it is hereby **ORDERED** that petitioner's request for the dismissal of the pending tenure charges on the basis that the public action taken by the respondent Board of Education to certify tenure charges against Dr. Williams causes the tenure charges to be void as a matter of law, is hereby **DENIED**.

This order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** either upon interlocutory review pursuant to *N.J.A.C.* 1:1-14.10 or at the end of the contested case, pursuant to *N.J.A.C.* 1:1-18.6.

Feb. 3, 1999
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

OAL DKT. NO. EDU 6460-98
AGENCY DKT. NO. 351-7/98

DR. H. BENJAMIN WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION DECISION ON MOTION
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF ATLANTIC CITY, ATLANTIC COUNTY,	:	
RESPONDENT.	:	

This interim matter comes before the Commissioner by way a motion for interlocutory review of the appended order of the ALJ, denying petitioner's motion to dismiss tenure charges against him on grounds that such charges were certified at a public meeting of the Board of Education, in violation of both applicable law and the consent order reached in resolution of a prior motion for emergency relief.

In his request for review, Petitioner argues that, in reaching his determination that the Board's certification at a public meeting constituted a technical violation of the laws governing the tenure hearing process insufficient to warrant dismissal of the charges, the ALJ both misread the law and failed to consider the history of this matter and surrounding factual circumstances which clearly demonstrate the Board's disregard of its obligations and the prejudicing of Petitioner's rights to privacy and procedural safeguard. In response, the Board denies that it violated either Petitioner's privacy rights or the tenure law, and contends that to interpret the previous consent order in the manner demanded by Petitioner would be tantamount to an unconstitutional prior restraint on individual board members, particularly in view of the allegations made against them by Petitioner in his concurrent Superior Court claim.

Upon review, the Commissioner concurs with the ALJ that the Board's actions in certifying tenure charges at a public meeting, notwithstanding the Board's contention that it was merely memorializing in public an action it had duly taken in private session in accordance with the law, was a clear violation of the plain language of the Tenure Employees Hearing Act and its implementing regulations, as well as, *ipso facto*, a violation of the consent order requiring the Board to "act solely in accordance with the provisions of [that act] in any action to seek [Petitioner's] removal." The Commissioner further concurs with the ALJ that the pending tenure charges should not be dismissed as a

consequence of the instant motion. He does so, however, for different reasons than those stated by the ALJ in the initial order.

Specifically, the Commissioner declines to rule *in the context of the present proceeding* on the effect of the violation *on the proceeding bound by the law at issue.* That question and the analysis offered in the initial order, that is, whether a procedural violation is sufficient to warrant dismissal of underlying tenure charges, are properly undertaken within the context of the separate tenure matter, which, it is noted, has *not* been consolidated with the instant appeal and is presently continuing on its own independent course. Indeed, as noted by the ALJ, a motion to dismiss the tenure charges on grounds which included those raised herein was, in fact, made to the ALJ as part of the referenced tenure proceeding, and, the Commissioner observes, interlocutory review of the ALJ's denial of that motion was not sought as permitted by *N.J.A.C.* 1:1-14.10. For a petitioner to attempt to have tenure charges dismissed through a proceeding such as the present one is, in effect, for him or her to seek "two bites of the apple," two opportunities to attack the same tenure charges on identical grounds, both within and without the scope of the tenure hearing. Clearly, notwithstanding the merits of any procedural defense, or of any concomitant intimations of bad faith, this is an unacceptable result.

The within motion, then, should be dismissed not on the merits of its arguments, to which the Commissioner does not reach herein and which properly await the Commissioner's determination on his ultimate review of the still ongoing tenure matter, but on grounds that dismissal of tenure charges is not an appropriate relief in the present context.

Accordingly, the order of the ALJ denying Petitioner's motion to dismiss the tenure charges against him is affirmed for the reasons expressed in the within Commissioner's decision.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 1, 1999
Date of Mailing, March 1, 1999

* It is noted that Petitioner is represented in the above-referenced separate tenure proceeding by a different attorney, who attempted to introduce submissions relating to the tenure proceeding into the record of this matter; these submissions were not considered in the Commissioner's determination herein. Additionally, it is noted that the Board's objection to the tenure submissions included a request for interlocutory review of a motion on which the ALJ has not yet ruled, a request for which, as correctly noted by Petitioner, there is no basis in statute or rule.

51-99

IN THE MATTER OF THE	:	
TENURE HEARING OF	:	
BRIAN YATAURO, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP	:	DECISION
OF LACEY, OCEAN COUNTY.	:	
	:	

SYNOPSIS

Board certified tenure charges of unbecoming conduct, insubordination and other just cause against respondent high school band director and music teacher due to his allegedly improper relationship with E.K., a teenage student and musician/band member, and to his failure to comply with directives issued to him to avoid contact with students after his suspension.

In light of the credible testimony of E.K., as well as the supporting testimony of her mother and her friends and the evidence in the record, the ALJ found by a preponderance of the credible evidence that respondent did engage in sexual conduct with E.K. ALJ concluded that respondent acted in disregard of the standards of professional conduct expected of public school teachers, as well as the policies of his employer. ALJ ordered respondent removed from his tenured position.

Commissioner adopted findings and determination in initial decision as his own. Commissioner concurred with the ALJ that the Board established its charges of unbecoming conduct against respondent by a preponderance of the credible evidence necessitating his removal from his tenured position. Commissioner ordered him dismissed as of the date of this decision and the tenure matter transmitted to the State Board of Examiners for action, as that body deems appropriate. Commissioner directed the issue of moneys which may be due and owing respondent be severed from the tenure matter herein and this sole issue remanded to the OAL for necessary determinations consistent with the ALJ's request.

March 1, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 08619-97S
AGENCY DKT. NO. 347-9/97

BOARD OF EDUCATION OF THE TOWNSHIP OF LACEY, OCEAN COUNTY,
Petitioner,
v.
BRIAN YATAURO,
Respondent.

Arthur Stein, Esq., and **Kimberly L. Gozsa,** Esq., for petitioner (Arthur Stein and Associates, attorneys)

Henry F. Collins, III, Esq., (Collins and Berman, attorneys) and **Steven R. Cohen,** Esq. (Selikoff and Cohen, attorneys), for respondent

Record Closed: November 30, 1998 Decided: January 14, 1998

BEFOI E **JEFF S. MASIN**, ALJ:

The Board of Education of the Township of Lacey, Ocean County ("Board") certified tenu e charges against Brian Yatauro ("Yatauro"), a tenured teaching staff member. The charges were transmitted to the Commissioner of Education ("Commissioner") on September 18, 1997. The Commissioner transferred the matter to the Office of Administrative Law ("OAL") as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A prehearing conference was conducted on January 7, 1998, and a prehearing order was issued on January 22, 1998. Hearings commenced on June 22, 1998, and continued for 13 non-consecutive days, with

testimony and closing summations occurring on November 30, 1998, on which date the record closed.[1]

The allegations against Mr. Yatauro, who until his suspension with pay on March 27, 1996, pending the resolution of a criminal allegation had served as a band director and music instructor at Lacey Township High School ("Lacey") for approximately six years, revolve around his purported improper relationship with E.K. (hereinafter often referred to as "E."), who was a student at Lacey during the school years 1993-94 and 1996-97. The Board contends that Yatauro developed an inappropriately close relationship with Ms. K., far beyond that appropriate for a teacher in relation to a student, and further contends that the relationship became sexual in nature. Mr. Yatauro was indicted on charges relating to the alleged sexual component of the relationship. His suspension was modified by the Board at the time of his indictment to a suspension without pay, pursuant to *N.J.S.A.* 18A:6-8.3. He was eventually acquitted following a jury trial in 1997, prior to the Board's certification of tenure charges. Ms. K. has since graduated and is now a college student.

In addition to the charges directly arising from the allegedly improper relationship with Ms. K., the Board alleges that Yatauro failed to comply with directives issued to him to avoid contact with students after his suspension. The Board had advised him in writing on April 23, 1996, that he was not permitted or authorized to have "any professional contact with students of the district." In a subsequent letter dated September 12, 1996, the Board iterated the directive, this time emphasizing that he was to "refrain from having <u>any</u> contact with Lacey Township High School students." (emphasis in the original). It again advised him in writing on September 17, 1996, not to have "any professional contact with students of the district."

Many of the facts surrounding the relationship between the married teacher and band director, Yatauro, and the teenage student and musician/band member, E.K., are not in dispute. Mr. Yatauro acknowledges that he developed a friendship with her, that he served as a mentor

[1] The hearings were interrupted for additional expert investigation, pre-scheduled vacations and finally to allow for the determination of issues of possible mootness and a motion seeking to intervene in the proceedings filed by the Division of Youth and Family Services. These were addressed in an Interlocutory Order issued on September 29, 1998, which denied intervention and ruled that the tenure proceeding had to continue to conclusion.

and father figure for her. He steadfastly denies that the relationship ever was inappropriate, romantic and/or sexual in nature.

Ms. E. K. who was born on February 11, 1979, lives in Forked River, New Jersey, with her mother, who is employed by a rehabilitation hospital located in Toms River. According to E., her mother is an alcoholic, and during some or all of the relevant period was a "closet drinker." Her father has not lived with the family since E. was nine months old. The women live in their own home, and for a time during the relevant period, E.K.'s elderly grandfather resided in their home as well. Her grandmother, a very significant figure in her life, died during E.'s freshman year on February 9, 1993. This event deeply affected her and is of some importance in the early relationship she developed with Mr. Yatauro. E. has her own bedroom in the house, a long, narrow, 9' x 22' room which was originally a porch and dining area converted into a bedroom when the grandfather moved in. This room runs the entire depth of the house and has a separate door from the outside as well as a door leading from the bedroom into the kitchen. The bedroom contains a television and stereo equipment, music stand and piano. There are windows in the door between the bedroom and the kitchen and between the kitchen itself and bedroom and the living room and the bedroom. According to Ms. K., there was a dolphin flag covering the window between the bedroom and the living room, pictures which she had drawn on construction paper on the door windows and curtains and a deflated parrot balloon on and vertical blinds on the kitchen side of the window between the bedroom and kitchen. The window which was over the sink in the corner of the kitchen only afforded a view of the back wall of her room, and not of the bed. All of this is significant to the case.

SUMMARY OF THE BOARD'S CASE

In short, the Board's case, as drawn from testimony, is as follows: During her freshman year, E., a clarinetist, joined the High School band, which was directed by Mr. Yatauro, who was then about 31 years old. After the death of her grandmother, who died two days prior to E.'s 14th birthday, Yatauro provided the stricken girl with support and comfort, which in and of itself was certainly not inappropriate. However, a deeper and decidedly inappropriate relationship then developed, with kissing and embracing leading to a first sexual encounter in her home late one night in June 1994. The sexual activity continued on a very regular basis throughout the summer

of 1994, then through her sophomore year. It occurred without any force or physical compulsion. During all this time, E. exhibited great musical talent and was recognized as such on a regional and statewide basis. According to the Board, as the relationship continued during the sophomore year and the next summer, Mr. Yatauro, a strong, charismatic, extremely popular and exacting taskmaster, attempted to exert ever greater control over the day-to-day life of Ms. K., pressing her to place her music and their relationship above all else and to greatly restrict certain other aspects of her social life.

In her junior year, 1995-96, as her romantic attachment to a high school peer developed and for other reasons, E. became disenchanted with the control Yatauro exerted, became significantly less intense in her commitment to her music, sought to lessen and eventually even cut off the relationship with Yatauro. In early 1996, Ms. K. learned that her father had suddenly and without warning contacted the school about his daughter, this after having had nothing to do with her life since shortly after her birth. The news of this contact confused and upset her.

Matters came to a head in late February/March 1996, when, as a result of what initially was an attempt to get her mother to seek help for her alcoholism, E. was placed in contact with Ms. Roberta Hogg, a counselor at school. She thereafter slowly revealed, over a period of weeks, first that she was in an emotionally abusive relationship with an unnamed "older man." When asked, she denied that he was from the school, and later in mid-March finally revealed that the man was named "Brian," and then, after being pressed for a more specific identification, that the man was actually "Brian Yatauro." Yatauro was thereafter suspended. The Board charges that Yatauro's conduct toward his student, both the controlling, intrusive, non-sexual aspects as well as the sexual component, violated the standards of conduct applicable to a member of the teaching profession and constituted unbecoming conduct. In addition, the Board says that he violated directives issued after his suspension which barred him from contact with students.

SUMMARY OF MR. YATAURO'S DEFENSE

As noted, Yatauro does not deny much of the factual presentation by the Board. He denies that his friendship with E., a girl whom he characterizes as coming from a somewhat dysfunctional home and having some apparent emotional concerns, was in any way romantic,

sexual, or controlling, abusive, intrusive or inappropriate. He simply tried to befriend and help a young lady with some problems and with great potential to realize what she herself saw as a future in the musical profession. He had done much the same with numerous other students. His conduct toward Ms. K., while perhaps more involving than with other students, was nevertheless well within the bounds of propriety for a teaching professional.

EVIDENCE

As is usual in this type of case, the only direct evidence of the alleged sexual activity is the testimony of Ms. E. However, the Board presented a number of witnesses and documentary proofs which it believes support the student's assertion of a romantic and even a physical relationship. For his part, Mr. Yatauro presented witnesses who have their own view as to the significance of the acknowledged occasional public physical contact between the two, and who in one way or another have shared their high school lives with Yatauro and experienced what they portray as a very caring, motivated, mentor and friend whose conduct with E. merely falls within the general experiences which they themselves benefited from. In addition, he also attempted to refute the allegedly damaging implications arising from the documentary evidence, consisting of cards, notes, letters and such produced by Ms. K. as items she claimed to have received from him; explaining them as either items he actually had given to his former college girlfriend and present wife, Cheryl, or as items which were only tokens of friendship and appreciation given to a student who now attempts to portray them as much more than they were intended. Finally, he presented witnesses to refute the Board's concerns about non-sexual conduct which in many cases he admits, but which he and his witnesses contend do not constitute unusual or improper behavior.

Ms. E.N.K. is now 19 years old and a college student. She graduated from Lacey High in June 1997. She first met Mr. Yatauro while in 8th grade, when he came to her middle school on a recruitment visit, seeking incoming freshman who had an interest in the band. She attended band camp in the summer before her freshman year and joined the concert and marching bands that fall of 1993. Practices for the band were held after school, usually from 4:00 or 4:30 P.M. to 7:00 or 7:30 P.M. She frequently went to school early in the morning to practice, arriving at about 7:10 A.M. or even earlier. Ms. K. and other witnesses for both parties agreed that other students would also sometimes arrive early, as would Mr. Yatauro. There were also some Saturday

morning practices. The concert band gave concerts for the winter holiday season, a concert usually held in March and a spring concert. The marching band played at football games and competed at Giants Stadium. There was also practice during class periods, and students practiced at lunch time and/or even before school.

E. gradually increased her practice time over the course of freshman year, including practicing outside of school. Yatauro encouraged her to try out for the regional competition in her sophomore year. During the summer between her freshman and sophomore years she took private lessons from Yatauro, for which he did not charge her. These were sometimes held at his house, which was located in Manchester Township about 20 minutes from her home. He lived there with his wife, Cheryl, and his young son. E.'s mother drove her to these lessons, usually went to the mall to shop and later returned to pick her up. Mrs. Yatauro was not usually present, except on at least one occasion. The Yatauro's child was then about three years old and was sometimes at home when E. had her lesson.

According to Ms. K., when her grandmother passed away during her freshman year, she met briefly with a guidance counselor. One day she was sitting in a practice room at school and having a hard time with her emotions. Yatauro came in and started to talk to her for a short time and they later spoke after school for a longer time, perhaps an hour or an hour and a half, in his office in the band room area. She was "extremely upset." Yatauro, who she described as "an incredible teacher," was the type of person with whom she felt comfortable talking.

Yatauro's first demonstration of affection towards E. occurred near the end of freshman year. This was also about the time that he started to telephone her at her home. It happened in his office after school, with no one else present. They had been talking and she was preparing to leave. He held his arms out, put them around her and hugged her. She hugged back. It was a "little hold and let go," lasting perhaps thirty seconds. This made her feel happy and close. In her words at trial, it was "okay."

The next display of affection was their first kiss, an open-mouth kiss which occurred in a practice room prior to the start of school about two weeks after the hug. The kiss was more of a "peck," than anything else, but lasted for a minute or two. E. is not positive, but recalled that

Yatauro may have asked her if he could kiss her. When he kissed her, he told her something like, "You've been waiting for me to do that for a long time." She did not answer and just smiled at him. At first he had his hands on the front of her shoulders, but after a short time she embraced him. She felt that he cared about her, and she cared about him. However, she testified that while she again felt "happy," she was aware that this was not a normal action on the part of a teacher. Despite this awareness, it seemed "okay" to her. She trusted him and he in fact told her that she could trust him. She perceived that he was interested in what she had to say and how she felt and she therefore felt close to him. It seemed like a friendship to her, she could talk to him openly about her grandmother and about other things. She told her friend T.M., who was not in the band and therefore "away from it all," about the kiss about a week after it happened. (Ms. M. confirmed this in her own testimony, explaining that her friend told her that he had "pinned her against the wall" and started to kiss her, lasting for "several minutes.")

Thereafter, the developing "relationship" progressed to sexual contact. The band participated in a parade in Wildwood, New Jersey, on a Saturday toward the end of freshman year. Yatauro, who said that he had to go somewhere after the event, drove in his vehicle rather than on the school bus as he usually would have. While they were outside the bus in Wildwood, he told E. that he would come over to her house late that evening, after the event ended. She didn't question him further. He called her from his car later that evening at around 12 midnight, telling her that he would arrive at her home in about 45 minutes. She set her alarm, and when he arrived, she saw his car in front of her house. She took her dog and walked to where he had parked, around the corner from the front of the house, which itself sits on a corner lot. This was between 12:45 and 1:00 A.M. They walked together to the house and entered through the outside door which led directly to her room, as they did not want to wake her mother or her grandfather.

In the bedroom they talked and listened to music while sitting on the floor in front of the stereo. She was wearing a tank top and shorts. He kissed her on the lips, eventually touching her above and beneath her clothes. She then touched him similarly on the chest, stomach and back. He undressed her and himself. They eventually engaged in oral sex and had sexual intercourse. He may have ejaculated during oral sex, but definitely not during the intercourse, as he removed himself before climax as he did not have a condom. He stayed for perhaps an hour and a half and

then left. She again was happy, felt that he cared for her, but she recognized at the time that all of this was "kind of unusual . . . not a normal thing to happen." He was her teacher and there was a large difference in age, as she was then 14 years old. She knew that he was married, was jeopardizing his position, that this was not "per se normal." These facts were confusing to her and bothered her. He told her that they would have to be careful, that people would not understand, and he used the phrase, "no mistakes," a phrase he used often.

Mr. Yatauro testified that he first went to the K. household in the early part of freshman year for a meal at the invitation of E. and her mother and they were joined by a fellow student, Mr. M. W. He was also at the house other times that year and Mrs. K. made him feel very comfortable there. He recalled the Wildwood parade. He had to attend a bachelor party for a friend that evening at a restaurant and then at a go-go bar which was located on Route 27 in Kingston, New Jersey, and he told his assistants that he had to leave Wildwood early. He drove to the shore in his car. He went to the party and left around midnight, traveling the approximately 1 1/2 hours to his home. However, he did not go to K.'s house that night and did not have any contact with her that night, sexual or otherwise. The next morning between 6:30-7:00 A.M. he was at his summer landscaping job, working for a friend's business.

Ms. K. testified that the next sexual encounter occurred early that summer at Yatauro's home when she went to his house for a lesson. They had sexual relations perhaps nine or ten times that summer, four or five times at his house in July and through the middle of August.[2] At that time she was not on birth control pills, and he would "pull out" rather than use a condom, as he said that "nothing should be between us." The sex in his house occurred in the so-called "marimba room" (where he had musical instruments including marimbas), in his bedroom and also in his son's bedroom, and at the bottom of the stairs. He usually initiated the sex, although later on in E.'s sophomore year she also initiated it on occasion.

As for the summer music practices, at his instruction she maintained a small spiral notepad, P-23 in evidence, in which he would write information about the lessons, practice to be done, etc. It contains entries for 8 dates, June 28 through August 31. On all but one of these the

[2] She claimed that in total there were around 100 "sexual events" during their relationship, but she did not indicate how many were oral and how many involved intercourse.

entries clearly discuss matters relevant to her lessons and practices. The sole exception, at least as far as the direct references are concerned, is the entry for July 12, which contains just two words, "You Know." According to Ms. K., this entry reflects the fact that on that date, they had sex for the first time in his house, in the marimba room. He initiated the contact, which resulted in intercourse. The words were written by him and as he did so he laughed and told her that thereafter when she went back in the book and saw them they would remind her of the sexual encounter.

The witness explained that her mother stayed at Yatauro's house during the summer lessons perhaps one to three times. Once Mrs. Yatauro arrived at the end of the lesson, once she was present in the house during the entire lesson. Yatauro's son was not normally in the home when they had sex. She "knew her mother would not just walk in" when she returned from shopping. However, on one occasion, when the weather was hot, which she believes may have been during the summer, Mrs. Yatauro's parents arrived at the Yatauro home while E. and Yatauro were having sex. The dog's barking alerted them. Mr. Yatauro's son was asleep in his bedroom. Yatauro stopped, looked out the window and said, "Oh, shit, Cheryl's parents are here." They hurriedly dressed and he ran out into the yard while the parents approached the house. She stayed indoors and explained to the parents that she was there to watch the child and that he was outside working on a swing set.

Mr. Yatauro testified that his wife worked only five to ten minutes away from the house and did not work a set schedule. She could come home at various times during the lessons, which lasted for an hour or longer. As for E.'s mother, she "had access in and out."

Yatauro discussed the notebook and entries, which he acknowledged were in his handwriting. He used this method with other students, and would make entries as they occurred to him or at the end of the lesson. It was meant as a place to note what had been done, what to practice, rehearsal schedules and the like. The entry for July 12, "You Know," was a reference to what had not been accomplished in the previous lesson and referred back to the July 5 lesson. There was "nothing new to add . . . nothing happened." As for any sexual implication, there was no sexual conduct for it to apply to.

Another entry in the same notebook, this time made on July 19, referred to "3 things-we have no control over." These were identified at the hearing as "time, distance, love." Yatauro explained these concepts as matters he spoke about to a number of students, including E. They referred to time, meaning dedication, love, that is, to an art form. He acknowledged that he drew the diagram found on the back of the score for Mozart's Concerto for Clarinet, K.622, P-16, which he gave to E. This diagram contains the full first name of Ms. K., written next to a set of horizontal and vertical arrows with the word "love" written diagonally across the meeting point of the arrows, with the word "me" to the right of the horizontal arrow. A vertical arrow with up and down points is to the right of the word "me" and a broken line extends vertically up and down from this arrow. To the right of this arrow is a broken line to the right of which are the words "everyone else." He explained that this diagram referred to her dedication, time commitment and "what she wanted to do." This referred to an approach to music he "used with all of his kids." The word "me" referred to him, and the import was that she, he and music were involved in a dedication to a program in order to be successful. He denied that the diagram implied any separation from or opposition to others, or any implication of a romantic or sexual relationship of he and E.

During her sophomore year, E. made the regional band, finishing tied for third in the competition, and also made the All-State symphonic band. (She repeated these achievements in her junior year, but for reasons to be explained she did not try for them in her senior year.)

According to E., throughout the sophomore, and indeed into her junior year, Yatauro visited the K. home frequently. He often had dinner at her house either before or after the Monday and Wednesday band practices. He also visited often on Saturday. They often visited in the bedroom, watching television or listening to the stereo, talking, eating, and having sexual relations. The door to her room from the kitchen was not locked, in fact her mother once walked into her room while they were eating. Nevertheless, despite this incident E. insisted that her mother would knock before she entered the closed room, and in the past she had yelled at her mother when she failed to do so. E. recalled that once Yatauro fell asleep on her bed. Yatauro, who acknowledged in his statements to the police (P-26 and P-27) and in this hearing that he would sometimes sit next to E. on her bed and at other times laid next to her on the bed, testified that he recalled falling asleep one Friday evening after he and a number of students returned late

from a practice for All State band or perhaps from a regular practice. He believed that Mrs. K. was present that evening, that she made him tea or hot chocolate, and that he then fell asleep on the bed with the door open and other students still in the house. He could not remember whether E. was on the bed with him either when he was awake or when he was asleep. Yatauro agreed that he did spend time with E. in her bedroom, as he also did in the living room. Her bedroom was also her "studio," and that was where she had her stereo, television, and where he would teach her a lesson. The door from the bedroom to the kitchen would be left open, but might be closed during a lesson, although he "really didn't notice."

Ms. K. testified that the sexual relationship continued throughout the 10th grade, usually two to three times a week. This usually occurred at her home, and included both intercourse and oral sex. The band usually had practice on Monday and Wednesday and during the marching band season on Saturdays. The sex sometimes took place on Saturday, but not as often as on Mondays and Wednesdays. On these Saturday occasions, when the sex occurred her mother may either have been sleeping or may have been out shopping. Sexual activity sometimes also took place at school. She specifically recalled that on one Halloween they had sex in the front practice room after school. Another time he brought her to his house in his living room while his wife was allegedly "up North."

In addition to the sexual activity, E. often arrived at school early for practice and they talked. She and Yatauro also spoke most evenings on the telephone. The length of these calls varied. He told her that he loved her, would protect her, would "be there" for her, that he would leave his wife and that all would "be great for us." She told him that she loved him and they ended the evening by saying goodnight. In addition to these discussions, their conversations also covered other subjects, such as band, school, auditions, their personal lives, "everything." Sometime during September/October of her sophomore year, they spoke in his office about birth control, a topic which had been brought up before. She had obtained birth control pills and brought them in to tell him about them. He was happy that she had them.

Mrs. K. testified that while the relationship between her daughter and Mr. Yatauro started out as that of teacher-student, she noted that by sophomore year it was more "fooly-teasing," characterized by "looks, kidding, a more personal relationship." During 1994-95, Yatauro began

to stop at the K. home after evening rehearsals, on occasion after concerts, and more and more often on Saturday mornings, when he would stay for about one hour and sometimes, at least for the first few months, bring his son.

E., her mother and Yatauro all agreed that he performed some yard work at the home, cutting tree limbs and blowing leaves. He also recalled removing snow once with a friend. He characterized the frequency of his Saturday visits as only occasional, not anything near every Saturday, but more likely once or twice a month, and he claimed that he went to teach or do yard work. He had a very distinctive looking 1986 Ford Bronco which would be parked at the house, easily seen by anyone, including a number of band members who lived within no more than a block or two from the K. house, such as R.K. who lived catty-corner to her house.

On one occasion, within a couple of months of the summer between sophomore and junior year, Yatauro and E. traveled to the Cherry Hill Mall to shop. According to her, they went there so that she could try to find a bathing suit, although she did testify that there may have been a second trip to the Cherry Hill Mall when he purchased her an outfit for a concert, or they may even have looked for both the swim suit and outfit the same day. E. claimed that he was insistent that she not wear bikinis which were too revealing, claiming that there was no reason for girls to "parade around." He hated those bikinis that she tried on and she did not buy any.

Mr. Yatauro testified that the trip to Cherry Hill was made with the knowledge of Mrs. K. and even of A.L., who was then E.'s boyfriend, as they were with Yatauro and E. before the two left for Cherry Hill. He said that they went to Cherry Hill to "avoid getting hassled," to avoid "run(ning) into a lot of people," as there were a "lot of rumors," and also simply wanted to go to a different mall from that which he usually frequented. This was the only such trip and purchase at Cherry Hill. He denied that they shopped there for a bathing suit, and even though he did tell the police that they had, he now recalls that they did not. He had shopped with other students at the Ocean County Mall and had seen E. there and walked the Mall with her. He had even run into Mr. Adamski and his wife. Adamski, who was the school principal, expressed no concern to him about his activity with the students at that time.

E. recalled that on another occasion during sophomore year, she was at home with her mother and Yatauro and she tried on two bathing suits for him which she had purchased with her mother. She changed in the bathroom. He liked them, but not for her to wear. He also objected to a piece of dance clothing she had worn to a dance recital during her freshman year, saying that he did not know why she would want to parade on stage in such a "demeaning" costume. She did not participate in dance during her sophomore and junior years, as it took too much time from her music, but also because Yatauro did not want her to do it. In her senior year she did participate in the dance team, as freed from Yatauro's control, such participation was now "okay." Mrs. K. recalled this matter of the dance costume, which she said consisted of a black sheer nylon over a body suit, which revealed E.'s figure. She remembered that it was hanging in the car and when Yatauro saw it and questioned what it was, he responded to its identification in an "incredulous tone of voice." While E. had danced since the 4th grade, Mrs. K. did not believe that she ever danced after this incident. However, she acknowledged that after the allegations against Yatauro came out, E. said that she probably would have stopped dancing school anyway.

The respondent agreed that there was an episode of "modeling" of a bathing suit at the K. home at Mrs. K.'s suggestion. It did not "set off any bells" for him as to anything being inappropriate about his relationship with E. He did mention issues regarding clothing he believed to be "provocative" to E. and to others as well, such as open blouses, short skirts and the like, items which E. at time wore. He told her to "dress like a young lady."

Mr. Yatauro acknowledged that he provided a number of gifts for Ms. K. over the course of time. He gave her reeds for her clarinet and a leather ligature, a "gig bag," which is a bag with a strap in which a clarinet case is placed. He also purchased a dolphin necklace for her (apparently of minimal value). He admitted that he left this necklace on her bed one day when he came to the house to give it to her while near the school. He found no one at home so he entered her bedroom via the unlocked door from the outside directly into her room, and then left. He related that he was shopping for his son, saw the cheap necklace, knew E. liked dolphins and bought it for her. E. testified that he also made her bed at the same time as he left the necklace and a note for her, but he denied making the bed. E. related that her mother was mad about the door being left unlocked, and Mrs. K. testified that she had given no one authorization to enter the home without specific permission.

Respondent also purchased and installed a car stereo which E. wanted. Apparently he was to pay for only a part of the cost of the stereo, which he recalled as about $300, with his share at around $80-$100, but the K.'s never paid their share. In addition, he lent her a gold chain and crucifix which they both agree he originally gave her "for good luck," at a performance, but which she did not return to him and wore during her sophomore year. He explained that he gave others "good luck pieces," "innocuous little pieces," such as an arranging pencil to K.H. "This wasn't extraordinary for me." However, he acknowledged that the chain and crucifix were not "innocuous" items, and he told the prosecutor's investigators that "it's a nice cross, it's a nice chain." He also told them that at some point he had asked for the return of the chain and cross, but E. had said that she was "not ready to give it back and it was no big deal to me." (*See* P-26)

Mr. Yatauro acknowledged that he also accompanied E. to a tattoo artist where she received an ankle tattoo. When she spoke of an interest in getting a tattoo, he recommended an artist he had used previously. They went to pick out a design, she choose one with adult and baby dolphins. He then returned with her for the actual tattooing. Ms. E. had told her mother that she was thinking of getting a tattoo, her mother did not approve but "was understanding." The tattoo cost $110 and Yatauro paid cash for it. Yatauro testified that his involvement in this tattoo matter was "not normal" and "bad judgment," but insisted that if he takes an interest in a student he tries to make sure that he or she "does good" rather than that he or she be harmed or end up in a bad environment.

During her sophomore year, rumors circulated in school that E. and Yatauro were involved in a sexual relationship. She was aware of the rumors and spoke to a guidance counselor at the school, Mr. Jack Owen, and asked for an opportunity to confront the rumors. She then met with one or more persons in Owen's presence to try to do just that and she denied any sexual relationship. Yatauro also testified that he was aware of rumors about the nature of his relationship with E. which arose during her sophomore year, and he claimed that he also spoke to Mr. Owen about the rumors, and denied them to several others.

During the summer between her sophomore and junior years, E. and Yatauro each testified that they traveled together to Batsto Village, an historic site in Burlington County. He

pegged the occasion as being at the end of a summer program at the High School. He recalled that E. wanted to take him out as a sign of appreciation and that Mrs. K. knew all about the trip beforehand. They left for Batsto in the late morning. They then went to either a lunch or dinner (their testimony on this point was at some possible variance) at the Grapevine Restaurant, where she had previously eaten and recommended that they eat that day. At some point they changed clothes from T-shirts to polo shirts. While she testified that they changed in his truck at the same time, he denied that she was anywhere near the truck when he changed inside. She may have been in the bathroom at the time. She paid for the meal and he left the tip. He recalled that they returned to her house at about 4:30 P.M. and her mother was "definitely" home when they arrived.

Ms. K. testified that during the course of their relationship, Mr. Yatauro sent or gave her numerous cards, notes and letters. These were sometimes left in her clarinet bag, which was often left in his office. (Students and teachers both testified that it was not unusual for better instruments to be left in his office.) A series of these were produced in evidence. Each of the series to be discussed now was produced by the Board, and were introduced as exhibits in the criminal trial by the Prosecutor. As now explained, their meaning is often the subject of dispute between E. and Yatauro. Indeed, the question of whether they were in fact given to her, or as he claimed, were in some cases actually items which he had given to his girlfriend and later wife Cheryl at one time or another during his relationship with Cheryl and then were apparently taken from storage in the basement of his house by E., was hotly in contest. Some of the exhibits have been repaired, as they were torn up under circumstances to be described later in this opinion. In addition to the testimony of E. and Yatauro regarding these items, the Board presented the testimony of an expert in forensic document examination, Ann Doherty, to support its determination that Yatauro was the author of the disputed documents. Ms. Doherty examined the several documents, as well as known exemplars of Mr. Yatauro's writings, using equipment and principles of document examination which are described in the record. Her comments as to the several disputed items are recorded here along with E. and Yatauro's remarks.

Ms. K. claimed that during her sophomore and junior years she and Yatauro occasionally exchanged cards, including at Christmas, on birthdays and Valentine's Day. He often signed them and put a musical note with his signature.

As an example of a non-disputed item, both witnesses agree that he gave her the Christmas card, P-2, which bears the pre-printed words, "Thinking of a Special Friend at Christmas." The card bears no name to personalize to whom it was given, has a handwritten "95" in the upper right hand corner of the inside, and is signed, "Love Always Brian." He testified that he exchanged cards and gifts with some students. As for the "Love Always," this was simply the way he signed and he meant nothing by it. He believed that considering the nature of the relationship which he had with E. she would have understood that the words meant "nothing." He did not consider that she might take the words literally, in fact, that thought never occurred to him.

A disputed item is P-5, a "Happy Birthday Sweetheart" card. She claimed that he gave it to her for her birthday during her sophomore year, February 1995. The card contains his handwriting, and she thinks that he gave it to her at her home. It bears a handwritten closing of "My love and Friendship Always," and is signed "Brian," with a musical note following the name. It bears no handwritten name of the person to whom the card was given and no notation as to the date, year, etc. Yatauro did not dispute that he had a connection to this card, but said that he believed it to be the type of card he would have given to his wife. He related that his wife kept old cards in the living room or in a bag in a chest of drawers in the basement, where there is carpet and a play area with toys for his son and where he also has musical equipment. While he often put his wife's name inside of cards which he gave her, he did not always do so, as indeed he did not in an anniversary card "For My Wife," part of a series of cards and letters, P-53, which he produced for the handwriting analysis and which he acknowledges he did write.

Another card in dispute is P-6, (designated by Ms. Doherty as her document Q-4), which has the pre-printed wording on the front, "I miss your Smile . . . I miss your Laugh . . . I miss our quiet times . . . I miss our WILD times . . . I miss the friendship you and I share!" In the inside pre-printed material, the card says in part that the sender wants "to clear up any misconceptions right here, right now . . . I think of you as <u>way</u> more than a friend!" (Emphasis in the original.) This is signed "Love Forever -N- Always Brian." In the upper left corner is the first name of Ms. K. Ms. K. insisted that the handwriting was Yatauro's and that he had given it to her, probably during her junior year. He, however, claimed that while the handwriting at the bottom of the card

was his, he did not believe that the word "E-----" was in his handwriting and he could not recall giving this card to anyone. Again, if he had given it to his wife he did not always put her name in the card.

Ms. Doherty testified that the "E" in Ms. K.'s first name in the corner of the document was compared to the same letter found on several of the items she had reviewed and which were acknowledged to have been written by Mr. Yatauro, items designated in her report as K-9(P-10), K-8 (P-8), K-12C (back of P-16), K-13A (P-47, pg. 2) and the letter "E" was "significantly similar in shape." The dot over the letter "i" and the letter shapes in the known rendition of the name were "very similar." In addition, she subjected the document to infrared illumination and filters. The ink in the name in the corner responded the identical way as the ink in the acknowledged writing below, making it "highly probable" that the same pen was used to write both the name and the words below. If different pens had been used the infrared would have disappeared. The use of the filters she used in the process can usually differentiate the tonality of ink. As for the letter forms, she noted that the "E" in the questioned name and the known version thereof each had a "squashed" letter "E," with no middle loop and in each case the letter was "tilted off its feet." The second "i" in each version of the name had a dot which was a "curl" or a "strike off." The first "i" in the questioned version and in K-12C(back of P-16) were similar. The letter "l" in each name was shorter than the "E" next to it. The spacing between the letters in the full first name in the exhibit and the known K-12C each are "pretty even." In addition, the "d" in the known writing K-13A (P-47, pg. 2) in the word "Edison" and in her Q-1 (P-1) and Q-3, the red bordered note, part of P-4, are similar in concavity and structure of the oval to "d"; contained in known samples such as K-4 (the folded index card, part of P-4), and K-3 (P-3). She characterized her opinion as to the identity of the writer of the name on Q-4 (P-6) as originally "strong," but at the hearing, after having examined other items, specifically those in P-53 which were provided to her after she issued her original report, she raised her assessment to that of a "reasonable scientific certainty" that the author of the name was also the author of the words at the bottom of the card, which are admittedly written by Mr. Yatauro.

P-7 is another "Friendship" card, which E. claimed Yatauro gave to her, probably in her sophomore year. Yatauro agreed that the handwriting was his, but the card would have been one which he would have given to his wife.

P-17 is a handmade Valentine's card within a handmade black envelope. It is "For a Friend," and bears the letters "E.K.," as the salutation within. It is unsigned and has several words underlined. The cover has a small musical staff with a music note thereon, the inside has a small printed music sheet of the music and lyrics of Rodgers and Hart's "My Funny Valentine," with a handwritten music and lyrics inside. This handwritten item bears the date February 14th, 1995. According to E., Yatauro made this card and envelope, was "really proud of himself," and gave it to her for Valentine's Day 1996. He told her that he made it just for her. She recalled that they had dinner but can't recall where. Yatauro denied ever making the card or writing any of it and claimed to have first seen it at trial. As part of P-53, he did produce a handmade card given to Cheryl dated 9/27/85, which is also a cut and past production. He had done this a few times for her, but not for anyone else that he can recall. He probably underlined the words.

P-14b was allegedly given to E. at the end of sophomore year. It is a pre-printed card, "I Am Committed to Loving You Forever," with no handwritten portions at all, no name identifying to whom it was sent, no signature, no date. She related that he and she had been discussing his signing her yearbook, but he said "no mistakes," and instead of signing in the book, he gave her the card, blank envelope and a note, handwritten on a piece of white unlined paper. This speaks of thanking the recipient for a "great year and much, much more." It also relates "I look forward to school because of you. You have given me faith and spirit. To my soul mate thank you again. This is my yearbook. With love and friendship forever and always." Mr. Yatauro acknowledged that he wrote the paper, but thinks that he wrote it at the end of a school year to another student, K.H. He never saw or sent the card. At the criminal trial he could not recall to whom he had written this, but has since recalled the recipient. He characterized the use of the term "soul mate" as "bad wording," by which he really meant a "friend," but acknowledged that he did not "know whether I can really give you a definition."

In addition to the cards, the two witnesses addressed a series of notes. P-3, two notes containing definitions of the words, "desire" and "friend," and each bearing the word "one" written in a stylized manner in the upper right hand corner, were, according to E., notes which Yatauro left for her. He claimed instead that while he did indeed write them, the note paper, which is pre-printed and contains the words "3 reasons for being a teacher June July August,"

came form a note pad of an English teacher, Mary Esch, to whom he wrote these definitions when he served as a study hall monitor. She had been a chaperone on one of his band trips. She had graduated from graduate school and could not go on another trip. They joked a lot and he wrote this "to bust on her a bit." He left it for her on her desk. There was no number which had any special significance between he and Esch, and he cannot recall what the significance of the word "one" in the corner meant. He did not give these to K. She was in his study hall on occasion when she was out of gym class. Ms. Esch was not produced as a witness at the hearing.

A series of four notes make up P-4. He denied that he wrote anything on the pink note paper, which contains a series of statements, such as "Seek to find new ways" and "An incredible uniqueness" and bears a drawing of a weight bench and barbell with the word "oneness" above the barbell. He identified the other notes as containing lyrics he would occasionally compose and jot down, sometimes with titles, as he believed the words "for you and me!!" on the folded index card were. This card, which he claimed he never gave to anybody, has a pasted-on, pre-printed drawing of two musical notes and the word "hooray" on the outside, with what appears to be a handwritten note inside, apparently written to someone other than Yatauro. In part it refers to "our growth," says that "my happiness is shared with only you," and that "you look tremendous today, my gorgeous woman. Mmmmm . . . I want to give you my ____. You know, I also want to make you ____ . You love it, admit it." Yatauro testified that none of these notes were ever given to E. He agreed that he did not normally put these types of "stickums" on notes which he wrote to himself. As for the "You know . . ." wording, he claimed that it was "not necessarily sexual," but could be an emotional love lyric and sex could be a part of such emotion. These and similar jottings were kept in folders and in a briefcase in his office.

Addressing P-9 consists of another series of small notes. As to two of these, the parties are in agreement that Yatauro wrote the two separate notes which say "How was everything?" She claimed that these referred to sexual encounters and were given to her the day after such events. He could not recall the specifics as to why these were written, except that they had nothing to do with sex with E. He wrote such notes from time to time and left them for her and others.

Mr. Yatauro claimed not to be the author of the note with the words "4-U with a special one for your heart" with a musical note and on the other side "You are the ultimate WOMAN," "I need you," and "No wall" in a circle with a line through it, and a drawing of a wall. However, he did sometimes use the numeral "4" instead of the word "four," as in his letter to Cheryl in 1980, again part of P-53 where he signs "4-ever." Referring to this note, E. testified that she had a tendency to put up walls to people and not let people in, and his comment was in reference to this, saying that "we can do something about the wall, can't we?" Ms. Doherty, who designated this document as Q-7, compared the word "the" in the phrase "You are the ultimate woman" to the word "the" in P-13, her K-Q-5, which he acknowledges having authored, and the word "the" in known sample K-11 (P-15). She explained that the questioned and the known versions of the word each were "significantly similar." The "h" tends to lack a hump and the "t" tends to swing up to form the top of the "h." The formation of the word "the" is "very unique, very unusual," indeed, not similar to anything she had seen before. She pointed to the hook at the top of the "h" and the "very prominent" wide "e." She concluded that these must have been produced by the same writer, as they were too difficult to manufacture unless the person attempting to do so had illumination and took great care.

Finally, Yatauro acknowledged that the red bordered note was in his handwriting, but E. did not recall the reason why he gave it to her and he did not acknowledge that he had given it to her

Two longer notes on composition paper were also identified by E. as having been given to her by Yatauro. P-13 was purportedly left for her after an argument in her junior year. He denied this, acknowledging that he wrote the note, but claiming that he had "no doubt" that it was written to Cheryl while he was in college some fifteen or so years ago. At the time he was apparently frustrated over their relationship. Cheryl saved the note in the basement. The note itself has no date or any obvious identifier as to its age or the circumstances of its writing, but it does contain the statement, "Look at me. Period 8 & 9/10-nothing but focus of you" and it urges the recipient to "Read me know (sic) please!! then respond with your eyes and soul." (Underlines in the original). Mr. Yatauro agreed that the day at Lacey was referred to by "periods" and his schedule confirmed that he was assigned to "lunch" for 8th period and had an "instrumental band"

class for periods 9 and 10, during which time he would occasionally work with E. He was not sure whether she ate during period 8.

Similarly, he denied that he had ever given the note, P-15, containing two questions and comments thereon, to E. While she testified that he had given it to her during her sophomore year and had written it in her English notebook, he claimed to have written it while watching a Depak Chopra video and reading a self help book. He put the note in his desk or briefcase.

Another document is P-1. The significant issue relating to this relates to the box drawn at the top, with the words "I Love A---," which Ms. E. testified that she drew and wrote. Next to this, on a page of what appear to be notes from U.S. History class, are the following statements written in blue pen.

> Why would you write this?
> Do you really? Did you?
> Then what am I?

Ms. E. claims Yatauro wrote these phrases and she found them inside her notebook. Yatauro is not certain that he did write them, but acknowledged that the handwriting certainly looks to be his, yet he is not certain why he would have written this.

In summary of her review of these documents, Ms. Doherty opined that the same writer had authored all of the questioned documents, with the exception of material on the pink note paper, her Q-2, which is part of P-4, about which her examination was inconclusive. The documents, which displayed characteristics consistent with those of a left-handed writer, also display unique, identifiable features which establish that they were prepared by the writer of the known samples of Mr. Yatauro's handwriting. Based upon her analysis of documents received in May and then supplemented by additional known samples of Yatauro's handwriting provided on June 22, 1998, she concluded that there was a reasonable scientific certainty of his authorship of the "I miss your Smile" card, P-6 (Q-4) and a strong scientific certainty as to Q-8 (part of P-9).

P-8 is a paper bag upon which Mr. Yatauro admittedly wrote out a schedule for Ms. K. According to her, this was written toward the end of her sophomore year, perhaps in the summer.

At the time, Yatauro was "very mad about A. (her boyfriend)" and the time spent talking to A. on the telephone. The schedule covers Monday through Sunday, 5:30 A.M. till 9:30/10:00 P.M. on weekdays and weekends from midmorning wake up until between 6:00-9:00 or 10:00 P.M. The detailed comments state that there is "no phone" on Sunday, Monday, Tuesday and Thursday evenings, that she is to "say goodnight" at 9:30 Monday through Thursday, that "day can end early we simply say goodnight earlier," that on Saturday at 10:45 A.M. she will "receive visit." (She understood that this referred to his visiting her at her home, he testified it had to do with her visiting her grandfather who was at that time in a nursing or a senior citizen's home), and that she would "eat w/me" on Wednesday at 5:15 P.M. It also sets times for practice and homework, reflection on the day, "R & R," and following "wake-up." E. explained that the four days of "No phone," each underlined in red, reflected Yatauro's upset over her spending time talking to A. or her other friends. In fact, Yatauro discouraged her from talking to her high school friends, as there was "no need to," as they don't know what is going on," and he wanted "no mistakes." She explained the reference to saying goodnight as referring to her nightly phone calls with Yatauro. When he gave her the schedule, which he prepared without first discussing it with her, she looked at it, but not being so regimented a person it was not something that she could follow. He referred to it as "his schedule for us." In summary, she claimed that he made it clear that she was to practice, have time for him and her school work.

Mr. Yatauro testified that he indeed prepared the schedule, but only after she had complained constantly about her lack of time to practice and deal with her school work. She had a number of upcoming issues to deal with, college preparations, All State Band, Governor's School. He told her of his experience with such a schedule in college and then prepared this for her. He denied that the "good night" references were associated with him, they just signified an end to her evenings. She may have implemented the schedule for a time, and they did talk "occasionally" in the evening, but not specifically to say goodnight. When they spoke at night, his wife was home and she said nothing about the calls. He received other calls from other students in the evening as well. It was not unusual to have contact with section leaders and others in the band regarding band-related matters, such as schedules, rehearsals, photocopy needs, etc. In fact, Ms. K. was a section leader and very helpful with these chores. As for the schedule, and generally in respect to E.'s allegations, he denied that she had to "check in with him." He discussed the preparation of a schedule for her with Ralph Bigger, a guidance counselor at Lacey High, but not

with Mr. Kaskow, the Director of Student Personnel Services. He acknowledged that he did try to get her to focus upon music more than she was, and that he saw the relationship she had developed with A.L. as interfering with her intensity toward music. She was "acting like a teenage girl," on the phone with friends and socializing. He also tried to keep her on track academically in order to further her intentions toward a career in music.

In addition to these exhibits, the Board also introduced a telephone calling card, which he acknowledged giving to E. at the All-State Band weekend when she needed to call home. He "forgot she had it," and since he knew the number by heart he did not use the card itself and thus did not realize that she still had it. He does not believe that she ever called him from a vacation, such as the vacation she took to Captiva Island with the family of another student.

A further series of exhibits produced by the Board consisted of pieces of clothing, including underwear, sweatshirts, shirts and belts. According to E., some of this clothing was left by Yatauro at her house on one occasion or another, such as after he did yard work and changed his clothes, leaving clothing for the K.'s to wash, or items that he gave to her or she may have borrowed from his office, as indeed a number of other witnesses testified students did with some frequency to wear during practice in cooler weather. One brown belt was identified by E. has having been used at her home on one occasion to tie her hands during sex.

Ms. E. described the circumstances which ultimately led to her revealing her relationship with Mr. Yatauro to school authorities and to her mother. During her junior year Mr. Yatauro placed more demands upon her regarding her music. However, she was becoming "disinterested" in the music, and did not enjoy the solo practicing for the Regional competition. Her mother testified that she noted that in the junior year her daughter, who had previously referred to him as "Mr. Yatauro," now often called him "Yatauro," but Mrs. K. did not attach any significance to this change at the time. (In fact, according to the testimony of former band member Ms. J.M., the "whole band" called him "Yatauro.") E. also did not go to the band room as often, did not want her to tell him she was at home when he called, did not want to go to practice, and even eventually said that she did not want to be in the band. She also noted that at times in the fall her daughter's dialogue in phone calls with Yatauro became "more heated," and once when a call ended E. came out of the kitchen and threw a door so hard that it left a hole in the plaster. The

girl confirmed to her that Yatauro was on the phone, but did not say what the discussion had been about. She was angry and then "very pensive."

Mrs. K. also recalled an incident which she believed happened during 11th grade, perhaps in January or February 1996, but maybe in the earlier part of junior year in 1995, when E. was home from school sick. At 8:30 A.M. Mrs. K., who had stayed at home that morning due to her daughter's illness, came into the living room where E. was on the couch. She discovered Mr. Yatauro sitting next to the couch, Indian style, his knees touching the couch, as E. slept. He said that the front door was unlocked. Mrs. K. went to the bathroom to prepare to leave for work and when she emerged ten to fifteen minutes later, Yatauro was still there. She told him that she was leaving and that it was time to go. They both left the house.

According to both E. and Mrs. K., a series of incidents and circumstances occurred in early 1996, especially in February and March of that year, which set the stage for the revelation. E. explained one episode, when in late February or early March she went out for lunch at Chinese King on a weekend with A. and her mother. She and A. were in the parking lot of the restaurant when she saw Yatauro's truck. She knew that she had not called him. He was supposed to drop a tape off at her house. She told him to put in it the screen door. She walked over to the truck and found that "he was so angry with me." He said that he "didn't know where you are. . . Now you're here with A." (She explained that he had indicated to her in the past that he did not approve of either A. or the time which she spent with him. It took away from her music, and from her time and attention to Yatauro. He got very angry if he saw she and A. together in the hallway.) She called Yatauro about twenty minutes later. Yatauro testified that he recalled no such incident.

On what E. identified as another occasion shortly before this incident, E. was about to go out to a restaurant with A. and her mother, and when the phone rang she was reluctant to answer it. She did, and Yatauro then asked her "20 questions." She told him that she was going out with A. to eat and he said "figures" and was, in her words, "very angry." She could not recall if she called him from the restaurant that day, however, both her mother and A. testified that on what apparently was this occasion in "March or so, 1996" (the mother's recollection) they arrived at a Chinese restaurant in the Shop Rite Plaza in Lanoka Harbor about 5:00-6:00 P.M. and after they

entered, E. went outside to the pay phone for a long time. A. went out to tell her that the dinner was being served, came back in and reported that E. was on the telephone and that she knew dinner had arrived. E. re-entered the restaurant a few minutes later and appeared upset. Again, Yatauro did not recall either telephone call. She might have hung up on him at some time because he was mad about something, but he could not recall the specifics.

A.L. testified that he also recalled the incident. He believed that E. was supposed to have been practicing for an audition, and she did for part of the time that he was at the house that day. As he recalled it, prior to their going to the restaurant he was present when she had an argument on the telephone with Yatauro, during which she was screaming and yelling and then just hung up. She got a call back from Yatauro, the argument started again and she told Yatauro that she was going out to eat. A. was close enough to hear a man's voice on the other end of the call, arguing with her, but he could not hear the discussion itself. She was yelling at Yatauro, bursting out things as she talked "really fast." They then went to the Chinese restaurant, and after she went outside and made a phone call, she came back in to the dinner, appearing "sketchy and off edge." They finished dinner and when they went outside they saw Yatauro driving around the parking lot. E. was "shocked," and could not understand why he was there looking for her. A. was also shocked at this.

E. and her mother described another incident, which Mrs. K. believed to have occurred within the first quarter of 1996, likely in February or March, within a month of the restaurant incident. Mrs. K. related that she had gone to the high school to "taxi" her daughter after a group meeting of the band. She witnessed her daughter come into the band room crying hysterically and exhibiting a flushed appearance. A teacher calmed her down. Thereafter, they got into her car. Mr. Yatauro came out of the school, E. left the car and went over to speak with him. Mrs. K. saw them speaking and then Yatauro pushed her daughter backwards perhaps a step or two, by placing his left hand on her shoulder. At this point the conversation seemed to calm, E. returned to the car and they left. Mrs. K. remarked that Yatauro appeared to be "very angry." She asked her daughter what it was all about, but E. replied that, "It's okay, Ma, don't worry about it, its okay." The witness did not know what the argument had been about.

Mrs. K. acknowledged that she did not mention this shove to either DYFS or school authorities. (It is not clear whether the question of counsel was posed in regard to her making an immediate report of the incident to either authority, or that she failed to mention it to these agencies after the allegations of improper conduct with her daughter were later revealed.)

E. testified that she and Yatauro did have an argument that evening and each was mad. When she exited the car to approach him, he shoved her backwards with two hands. Yatauro testified that he never pushed or shoved E. and did not recall the "fight" at all.

E. gave another example of Yatauro's reaction to her relationship with A. For Christmas, 1995, A. gave her a gold and diamond charm with a heart. She wore it, usually tucked in her top. One evening she and Yatauro were in the back practice room and he saw it and "ripped it out of the shirt," saying "what's this shit." She told him that A. had given it to her, and he told her to take it off. She declined and left. Yatauro told the Prosecutor's investigators that he might have asked her if the heart was yellow gold and if the diamonds were real, which he agreed might have been construed by somebody as "making fun of" it. However, he "didn't believe" that he ever made any comment to E. that she should be wearing his chain rather than A.'s gift to her.

E. related that in addition to these incidents, during her junior year Yatauro had begun to leave disturbing messages on her answering machine. Whereas he had previously left messages such as "Hey, just called, love you," towards the end of the relationship the messages included such as "Where the hell are you, I need to talk to you" and "I don't know where the fuck you could be." He was "very urgent about the whole thing." Mr. Yatauro testified that he might have cursed to her at some time, but he did not recall leaving curses on her answering machine.

The witness related that she had been best friends with Ms. J.M. since 2nd grade. She remained closer to her during sophomore year while growing apart from other friends, with whom relationships slipped during the time she was so involved with Yatauro. Sometime during January or February of her junior year, as E. attempted to draw back from the relationship with Yatauro, J.M. reported to her that she had received a call from him asking Ms. M. where E. was. Indeed, Ms. M. later on told E. that she was uncomfortable going to lunch at the band room, as Yatauro was regularly asking her why E. was not talking to Yatauro, seeking to find out what was wrong

with E. E. had advised J. that she was no longer so involved with the respondent, that she was tired, could no longer deal with the situation, could not deal with having to check in. She "wanted to be left alone." In her testimony J.M. confirmed receiving a call, but thought it was a week and a half or two weeks before his arrest in March. She also described her encounter with the respondent at the band room, where he took her out on to the stage and questioned her as to what was wrong with E., asking why E. was acting the way she was, why did she seem so distant. J. denied any knowledge of the answers to his questions. He seemed concerned and worried. The next day he again demanded answers, insisting on knowing why E. "was doing this." By the third day, J. did not go to the band room so that she could avoid Yatauro's interrogation.

E. recalled that she had first met with Ms. Roberta "Bobbie" Hogg during E.'s sophomore year. Ms. Hogg is self-employed and has worked under contract with the Lacey District since 1993. She serves as the Substance Awareness or Student Assistance Coordinator. As such she relates with the school's CORE Team, and deals with referrals regarding substance abuse. According to Ms. Hogg's recollections and her notes, they first interacted in November 1995. At that time E. came in as a self-referral and asked Hogg for information regarding "a friend" who might need assistance because of too much drinking. On an "educated guess," Hogg asked her if there was any alcoholism in her family, and E. revealed that the "friend" was her mother, who she described as an alcoholic.

E.'s next contact with Hogg occurred in March 1996. According to E., she had reached a point where she no longer could cope with having to take care of her mother while also dealing with her own problems related to her situation with Yatauro. She decided that she would leave her home and stay at her boyfriend's house in an attempt to get her mother to seek assistance. She told her mother that she was not coming home until this occurred. E. then asked Mr. Yatauro for Bobbie Hogg's phone number and he provided her with Hogg's unlisted home number. E. called Hogg on March 7, 1996, which happened to be a snow day. Hogg testified that E. related that they had to talk about her mother, that she was tired of taking care of her and wanted her to get help. They talked about ways to handle the situation, including AA. In the course of the discussion, E. said that she was tired of not being in control of her life and of others controlling it.

According to Hogg, on March 12 E. came to her office and explained to her that a man had been showing up at her employment, that she had to report in to this man where she was and who she was with. Hogg queried her as to whether the man was a boyfriend and E. said he was not. Hogg told her that this appeared to be an abusive situation and should not be occurring. She then referred E. to Ms. Josephine Schreiber. Schreiber holds a master's degree in Social Work from Temple University. She was employed by the Division of Youth and Family Services for 12 1/2 years before she returned to school for her graduate work. As a part thereof, she served a social work internship at Lacey Township High three days a week, working under supervision as a school social worker. Ms. Schreiber was conducting a woman's group at school, dealing with abusive relationships. During her meeting with E. she gathered background information and received "non-specific" information about a problem with an "older man," reported to be about 25 years old. This man "lived out of the area." He required that E. advise him of where she was, who she was with, he followed her and called her. If she was not at home to receive his calls, he interrogated her as to where she had been. E. reported that she was in a current relationship with a peer (actually A.L.) and that she was disturbed about this other situation.

Schreiber felt that the information she had gathered revealed a bright, very upset young woman who came from a "fairly dysfunctional" family and seemed to be easy prey for an older man. The girl, who seemed "prematurely adult," did not know her father and reported having an alcoholic mother for whom it appeared she was acting in an almost parental role. She provided E. with a handout on how to identify a relationship as either fair or abusive and discussed issues of power, control and what love is and is not. E. "jumped on the idea that she would be active about this." However Schreiber was concerned about the possibility of danger to E. if E. acted precipitously to try to cut off the relationship. E. testified that they discussed her getting out of the relationship, but E. told Schreiber that that would not be easy to do.

At around the same period in late February/early March as E. first began to speak to Ms. Hogg and Ms. Schreiber, she revealed to J.M. and to A.L. the nature of her relationship with Yatauro, including its sexual aspect. They each testified to the meetings in which she separately told them about this. She "swore" them both to secrecy. A.L. testified that he had to tell someone, so he told his parents. He related that E. was very concerned to simply end the relationship herself and not tell anyone else, as she was quite anxious that no one else know of its

sexual nature and she did not want it to be known of in school. She also was scared of Yatauro and did not know what he would do.

J.M. related that when she told her, E. was "hysterical, very upset." She talked of how she might deal with ending the relationship. Eventually, J. told E. that she knew someone who had told her that this same kind of thing had happened before at a previous school Yatauro taught at, information which "infuriated" E. (There is no evidence whatsoever in this record as to any such incident, it is reported here only as information purportedly given to E. prior to the time she revealed her claims about Yatauro to school authorities). After these discussions and the talk with Schreiber, E. called Yatauro one evening from A.'s home, in the presence of J. and A. E. told him that she wanted to be left alone, that she knew what he had done. She told him to leave her alone. J., and A., each of whom could hear the call, which she said lasted 20-30 minutes, confirmed the contents reported by E. Yatauro insisted that he wanted to come speak with E., but she told him that she did not want to see him and she hung up. She was very angry, upset and concerned about Yatauro attempting to see her. J. recalled that they decided to go to E.'s home and get her some clothing and have her stay at J.'s house for the night. J. drove her to E.'s house, however, by the time they arrived they saw Yatauro's truck outside her house. They returned to J.'s, called Mrs. K., telling her to pretend that E. was not on the phone. Mrs. K. told E. that Yatauro was in the house. Later on they again drove by the K. home and saw that he had left. E. obtained the clothes and returned to J.'s. J. also stated that E. never raised any issues about her mental health, about self-mutilation, split personality, leaving home or living at A.'s house.

Mrs. K. testified that she recalled an evening in March when E. and J.M. came from A.'s house and explained that E. was going to spend the evening with J. at J.'s home. They had come home to get clothes. They seemed insistent about going to J.'s. The girls looked out of the house and saw Yatauro's truck go by and Mrs. K. looked and also observed the truck and Yatauro.

Mrs. K. also testified that sometime in March Mr. Yatauro arrived unannounced at her workplace at between 7:20 and 7:30 A.M. She was very surprised to see him. She inquired as to why he was there and he told her that he had to go out and get something for school, which seemed an odd reason to her for his appearing at her work place in Whiting, a 15 minute ride from the school. He told her that he wanted to see if there was anything wrong with E., who would

not come to the band room and would not talk to him. She saw that he was upset, and while quiet and not shouting, he was in "obvious disturbance." She told him that E. was "a kid" and to give her "some space."

Ms. Hogg testified that E. called her and advised her about the phone call to the older man and told her that he had screamed and yelled. Hogg was concerned, the situation did not sound safe. She told E. to be at her office first thing the next morning. At 8:10 A.M. that next morning, Mr. Yatauro appeared at her office before E. arrived. He seemed very concerned about E. He reported that E. would not talk to him and he wanted to know what was bothering the girl. Hogg told him that everything would be okay, that she was aware of the situation and was making sure that E. received the help she needed. To Hogg, the main focus of Yatauro's remarks seemed to be on E.'s refusal to talk to him and his belief that E. was avoiding him. He "was kind of agitated," "questioning and questioning her." As she sought to assure him that all would be all right, he kept asking over and over.

When E. and A. arrived at Hogg's office they reported the previous evening's phone call and A. advised that he was aware of the situation. E. admitted that the relationship was sexual. Mr. Kaskow came in and Ms. Hogg related this information.

William Kaskow testified that he first became aware of E.K. on March 12, 1996, when Ms. Hogg reported to him that E. had disclosed that a "controlling relationship" with an older man was causing her great concern. He asked Hogg to work with Ms. Schreiber. Hogg reported on March 13 that the man was "significantly older." Kaskow was concerned to know whether the man was in the local community or in the school. He asked Hogg to arrange for a meeting with E., and he did meet with E. and A.L. and Hogg. He spoke with the two students separately and together. They said that the man was from "up north," and not in the school. E. reported that the relationship was totally disrupting her life and that she was out of control. She was not able to have a relationship with her boyfriend or girlfriends. Kaskow asked for the man's name, but they would not provide it. He asked if the man was a teacher and the students denied that he was, as well that he lived in town. Kaskow and Hogg were very concerned about the situation. They wanted E. and A. to speak to Mrs. E. and he asked Hogg to verify if they had. E. told them that she was 16 years old when the sexual activity occurred. She reported that the person was a friend

of the family whom her mother knew, but that she did not know of the sexual relationship. E. did not want the sexual nature of the relationship disclosed to her mother. They agreed that E. and A. would tell her mother about the relationship and that she did not want to see or hear from the man.

On March 21, Ms. Hogg had a similar encounter with Yatauro to that of March 13. He wanted to know why E. would not share with him. He kept asking, almost as if Hogg could not come up with the right answer. Hogg described the man as acting as if Hogg "could not satisfy him." He was excitable, agitated, acting inappropriately, and to Hogg, it seemed as if something was really wrong. She "had a bad feeling." She had never seen a teacher react that way. On March 22, Mr. Kaskow was at the fax machine when Brian Yatauro came up and remarked "Gee Bill I never see you but once a week, now I see you more often than I ever had." Kaskow had in fact had no contact with Yatauro. Yatauro asked him what was going on, why all the turmoil about E. Kaskow told the respondent not to worry, that she was fine and in good hands. (Yatauro testified that he did not remember any such meeting with Kaskow.) When Ms. Hogg went to Mr. Kaskow and reported her concern about her encounter with Yatauro and her feeling that she knew who the older man was, they contacted Jody Schreiber and asked her if a name had been mentioned for the man. According to Schreiber's notes, she had met with E. on March 15, at which time E. reported that she had told the man, now identified as "Brian," that she did not want to see him anymore. She did not identify Brian as a teacher. E. reported that she was having difficulty with A. She also told Schreiber that in a fit of anger she had torn up cards received from Brian. Schreiber asked if the remains were still in the house and told E. to get them and hold on to them, (which E. eventually did.)

After a fairly positive meeting with E. on March 18, on March 19 E. told Schreiber that she was feeling low and vulnerable. Brian was trying to apologize and reinitiate the relationship. E. seemed to be weakening. Schreiber encouraged her to remain strong, and she reported to Hogg and Kaskow, who supervised Hogg, that E. needed extra support. In her discussions with E., it was apparent to Schreiber that the girl was "preoccupied," but the possibility of suicide, which was discussed only in connection with a superficial attempt in 8th grade reported by E. to Schreiber, was not a concern for Schreiber at that time.

When she was contacted by Hogg and Kaskow, Schreiber told them that the only name provided for the man was "Brian." Both Kaskow and Hogg testified that upon learning that Brian was purportedly the man's name, they called Mrs. K. and asked her who the person who had been controlling her daughter was. She was reluctant to name the person, and Kaskow offered that he would give her a name and she could indicate if it was correct. He said "Brian Yatauro" and she confirmed that he was the person. At this point Kaskow contacted DYFS. A meeting was then arranged for later in the day at the K. home. In this session, E., who had earlier that day exploded in anger at A.L. and J.M. when she mistakenly thought that they had revealed her secret, finally acknowledged the sexual relationship to her mother. Kaskow testified that E. was "very distraught" regarding her mother's well-being, and at the K. home, the student was very reluctant to give up the name of the man, and claimed that only the degree of control he had exercised over her had caused her to finally reveal it. He reported that to her, the sex was not the issue, it was the fact that he would not allow her to be a 17-year-old. She could not go to people's houses, he would call her and scream at her. (In fact, Ms. K. testified that at the time of these events she still loved Yatauro, still cared for him and just wanted to be left alone. She was also concerned about the problems that would occur if the matter was revealed, both for her, her mother, her friends such as A. L. and J.M. and for this well-liked teacher.) E. reported that sex, which she said occurred at least once a week, had taken place in both the K. home and at Y.'s home. When Mrs. K cried, and according to Mrs. K. said "why didn't I see it," her daughter said to Hogg and Kaskow, "See, I told you so."

Mrs. K. testified that she did recognize that the relationship between her daughter and Mr. Yatauro had developed in the sophomore year beyond that of student and teacher and that in her view he was at least for a time a "father figure" to the girl, although she added that later on in sophomore year he seemed to her to be more a "friend" than a "father." She believed that he had a similar mentoring relationship with other students, as far as their music was concerned. In fact, as both E. and Mrs. K. agreed, at one time E. had mentioned that she wanted Yatauro to walk her down the aisle at her wedding. Mrs. K. never raised a concern with her daughter about the relationship prior to Kaskow and Hogg's visit, although she also noted that when he came to the house at Christmas time in 1995 and exchanged gifts with E., she had "some question in my mind" and addressed it with her daughter, who assured her that she needn't worry, there was nothing wrong.

Mr. Kaskow testified that when he informed Mr. Yatauro of the allegations made against him, Yatauro asked him what he should do, but neither denied the allegations or asked the nature of them.

In this hearing, Yatauro discussed the events surrounding March 1996 as he knew them. He explained that during E.'s sophomore year, a student, Mr. Ja. M., told him that in 8th grade, E. had told him that she had attempted suicide. Yatauro knew that the girl had a problem, with her need to reach out and get attention. He had spoken to E. about what Ja. M. had told him and she said that it was true. In March of E.'s junior year, another student, Ms. A.S., advised Yatauro that E. had come to her and spoken of thoughts of suicide in middle school and had also referred to a television show about split personality. Yatauro had noted a great change in E.'s behavior.

On a Friday in March, Yatauro spoke to her about her not coming to the band room, her not practicing or coming in for scheduled lunch time lessons. He asked her about her discussion regarding suicide with A.S. She claimed that it was only a reference about what had happened previously, and not any immediate issue. She also claimed to be losing interest in music as a college pursuit or in auditioning for the Governor's School. She mentioned that her mother's drinking was causing her a lot of problems. She said that she was not going home because of the drinking and would not until her mother got some help, but would instead stay at A.L.'s house. Yatauro told her to get in touch with Ms. Hogg. He had no contact with E. over that weekend, and on Monday he went to see Hogg. She explained that E. had called her over the weekend and also spoke of another circumstance, which, when he asked Hogg, she described as an abusive relationship. He had no idea who this referred to.

About a week later he asked Hogg how things were going with E., Hogg replied that she was in counseling and everything was okay. Yatauro denied that his demeanor towards Hogg was "frantic." He was confused regarding where E. was living and whether everything was all right, so he tried to contact a friend of E.'s to confirm this. He in fact may have talked to a few of her friends, including A.L., but denied that he was "questioning" them. He tried to contact E.'s mother, and went to her workplace. He asked her if everything at home was all right, she told

him that everything was "working out" and that E. was staying at A.L.'s. He acknowledged that he had concern for E.

The respondent related that he did receive a "bizarre" phone call from E., who was "hysterical." She told him to leave her alone, that he was not to talk to or bother her and that she did not want him to come back to Lacey High. She claimed that she had heard he had been fired from another job (which he testified was not true). He went to E.'s house after receiving the call and spoke to E.'s mother, who seemed confused by his revelation of the call. He went home and thereafter had no contact with E. He acknowledged that despite the concern he felt that she might be suicidal after his talk with her in late February or early March he did not report this concern to anyone at school.

Much evidence was presented as to the after effects of the revelations made by E. and the resulting suspension imposed upon and criminal charges lodged against Mr. Yatauro. All relevant witnesses agreed that it seriously split the band into factions, some supporting Yatauro, some friends supporting E. Her group of friends from the time prior to the suspension were themselves divided, and as a result, some no longer were close, or even friendly, to her. Among those who testified and who she classed as having been friends, even close friends, until these charges emerged were Ja. M. and R.D.

Ms. E. denied that she ever discussed any thoughts of suicide or mental health concerns with any students during the months preceding the revelation of her allegations against Mr. Yatauro. She did make a joking reference about multiple personality disorder to Ms. Hogg. She had at one time told Ja. M. about her suicide attempt in 8th grade and also about her self-mutilation, showing him scars which she testified reflected her "channeling in harmful ways" her emotional response to events at home, including her mother's drinking and grandmother's death in 9th grade. These conversations mostly occurred while they were in middle school. Mr. Ja. M. testified however that in March 1993, he received a telephone call from E., who seemed "distraught" and spoke about taking her own life. She said "I don't know why I go on. . . Why do I continue." She repeated these comments to him the next day in school. He also reported that during high school prior to that March 1996 call, she had at times told him that she was "doing it again," showing him self-mutilation marks on her arms, purportedly made with a

scissors. (At the hearing, which of course took place long after these events, Ms. E. exhibited her hands and wrists, palms up, and no scars or marks were observed.)

A.L. testified that he dated E. from the summer of 1995 for about 1 1/2 years, including at the time of the criminal trial. They are still in contact as of the hearing at OAL. He was aware that she had outside contacts with Mr. Yatauro, that these included after school practices and that she had gone to concerts with him and others. He observed them hug and kiss after a concert, both inside and outside her house. One time in junior year (he could not be more specific) Yatauro stopped over at E.'s house while A. was visiting with her. He remained in the bedroom, watching television, while she spoke with Yatauro in the living room. The conversation lasted between 15 and 25 minutes and was loud, although he did not hear what they were saying. After Yatauro went outside, she was upset, but when he asked what was the matter, she just "blew it off," saying that he was "not to worry about it, it's nothing." However, he noted that her eyes were tearing. On another day, Yatauro was leaving and as A. was coming out of the front door of E.'s home he saw them near Yatauro's truck and she hugged Yatauro and kissed him on the cheek. He also observed a deeper hug with their arms around each other. A. was jealous, they talked about it, but once again E. "blew him off." He acknowledged that in speaking to the police he did not describe to them that he had observed an "embrace," between the two, using the word "hug" instead, as to him he did not think of an embrace as implying anything deeper than a hug.

Joseph Cox, a custodian for the Lacey Board of Education for twelve years, testified to seeing E. K. come out of the music room at around 8:00 P.M. one evening about three months or so before Yatauro was suspended. She was running out of the room, crying that she could not take it anymore. Yatauro came out and said, E., don't be that way, don't be that way," and he chased her. Mr. Cox had never witnessed such a scene before. He had seen persons alone in the band room after school hours and "lots of nights" observed E. and Yatauro there. He never notified anyone of the scene he witnessed, but would have had he seen anything "improper."

Ms. J.M. related that prior to their junior year, based upon her observations and what E. told her, she understood that E. and Yatauro had a teacher-student relationship with each other, but she was "obviously closer to him than most students were." As a section leader in the band, Yatauro relied upon her, but even more than most of the other section leaders. On several

occasions she saw his truck at her home. She knew that E. had received gifts, clothing and sweatshirts from him and wore his necklace.

Another former student, Ms. T.M., testified that after first having been told about the initial kiss during freshman year, she again discussed E.'s relationship with Yatauro with E. during sophomore year. When she asked E. what was going on with Yatauro, E. replied that "It's crazy, I go with him all the time" and related that she hugged and kissed him all the time," but did not say where this occurred. In 11th grade, she was driving with E. and asked what was going on and E. told her that the situation was "driving me crazy, (Yatauro was) always in my business, can't deal with it." She described E. as "angry, fed up and frustrated." T. testified that in both the sophomore and junior years, when her relationship with E. sort of drifted in and out and they did not talk every day, it was she, not E., who brought up the issue of Yatauro and E.'s contacts with him, not E. E. never revealed a sexual aspect of her relationship with Yatauro to T. until after his arrest. Indeed, T. confirmed that in sophomore year, E. responded to rumors by denying to a number of people that any sex was occurring. T. did not testify in the criminal trial and did not advise the police of what she knew.

Ms. M.M., who described herself as a very close friend of E.'s from 7th through 12th grade, testified that she observed Yatauro's truck outside E.'s home on various occasions, sometimes late in the evening and even past midnight.

Ms. M. described Yatauro as "very angry" at the rumors of some kind of intimate relationship which surfaced during sophomore year. He pulled several students aside and told them that nothing was going on, that he was a "father figure" to E., that it was "just a friendship." She questioned E., who also referred to Yatauro as a "father figure," and urged M. not to think otherwise.

Ms. M. related that she and her family took a summer vacation during 1994 on Captiva Island off of the coast of Florida. E. accompanied her family on the trip. E. was continually making telephone calls. She asked E. who she was calling and E. claimed that she was homesick and was calling her mother. One morning at 7:00 A.M. she saw E. at the pay phone by the pool. M.'s parents brought her inside and asked why she was using the pay phone. She cried, claimed

that she was homesick and had not wanted to wake the others. After Mr. Yatauro's suspension from school, M. asked E. if she had really been calling her mother, and E. told her that she had actually been calling Yatauro, who had told E. that if she did not call him at certain times "he would not be there for me when I got back."

During 1996, M. was aware that E. was not getting along with Yatauro as well as she previously had. E. did not go in to school early for breakfast, and she did not see Yatauro's vehicle at E.'s home. E. told her that she did not talk to him or have much to do with him anymore. At some point she observed them in a discussion in his office in the band room and while she could hear raised voices, but not words, she believed from their expressions and body language that they were arguing. Yatauro had the same look as when he was mad. (She described Yatauro as an excellent band director who had a temper, and his students knew it. When he got mad "they feared him," yet students, including Ms. M. looked up to him). In the beginning of March, she asked Yatauro for a pass to go to Ms. Hogg's office. She knew that E. was talking to Hogg about her problems. Yatauro questioned her about what was going on, in a manner which M. characterized as "kind of demanding."

Karen Marie D'Avino started at Lacey Township High School in September 1995 as the choral director, also in charge of the color guard and the after school choir. She became the band director in March 1996 when Mr. Yatauro was suspended. Ms. D'Avino, who came to Lacey from Bergen County Technical School where she taught for one year and graduated from Montclair State in 1994, will not become tenured in her position at Lacey until September 1, 1999, and would lose her positions if Yatauro returns.

Ms. D'Avino described receiving at least two telephone calls from E. on different mornings, advising her that Mr. Yatauro would not be in school that day and advising her of his directions for the day. On each occasion, E. explained that she had just spoken to Yatauro.

Ms. D'Avino also reported her observation of an incident when she was teaching a music theory class in the band room one morning. She saw Yatauro and E. at the copy machine, hugging. He was against the machine, they were "front to front," arms around each other in what she saw as an "affectionate" manner. She never saw him do this with any other student. While

she thought the hug was "inappropriate," she did not report it. On another occasion, Yatauro and E. were having lunch together in the second practice room. This in itself was not all that unusual and she recalled that M.M. and/or J. M. sometimes would be there also. This practice room was not as visible to those in the band room as was Yatauro's office with its large glass window. The second practice room was so located that one would have to be at the narrow window to see into the practice room. The door was usually kept closed during these lunches, and one day when D'Avino knocked on the door to give Yatauro a telephone message, he told her to "take a message." She felt that Yatauro was very annoyed that she had interrupted his lunch and thereafter she decided to take messages rather that to go to him and tell him that he had a phone call. However, she did not know the basis for his perceived annoyance.

After Yatauro's suspension, D'Avino was aware that E. was withdrawn, "obviously humiliated," and displaying "guilt." Other students "gave her a hard time," and she was treated like the "black sheep of the family." These others saw it as her fault that their leader had been ripped from the band.

The witness testified that she was aware that students, who were upset and confused after Yatauro's suspension and their concern that he had been removed without any answers or closure, were advised that they were not to have contact with him until the trial was over. Nevertheless, she became aware of a meeting purportedly attended by a number of band members and Yatauro on October 24, 1996, held at a student's home. This was conveyed to her by Mrs. Sa., who had several children who had gone through the band program. Thereafter, Ms. D'Avino heard comments made in her presence by students that the criminal trial would be taking place shortly and that thereafter Yatauro would return by Christmas and "things would be back to normal," and then would be done "as he wanted them done," so "they better be ready for it." She also described how, after Yatauro's suspension, it was apparent that sides had been taken and problems occurred at rehearsals, when comments were made that he would "do things differently." In contrast to the testimony of Mr. Ja. M., who described the supporters of Mr. Yatauro as "quiet about it," and the supporters of E. as openly speaking negatively about him (saying things such as, he would "fry for this," he would, "go to jail"), Ms. D'Avino observed that the Yatauro supporters were vocal, while those who supported E. constituted a small, quiet group. Speaking of a specific incident, she referred to a football game held at Pt. Pleasant Boro in

the fall of 1996, shortly after the alleged meeting of October 24. At this game 4 to 5 members of the band (which had about 100 members) placed the words "OBI WAN KENOBI[3] on their foreheads and down their arms in black eyeliner or similar medium. When Ms. D'Avino observed this display, she pulled the offenders out of the stands and told them that she did not appreciate this conduct, which she had known nothing about. The students denied that the incident had to do with anything, they simply "believed in Obi-Wan Kenobi." No one referred to Yatauro during this incident. However, Ja. M. testified that the name was a direct reference to Yatauro, although he contended that the use of the name as a code for Yatauro was strictly derived by the students and not discussed at the meeting at A.K.'s house which Yatauro attended in November 1996.

The Board presented testimony which addressed the standards of conduct for teachers and teachers functioning in a band director's role and the policies of the Board which touched upon matters relevant to the charges. William Kaskow, Director of Student Personnel Services for the District (who, it should be noted, never evaluated Mr. Yatauro), identified the Job Description for the teacher position held by Mr. Yatauro (P-60). There is no special Job Description applicable to music teachers or band directors. Additional Board policies and faculty manual sections were identified. Shown the schedule P-8 prepared for E.K. by the respondent, he explained that teachers are expected to provide advice and counsel to students on school related matters, but the primary responsibility for dealing with counseling aspects lie with the guidance counselors and Student Personnel Services, as well as the Child Study Team. Additional professionals such as psychiatrists and psychologists are available as necessary. If a student presents a counseling problem, a staff member should go to the counselors or refer the student to them, including for such matters as peer relationship issues and difficulty in completing assignments.

As for the schedule, if Yatauro came to him and said that he gave such a schedule to a pupil, he would see such conduct as problematic, for the Job Description does not in any way imply that a teacher should develop a schedule such as that represented by P-8, and the schedule represents an effort which lies outside the scope of a classroom teacher. It is not a "school house schedule," as it involves hours and activities far removed from the school day. While the Board

[3] The reference is to the wise old Jedi knight Obi-Wan Kenobi, the character portrayed by Sir Alec Guiness in the *Star Wars* movies. Before his death [and even thereafter] Kenobi provides mentorship for the young warrior Luke Skywalker.

Policy 5131(a), P-63, provides that the Board holds teachers "responsible for the proper conduct and control of pupils while legally under the supervision and jurisdiction of the school," P-8 represents a far more extensive attempt at control of the student's life and activities. It also is contra-indicated by the *Lacey Township High School Goals* for students listed in P-71, as it is far too controlling and restrictive and not designed to cultivate a student's mature self-development.

Mr. Kaskow also testified that the loan of the chain and crucifix for up to one year was beyond appropriate limits of the teacher/student relationship. The giving of personal gifts by teachers to students implies a relationship which is not proper, and the District's philosophy as presented in P-70 looks to foster "desirable relationships . . . between students, faculty, administrators, ..." The loan of the chain does not enhance any of the approved goals of the Lacey Township schools, as set forth in P-61. In addition, such conduct does not enhance the performance of a teacher's responsibilities in the job description.

The queries written on P-1, such as "Then what am I," if written by Yatauro, violate the well-being of the student and therefore violate the *Concept and Roles in Student Personnel*, P-62, which requires that the Board "provide(s) for the physical and mental well-being of pupils." A teacher stands in a position of trust and authority.

Paragraph H of Section XIV of the Board's Manual entitled "Community Relations," admonishes teachers that they "do not 'be a friend' to students but avoid ruthlessness, over criticizing, and vindictiveness. Be consistent, fair, and firm."

Reviewing P-6, the "I Miss Your Smile," etc. card, Kaskow opined that such a card sent to a female student by a teacher does not fit within conduct lying within the job description of a teacher. It is not an act of "mentorship," but instead is an act of friendship. The same can be said of such items as P-2,3,4,5,7,9,13,14a & b,15,16, and 17 if given to a female student. These items do not fulfill any of the 12 areas of responsibility in the Teacher's Job Description and neither do they advance any of the Board's policies.

The faculty manual is given out each year on the first day of class and is returned for updating at the end of each school year. It has been in effect for the High School since September 1981.

Kaskow noted that Mr. Yatauro never referred E.K. to the Crisis Intervention Team, which properly deals with students identified as in need, students exhibiting signs of possible suicidal behavior, etc. Nor did he refer her to the CORE Team, on which Yatauro sat, which deals with students with alcohol and drug abuse issues.

Band is considered to be a co-curricular activity. In the witness' opinion, any pressure placed upon a student to participate at a higher level than the student wanted to participate is conduct not consistent with the goals of the Board or the responsibilities of teachers. Students are entitled to their leisure time and are to be respected as people.

Addressing the "father figure" issue, Mr. Kaskow explained that whether the student or the teacher believes that they are involved in a "father figure" relationship, such perceptions do not advance the Board's goals. If there is a mis-perception of such a relationship, counseling should be sought to straighten out the understandings.

Several former students were called as witnesses by Mr. Yatauro. Mr. M.W., who graduated high school in June 1995, knew Yatauro at Lacey from his 9th through his 11th grades, then left to attend Toms River North in his senior year. He now attends Rutgers University where he is pursuing a B.A. degree in jazz performance piano at the Mason Gross School. He knew E.K. in her sophomore and junior years and briefly in her senior year. He described himself as her good friend in 10th and 11th grade. They spoke frequently about family situations, their lives, music. Both he and E. had pretty hard family lives, as his father had also left when M. was very young. During his 11th grade year, he visited E. at her home, and they would hang out in the living room and the bedroom, as well as in the kitchen. One time he ate with E. and Yatauro at her home. Yatauro occasionally offered to provide M. with money on band trips as M.'s family was not well off. Yatauro also taught him privately at school without pay.

The witness testified that he spoke "every day" with E. during 10th and 11th grade and they discussed Yatauro in regard to the band, music and his approach to teaching. She discussed her relationships with other boys in detail, but she never mentioned sex with Yatauro, indeed never mentioned anything other than a student/teacher, mentor/student relationship with him. He was aware that she was practicing less about the time that she started to date A.L.

After he moved to Toms River, Mr. W. maintained a mentor/student relationship with Yatauro, showing the respondent ensemble pieces which M. was arranging for the Toms River North Concert band. Once he visited Yatauro at the respondent's home regarding a large ensemble piece. At some point while he was a student at Toms River North, Yatauro drove him to see the Lacey Band perform, but he is not sure when this occurred.

The witness recalled that Yatauro used the "catch phrase," "No mistakes" in his musical theory class as a short hand for being very thorough, treating the music with respect, honestly and sincerely, in such a way as to avoid making mistakes. Yatauro advocated that a student should do everything seriously in order to get all correct, there should not be any mistakes if one kept focus. He used the phrase in similar circumstances with other students.

Yatauro purchased a book for M., a collection of songs which he estimated cost perhaps $20. He also gave him compact discs for his birthday. In addition, when he wanted to attend a jazz clinic which Yatauro was giving in the summer of W.'s sophomore year and the school would not assist his attendance, Yatauro allowed him to attend the five week workshop without charge.

Mr. W. never saw Yatauro kiss E., but saw them embrace right after the band won a competition, when "all were embracing." He is sure that Yatauro hugged him as well. M. described Yatauro as a "really special person in his life," who allowed him to feel that he could do what he wanted to do. He provided a sincerity that W. had not found in his family or otherwise. He provided support which had not been there before.

Ms. P.T., a 1995 Lacey graduate who was a band member and served as drum major during her last two years, is now a college student and auditor for an accounting firm. She testified that when E. joined the band she made three phone calls to Ms. T. and spoke about her

personal and family life, indicating that things were not good at home. At the time T. did not really know E. T. felt that E. was emotionally distracted and she spoke to Mr. Yatauro out of concern for why E. was calling her. Although she acknowledged that E. never mentioned the word, she was worried that E. was insinuating suicide, and she had never dealt with anything similar before. However, she is not certain that she mentioned her concern about suicide to Yatauro. Yatauro told her that both he and the guidance counselors were aware of E.'s family situation, and opined that perhaps E. simply needed someone to talk to and P. seemed approachable.

Ms. T. felt that the respondent was caring about his students and she discussed nutrition, diet and career plans with him. He gave her inspirational messages on the computer and on practice sheets and told her to put them under her pillow before competitions. He never discussed birth control with her or sexual issues regarding her boyfriend, did not go with her outside of school or come to her home. He never gave her gifts. He spoke to her of the concept of time management, but never discusses "time, distance, love," with her.

Ms. T. observed Yatauro hug "everyone," including E., after competitions or on their birthdays. Like others, she remarked that E. always seemed to be trying to get his attention. Many times he would roll his eyes at E.'s actions and try to walk in another direction. E. was a "touchy" person, always putting her arm on people to get attention, more so with Yatauro than others. He seemed as if he was trying to get away when she did this to him and acted as if he was not approving of her conduct. One time during T.'s senior year, Yatauro yelled at E. in class when she interrupted him and she stomped her feet and rolled her eyes like a child being told off by her parent.

B.S., another 1995 graduate, band member and football player, who described himself as a friend of Yatauro's during his school days and "absolutely" now, testified that the respondent was a perfectionist and that "no mistakes," was his motto, often said and even made into a placard by someone and placed on the wall. He "absolutely" discussed his personal life with Yatauro, as did others. The teacher was "very honest, straight up and down," and "asked the best from everybody." This was especially true in S.'s senior year when he was not close to his guidance

counselor and saw the respondent as his "counselor." He received a "beautiful" letter of recommendation from Yatauro.

B.S. confirmed that clothing was often "borrowed" from Yatauro's office and not always returned, as he personally still had Yatauro's windbreaker. S. visited Yatauro at his home to sample the cooking which Yatauro bragged about and to watch sports events. He worked out with the respondent, who was into martial arts. He and several other students also worked on repairs to the teachers condominium in the summer. He once received a key chain from Yatauro a few days after they and others attended a New Jersey Devils game. When he lost his wallet on the Virginia Beach trip Yatauro gave him somewhere between $60-$100 and he has not paid him back. He drove Yatauro when the teacher's truck broke down.

On one occasion during his senior year, Mr. S. went to Yatauro's office and found E. there. Yatauro was talking about how sore he was from his karate lesson and she took it upon herself to rub his trapezoids. Yatauro gave S. a look and S. "felt uncomfortable," as he "could tell" Yatauro did as well. He told her that the massaging hurt and she eventually stopped.

On another occasion, she entered the office while Yatauro and B.S. were talking. She seemed annoyed that they were conversing. When she interrupted their conversation, Yatauro told her that she could not just do so and asked her to excuse herself. She became upset "real fast."

Mr. S. was not aware of jealousy on the part of other band members to the time which E. spent with Yatauro. Indeed, he did not recall any reaction to it. He did not recall seeing them together more often than he saw Yatauro with other students.

The witness related that he had been accustomed to wearing very baggy jeans to school. Mr. Yatauro once screamed at him, "S.," and told him to "pick up your jeans, tuck in your shirt and put a belt on," all of which he did. S. and his girlfriend, K.H., went shopping in the Ocean County Mall with Yatauro while in high school.

R.D., now a junior in college and another 1995 Lacey graduate, band member and football player, testified that in his senior year Yatauro sat him down and counseled him when D. started to slack off and miss school, causing his grades to suffer. Yatauro advised him to get things together, avoid alcohol and put himself in a position to get into college. Other teachers did not do this, they would just report him when he got into trouble. Yatauro called D. when D. was out of school or missed a practice to see if everything was okay. The only other school personnel who did this were attendance officers. Yatauro was different than the school's guidance staff, "more like a friend than a normal teacher." The guidance personnel were always too busy if D. needed to see them, or if available only wanted to talk about grades. Yatauro was a one-on-one type person, who D., and everyone else, discussed their personal problems with. Yatauro also lent him money which he has since paid back. D. was another of the Virginia Beach "ear piercers" and had no problems with his parents about that event. He shopped with Yatauro around Christmas time and birthdays as well.

The witness acknowledged that he viewed the respondent as "one of the guys," and has described his relationship with Yatauro as "unique." He has previously said that he "loves" Yatauro, who was his "mentor." However, Mr. D. denied that he ever said to the parents of M.M. that he would do anything, including lie, for Yatauro.

D.'s father did not live with him. Perhaps two or three times since he graduated, Yatauro has come to his house to see how he is doing. While D.S. was in high school, Yatauro was at D.'s home perhaps six or seven times.

Mr. D. lived 1 1/2 blocks from E. He recalled that he would sometimes see Yatauro's truck outside her house and would beep the horn and Yatauro would come out to see him. He once saw the respondent working in the yard. It is possible that he and another student, M.C., may have gone into the house once.

K.B., a 1994 Lacey graduate and band member now a college student, testified that she was a section leader for the trumpet section and it was not unusual for Yatauro to call her at home to see if a letter or other project she had to perform had been accomplished. He also called if she missed school to see if anything was wrong. In addition, he called even when she was not

sick or absent, "just to talk" for five to ten minutes perhaps every other week, just to see how she was doing. These calls were continued during the summer, either he or she initiating them. He advised her as a friend and mentor on things to do and not do in life, on college decisions, etc. He never spoke with her about birth control or sexual issues involving her boyfriends. She was alone with him at times in the band room after school, and once he came to her house alone to borrow her car, which had a trailer hitch, to pull the band's trailer. She was never uncomfortable with him. He never entered her home when her parents were not present and was never in her bedroom. He did give her a friendly hug at times. She also baby-sat for him. When she graduated he gave her a card and $100, as she also received $50 from a teacher who was a family friend and neighbor. Her parents were aware of his gift and expressed no concern about it. The card was signed, "With love, respect and thanks, Brian Yatauro." At graduation, he told her that he "missed her" and "loved her." He kissed her on the cheek then and has since then when she came back to school to visit.

Ms. B. recalled that she observed E. to be very "protective" of Yatauro, always in his office, always wanting his attention. Once, when he was absent and B. had to go into his office to get some paperwork, E. did not want to let her into the office.

Ms. S.G. is now a student at Trenton State, Mr. Yatauro's alma mater. She graduated from Lacey in June 1998 and was a sophomore when Yatauro was arrested. Her father died in December of her sophomore year. She had a hard time dealing with this and tended to shut out people. Yatauro helped her get through the situation, get herself back with her family and friends. He spoke to her of his own father's illness. He inspired her and she used music to keep herself occupied. She acknowledged that she "owes Yatauro a great deal" and he is the person she most admires. She appeared before the Board of Education to support his reinstatement in September, 1997 and was visibly upset at that time. At the time she argued that the tenure charges had nothing to do with his ability as a teacher. She saw him at his home about five times during her junior and senior years, always with her mother. These visits lasted about 1 1/2 hours each and they discussed music, her personal playing, exercises, how she was doing without her father, college matters, etc. They also spoke on the telephone more often then they visited, she calling him.

In addition to the students, two parents testified. Gail S. testified that her older son A. was in the band under Mr. Yatauro's direction. The boy had a "familial" relationship with Mr. Yatauro, whose child called him "uncle A." She recalled that A. went shopping with Yatauro on a number of occasions. He really liked the teacher a lot and tried to do things with him. She and her husband were aware of this. Her son ate at Yatauro's home when he went shopping with him and on one occasion he and several other students slept at Yatauro's home when they returned late one evening from shopping around Christmas time. Her son and others had their ears pierced while on a band trip to Virginia Beach. Yatauro accompanied the boys to the piercing and she was not concerned about this, as Yatauro knew that her son had been given permission to do so, having been present one evening after a band meeting when she and her son had talked about the idea. She believed that her son paid for the piercing. She never questioned Yatauro about the fact that he and another teacher and band assistant director, Mr. Schuerman, accompanied a group of students to a hockey game at the Meadowlands Arena and to dinner. This was "common knowledge among band parents." She also explained that on perhaps five or six occasions Yatauro called her son on the telephone and left messages such as "Where are you," which may have had to do with his having to be at a band practice. Yatauro once dropped the boy off at home, but she was not there at the time.

The witness described E., whom she first met during middle school when E. and Mrs. S.'s younger son were in the Middle School jazz band, as "very forward," toward Mr. Schuerman, even in 8th grade. According to the witness, E. was "all over" Schuerman, always running up to him. Once she actually began to change in a room. Schuerman left, but her son stayed. Mrs. S. told E. that she "shouldn't be doing this." The girl "always had to be the center of attention." At the band camp in the summer before 9th grade, she observed E. "still very close to Schuerman, run up to him, give him a hug and cling on his arm." E. referred to him as "Schurmie." At a band parents meeting in October or November of E.'s freshman year, she offered to drive E., home, as she was the only child there, but at first the girl said that she would wait for Schuerman to do so. However, S. insisted and did drive E. home. She agreed that the presence of students at these meetings was not uncommon. On another occasion in the Spring, when Schuerman brought his wife to a school concert, S. observed E. to be "visually agitated."

Mrs. S. testified that by E.'s sophomore year and on into her junior year, E.'s attention had shifted to Mr. Yatauro. She was constantly in his office when S. had occasion to visit, and when she wanted to speak to Yatauro, she had to ask E. to leave the office. At this, E. would get "huffy." She again was "always the center of attention." When rumors circulated about Yatauro and E. during her older son's senior year in the Spring of 1995, she called Yatauro, told him what she had heard and he answered all of her questions. He told her that E. was a very talented musician and that he was being her "mentor" (Mrs. S.'s word), giving her private lessons, and he explained that his car had been parked at the K. home because he had been driven to competitions by Mrs. K. S. saw nothing to lead her to any conclusion that there was anything untoward going on. She did recall that after A. graduated in June 1995, she had occasion to speak to Yatauro in the next school year and E. was not around the band room, did not answer the phone there as before, and there seemed to be a lessening of E.'s involvement in band activities.

Mrs. S. recalled that Mr. Yatauro gave $40 toward her older son's scholarship from the Music Department. He also gave the boy a hat on one occasion.

According to Mrs. S., Yatauro felt that if one were going to be in music, one had to give it one's all. In his freshman year, when A. was playing soccer and also participating in the band, Yatauro was once very upset about A. wanting to leave a football game to socialize with the soccer group. She thought that Yatauro was "very arrogant," and had a "lot of nerve." He asked A. if he planned to stay in the band and wanted him to give the band his full attention. She felt that this was an issue between she and her son. She felt as a parent that Yatauro was taking a lot of her son's time, given the demanding practice schedules. Two or three months later she told Yatauro how she felt about him and he laughed.

Mrs. S. acknowledged that the changing of blouses with bras remaining in place underneath was common practice within the band in high school, occurring even on the bus, in front of teachers and mixed groups of students.

Rosa C., mother of another band member K., a 1995 graduate who served as drum major, testified that Mr. Yatauro wanted to have a perfect band program. Mrs. C. testified that when her daughter wanted to play sports she had to deal also with the very demanding band schedule.

Yatauro once put up two fingers when her daughter ran in nervously from a basketball game and he said, "What am I #2." He wanted the band to be #1. He said "Music is #1." K. eventually quit sports to concentrate on the band. C. acknowledged that K. had a "special rapport" with Yatauro.

Yatauro would call K. at home about band matters and these would result in calls passing down the band's phone chain, and also called Mrs. C. for band related matters. If K. was out of school for a couple of days he would call to see if everything was okay and to find out if the girl was sick. When she had a car accident he called as well. She could not recall that other teachers did this. However, he did not come over to the house when K. was sick or at the time when she was out of school due to the accident.

Yatauro gave K. a baseball cap with her initials on it and a "B.U.M." shirt at Christmas. She did not recall that other teachers gave her daughter gifts. She had no concern about these gifts. He also gave the girl birthday and Christmas cards, none of which referred to K. as "his soulmate."

Mrs. C. also observed that E. had a tendency to try to always be near Mr. Yatauro. If E. had been her daughter, she would have "seemed too close for comfort." She spoke to him about this. She remembered that when her daughter was a senior she and others complained about how much of Yatauro's attention E. took from them. When she took it upon herself to talk to Yatauro about this, he explained that he was acting as a "parent" and friend to E., that "kids come here, need attention." At one point she had been told that his vehicle was seen a number of times outside E.'s home. He claimed that E. was having emotional problems at home and that he had told Mr. Adamski what he was trying to do for E. She told him that E. was "always there" (that is with him) and he said that he'd consider her advice. He told her that as far as E. was concerned, "he had it under control," or at least words to that effect.

Mrs. C. once baby-sat for Yatauro's child with her daughter at her sister's house when Yatauro called her at work to explain that he had the boy at school in the band room where he was working on band camp music. She acknowledged that she had "strong feelings" for Yatauro,

liked him very much and had had a "close relationship" with him, although they now talk "once in a blue moon."

Francis Schureman, a music teacher in the Lacey District employed by the Board for 18 years and a teacher for 25 years, testified that he served as assistant band director at the High School from 1986 until June 30, 1997, and also directed the jazz band at the Middle School. He has socialized with Mr. Yatauro outside of school as well as serving as his assistant. Mr. Schureman related that he has conducted private lessons for students both at the school and in his own home and has not sought permission to do so from the Board, although he believed that the administration was aware of his activities. He observed E.K. and Mr. Yatauro together on occasion. They seemed friendly, but in his view Yatauro was "basically friendly with anybody."

The witness acknowledged that he was never at a student's house very early in the morning except for a 3:00 A.M. breakfast at the H. home following a competition which was attended by many persons, including Mr. Yatauro.

Mr. Schureman confirmed that while in Middle School E. was always in the band room, hanging around, standing next to him. She was a "hugger," who would initiate hugs. He would respond to these by giving a half hug back with his arm next to her.[4] As a rule, Schureman would not give a student, in fact not even his own child a "full hug," as it is "not his style." He recalled that on one occasion K. wore clothing of his, a sweater which he had at a rehearsal and later realized K. had been wearing without asking for his permission. She returned it to him when he asked for it.

Schuerman observed that E. clung to Yatauro more than she had to him. One time he wanted to talk to Yatauro when she was with him and when Yatauro asked her to leave she gave them a look which, "if looks could kill they'd (he and Yatauro) both be dead."

[4] Another witness, Thomas R. Dorso, a school social worker employed for 21 years, also experienced hugs from E. when he knew her in Middle School and in 9th grade. Others also hugged him, although he characterized this conduct as "not normal interaction." He would respond by acknowledging the embrace (his word) and creating distance with his hands while appearing "almost frigid."

Mr. Schureman characterized a situation where a teacher was in a student's bedroom watching television at night with the door closed as "not normal." He was not aware how much time Yatauro and E. spent together outside of school. When he gave lessons to students, 99.9% of the time someone else was at home with him and he was paid for the lessons. Schureman did not socialize with students outside of school, never dropped off presents at student's homes when no one was present, doesn't recall that he bought students gifts, did not give students Valentine cards or go shopping with them, did not discuss birth control with students or ask if they were sexually active, never left clothing at a student's home and has not had dinner alone with a student at a restaurant. He has not kissed students on the lips or left messages on a student's answering machine. He would not do these things which are in many cases inappropriate. He has given graduation cards. He has delivered an instrument to a female student's home, possibly because she was sick, however, he did not come unannounced.

Schureman's daughter was a band member in Yatauro' band for three years. Nothing he saw or heard of ever caused him to be concerned about Yatauro' conduct.

The respondent's expert witness on the role and conduct of a band director and high school music teacher was Frank Lewis Hughes, a 24-year employee of the Toms River Board of Education and Band Director for Toms River High School North. Mr. Hughes holds a Masters Degree in Instrumental Conducting, a New Jersey Supervisor's Certificate and is the only member from New Jersey of the National Band Director's Hall of Fame. He has lectured at professional clinics for the State Music Director's Association. He knows Mr. Yatauro as a band director in the area, has seen his interaction with bands and musicians at festivals, competitions and a football game and in the South Jersey Band on a total of about three or four times, and presented factual testimony on these subjects. He described the respondent as "dynamic, very strong, very forceful, very demanding." Students seemed to respect and like him a great deal and the interplay between Yatauro and band members seemed "easy."

Mr. Hughes related his interactions with M.W., the former member of the Lacey Township High band who had transferred in his senior year to Hughes' school. He had W. at his home often for jam sessions and drove W. in Hughes' car to auditions for such social events as

attendance at a concert which they were each attending. Yatauro, Hughes and W and two others played in a summer group at W.'s request to assist a summer music program.

The witness explained that in general the relationship of a band director to his or her students is not the same as that of a regular classroom teacher with that teacher's students. This is because the band director tends to have the student in the band for three or four years, whereas the typical subject matter teacher may often have the pupil in class for one year. The music teacher/band director has the opportunity to watch the student grow and develop musically and as a person. In addition, as music is a very emotional subject, the instructor seeks to reach the student in order to draw these emotions out from the student. He has observed the level of emotional involvement displayed by Mr. Yatauro.

Mr. Hughes reviewed a number of issues regarding interactions with students and the propriety of such activities. The music teachers and band directors discuss issues of conduct at conventions, band camps, etc. Students frequently will discuss personal issues, such as legal problems, family issues, pregnancy, deaths, etc., with directors. Hughes has on occasion given money to students for lunch, or so that they could pay restitution, and at times these have been "gifts." Others did this as well and it is not an uncommon practice. He has also driven students to school events. He has been consulted on car stereos, tuxedos and has taken students shopping, helped pick out such items and aided in the installation of equipment. He has given gifts of jewelry as an award for making the All-State Band, such as a pin with an instrument on it. He has given students T-shirts, mugs as a graduation present, and has purchased mouthpieces and reeds for students who could not afford them. He has always been reimbursed in these instances. Again, this is common practice amongst band directors. He has called students at home who have missed important rehearsals of performances or if they have been out of school for an extensive period of time. He has visited students' homes for private lessons, or for social occasions such as graduation parties, weddings of siblings, and has golfed with students. He has showered in a student's home (a friend of his daughter) after a golf outing prior to a nighttime rehearsal. He has been allowed to enter a student's home prior to a lesson when no one was yet at home and the door was left open for him and a message left to "make yourself at home." He has even fallen asleep while watching television after having been invited to stay for dinner at the home of a student who was his last private lesson of the day.

It is not unusual for a band director to seek to nurture and guide, challenge and prod his better students to try to get them to make the best use of their talents. Hughes has himself mentored a lot of students, by which he means that he gave the student extra time and attention to help the student achieve a particular project or goal and provide direction and advice regarding music.

On cross-examination the witness acknowledged that he had signed a statement in which he expressed his "utmost faith that Brian is innocent of the allegations made by Ms. K." He agreed that it would be "poor judgment" for a teacher to watch television with a student behind closed doors, an activity that has nothing to do with teaching. He would not kiss, embrace or tell a student that he loved her. This is neither appropriate nor good judgment. He has given a lucky silver dollar to a musician prior to an audition, but received it back within a couple of days. He has been in a student's bedroom to give a lesson with the door closed if the parents of the child were at home. If the parents were not home the door would generally be open. It would be inappropriate to ask students about sexual activity with their boyfriends. He has not gone out to dinner with students alone. He has left messages for students inquiring where they had been or what they had been doing, but not who they were with or whether or where they were with a boyfriend. It is inappropriate to use the word "fuck" in the presence of students. It would be inappropriate to shop with a student for her bikini. If the teacher thought that a student might be suicidal, the proper course would be to contact the parents and to seek professional assistance, following the Board of Education's established procedures. Expressions to a student such as "Happy Birthday Sweetheart," or the "I Miss Your Smile" etc., are inappropriate. He does not believe that it is appropriate to give Valentine cards to any student. As for the creation of a schedule for a student, the propriety of such an action would depend upon the context. He has prepared a schedule for a student who needed assistance in structuring his or her time. Usually the student is having trouble accomplishing school work, practice, social time etc., in one day. When he has done this, perhaps three or four times, the child's parents have discussed the problem with him, or he may have told the parents that the child seemed to require such a schedule.

Mr. Hughes advised that he personally remains aloof to most of his students.

In his direct testimony, Brian Yatauro agreed that some of his teaching methods and contacts with his students were "unusual." He spent "a lot of time with the kids," summers, nights, weekends, before and after school, trips, rehearsals, etc. However, he contended that the school's administrators knew of his methods and did not complain to him about them. Some of the administrators and Board members' own children were members of the band and students of his at one time or another. These authority figures saw him at malls and restaurants with students. Other teachers held similar "get togethers" with students as he did, lunched with students, purchased gifts for them. These did not seem to be out of the ordinary practices. As for the Board's policy against becoming friends with students, he did not know about this, and only read the manual when he first received it, but actually had no recollection of actually receiving it.

In his statement to the Prosecutor's investigators, Yatauro acknowledged that he never spent time with another student in the way that he did with E., and never had a personal relationship with a student in which they spent time at each others' homes the way he had with her.

Yatauro denied that he had any "professional contact" with students after he was suspended and advised that he was to have no "professional contact" with them. He did go to A.K.'s house on a school night before the criminal trial and a number of students were there that evening. He was working part time as a limousine driver. He was in the area of A.K.'s house He had been asked to stop by there when in the area. Students did come over to the house he had no "professional contact" with them. The gathering lasted for perhaps 2 to 2 1/2 h around 11:00 P.M. Various parents were also present. He anticipated that the tri over by the Christmas holidays and so advised Mrs. S. that night when she aske doing. He planned to return to school and teach after what he anticipated would outcome in the criminal matter. However he did not say this to the student which surfaced thereafter (apparently such as testified about by Ms. D'Avino what he told Mrs. S. that night. As for "Obi-Wan Kenobi" he does n mentioned that evening, and he only heard about that name in relation to got into trouble at the football game.

Yatauro did accompany a group of four students from his house to Jackson Townsl High School on a day sometime after his suspension. They had stopped at his house for a soci visit and then A.K. had to go pick up his girlfriend. They asked if wanted to go and he went. H did not see the Jackson Township band that day.

The respondent also acknowledged that he spoke occasionally with Ja. M. The conversations were not of a professional nature, although there was some talk about Ja.'s frustrations with band issues. However, Yatauro told Ja. that he could not talk about specific matters.

In his interview with the Prosecutor's investigators, the respondent, who agreed that he had kissed E. and had verbalized to her that he loved her (but never in a sexual way), acknowledged that his relationship as a thirty-year old man with this fifteen-year-old student was unusual,

> not a normal thing to do. I mean there, on occasion, after we did things and that was, I guess people would look at that as being improper if that's what we're . . . I think people would look at that as being improper but . . . I guess I would imagine other people would see them as improper but I felt that I didn't really see them as improper. I don't think E. did and, I believe her mother didn't . . . Cheryl didn't either. She knew that I cared about the kid . . . love is, is concern as well.

DISCUSSION AND ANALYSIS

The Board's most serious allegation against Mr. Yatauro is that he engaged in sexual ions with Ms. K., an early to mid-teenage student. The Board additionally claims that even and in the absence of a sexual element, the nature of Mr. Yatauro's relationship with was inappropriate and in violation of the standards for a teaching professional. As the respondent readily acknowledge, if sex occurred between this adult teacher and tudent, Mr. Yatauro will rightfully lose his tenure. If sex did not occur, then the e propriety of his conduct in relation to Ms. E. must be carefully weighed, and

if he did violate the proper limits of such a relationship, the appropriate remedy must be assessed. As the determination of the question of a sexual relationship is potentially dispositive, the proofs on this subject will be examined first.

Not surprisingly, there are no eyewitnesses to the sexual activities alleged by E. The respondent admits that he occasionally hugged her, that he kissed her on the cheek, but not on the lips, that he had a very close friendship with her, that he spent time alone with her in her bedroom, even on her bed, that he was alone with her on at least a few occasions at his home, that he bought her some gifts, that he traveled alone with her on shopping trips, to restaurants, to local places of interest. Nevertheless, he denies that his self-described "mentorship," his "friendship," his "father-figure" relationship with her ever slipped over the edge of propriety into improper physical and sexual contact (putting aside for the moment the questions of its appropriateness given his role as her teacher).

There are a few important physical exhibits which may be significant clues to the answer to the question of whether Mr. Yatauro's denials are genuine. If certain of the disputed documents were actually given by Yatauro to E., the implications are very significant. For instance, the "friendship" card, P-6, which bears the name "E" in the upper corner, was a card which he admittedly signed "Love Forever & Always Brian." Thus there is no question that this was a card he had purchased and had filled out to give to someone, someone whom he wanted to tell that he missed much about the intended recipient, that person's smile, laugh, and their "quiet times" and "wild times." The interior wording strongly asserts the real feeling Yatauro intended to convey to this person, in fact it refers to the possible concern of the recipient that that person may have felt that he or she (the card itself is gender neutral) was putting too much of an investment of "emotional energy in someone who, all along, just thought of you as a friend," when, it assures the recipient that Mr. Yatauro viewed the relationship as much more than that of "friendship," indeed, it says that he thinks of the recipient as "Way more than a friend." (emphasis in the original). The card does not of course imply that the relationship of these persons is sexual, or necessarily even romantic, but the intent of the card is surely to tell the recipient that Mr. Yatauro has a great deal of feeling and emotion for the person.

If the card was actually sent to Cheryl Yatauro at some time or another, than it is evidentially unimportant, that is, unless Yatauro took an old card from the storage area and placed E.'s name thereon and re-cycled the card to her. If he sent it to the teenager, whether it be a new or recycled card, then the act of sending the card and the card itself suggest, in fact establish, that his feelings for E. were well beyond the appropriate level for a teacher and a student, indeed even for a mentor and a student or a father figure and a teenager. The card may not by itself prove sex or romance, but it would be a telling message about how he felt for E., how he viewed them as a set of two interacting persons. Additionally, since he denies having placed her name upon the card, if he did, his credibility is substantially effected, and the conclusion must be that he is now trying to hide the depth of his feelings for and involvement with E. That in itself would be a powerful clue to the truth of E.'s assertions.

Another document which may be strong evidence of the actual nature of the relationship is the folded index card, part of P-4. Yatauro denies that he ever gave the card to anyone, and apparently suggests it was purloined from his briefcase, desk or some other private place. He identifies the item as a example of his jottings, the "for you and me!!" as probably a song title. The inside note, which he suggests to be lyrics, or at least thoughts about a song, seem to read more like a straightforward note to a lover. While perhaps the wording does not intend to convey sexual messages, and perhaps some non-sexual words or phrases might fit the blanks, a fair reading of the note as a whole and the lines, "You look tremendous today. My gorgeous woman. Mmmmm. I want to give you my ------. You know, I also want to make you ------. You love it, admit it," strongly suggest that the writer intends to convey sexual thoughts, but even if not, the whole seems to almost compel the conclusion that the writer is at least speaking of romantic matters. In sum, if this card was written to or given to E. by the respondent, the almost unavoidable conclusion must be that he was romantically and/or sexually involved with her.

The series of cards and such documents produced by Ms. K which Mr. Yatauro denies having given to her and which he asserts were actually given to his wife at one time or another, pre- or post-marriage, are additionally important. If despite his present denials he did send them to E., then his credibility is seriously damaged and the full extent of his feelings for the girl are more completely revealed. If instead, he is correct and he never sent these to E., we are faced with some disturbing possibilities. Since E. produced these for the authorities, she had to have

obtained possession of them at some point. If they were indeed stored in a drawer or file in Yatauro's basement, (here it must be noted that Cheryl Yatauro never testified in this proceeding and never confirmed any of her husband's assertions) then she must have stolen them from there. If she did, then it would appear that at some point she was rummaging through his dressers, or at least the basement storage area. She must have either taken these old, stored memories and converted them into her own store of "pseudo-memories" and later used them against him, or, with an already formed intent to harm Yatauro, must have taken them to serve as evidentiary proofs of a relationship so that she could provide them to the authorities when she leveled her false charges against him. Either alternative would create deep concern about E.'s credibility, for she was either so obsessed about Yatauro that she needed to use his wife's stored remembrances to create her own fantasy life involving him, or she, for some unknown reason, simply determined to "get" Yatauro. It is possible that these two scenarios even blend into each other.

The expert evidence presented by Ms. Doherty is helpful in resolving whether Yatauro wrote E.'s name on P-6. As she noted, it is clear that the writer of this word did not use a loop in the letter "E." In known samples K-9 (P-10), K-8 (P-8), K-12C (back of P-16) and K-13A (P-47, pg. 2), Yatauro also used no loop. The "dash" form of dot over the letter "i" appears three out of four times over that letter in the unknown sample and in the spelling of the full first name in the known sample K-12C. An important additional support for the correctness of Doherty's conclusion that Yatauro wrote E.'s name in the corner of P-6 is her analysis of the unknown and disputed item in P-9, the square white piece of paper bearing the words "4-U with a special one for your heart." The key here is the word "the," in the phrase, "You are the ultimate woman." Doherty compared the form of this word to known samples P-13 and P-15. The formation of the word is in fact strikingly similar to several parts of P-13. For example, the word "the" appears in the sentence in the second paragraph which reads, "So I broke the balloons" and again, "the" in the third paragraph in the phrase, "So I get disappointed that you didn't act or overreact the way I would have wanted . . ." In each the formation of the "h" and the "e" and combination of the two almost makes the "h" appear as an "L" and the "h" has no hump. This also appears in the word "the" in P-15, which he says were his jottings relating to a Chopra tape, where once again the word "the" appears in the phrase, "I feel that if we had more opportunity to share the love factor and commitment . . ." In fact, the same formation appears back in P-13, in the word "she" which appears twice in the first two lines of the document. Since Ms. Doherty's identification of

Yatauro, the acknowledged writer of P-13 and P-15, as the writer of the unknown sample Q-7 (P-9) has been shown to be correct, that is, she says that the same person wrote both because of the similarities and, in fact, he acknowledges that he wrote P-9, her determination that he was the person who wrote the full first name "E" in the upper corner of P-6 gains considerable credence.

As for P-13, Yatauro denies that he gave this to E., although he acknowledges writing it. The reference in the letter to the class periods 8 and 9/10 is telling, as it is clear that these periods have meaning in connection to E., but the record does not reveal any connection that this comment might have to Cheryl. Thus, I **FIND** that Yatauro did give this note to E.

Based upon the testimony of Ms. E. and of Mr. Yatauro, the convincing expert testimony of Ms. Doherty, which stands unopposed by any countervailing expert proof, and an examination of the documents, as well as consideration of the documents in the context of other testimony, I **FIND** that Mr. Yatauro did write Ms. K.'s first name in the corner of P-6 and did give her this card. In addition, I **FIND** that he did give her the folded index card, part of P-9, and that whatever the meaning which he intended to attach to the blank spaces, the card clearly indicates that the relationship he had with Ms. K. was not limited to friendship, mentoring and a form of parent figure.

A further significant consideration in determining the truth of Ms. K.'s allegation of a sexual relationship is the manner in which her claim was revealed. The evidence establishes that when she first spoke to Ms. Hogg about the subject of an abusive relationship, E. did not reveal any details about the person with whom she claimed she was in that relationship. Over the next few weeks she only reluctantly and when prodded came forth with additional, sometimes cryptic information. She attempted to deflect any thought that the "older man" was a person from the local community, from Lacey High or from the school district, as did her boyfriend, A. Even though I **FIND** that by this time she had told J.M. and A.L. who the man was and that the relationship was sexual, she did not readily volunteer this information to school authorities, and in fact the credible testimony of Ms. Hogg and Mr. Kaskow establishes that the respondent's own panicked queries about E. led them to question the possibility that Yatauro might be involved. By

that time E. had identified to Ms. Schreiber that the first name of the "older man" from "up north" was Brian, but it is not at all certain that she would have identified "Brian" as Brain Yatauro.

In fact, had Yatauro's response to the telephone call from E. been to back off and to openly accept her strong statements of disinterest in him, it is not clear that he ever would have been identified. In the event, Kaskow took the offensive, contacted Mrs. K., and learned that Yatauro, who had even gone so far as to come to her workplace in his frantic attempt to learn what E. was up to, was the man who was calling and pursuing E. Thus, in the whole time from February, when she let J.M. and A.L., two good and close friends, in on her secret, until the moment she told her mother, Kaskow and Hogg while seated in her living room after being summoned home to a meeting, E. never made any open attempt to identify Mr. Yatauro as the person with whom she was involved. If the respondent suggests that the accuser was setting him up, was stealing his wife's cards from his house, was asserting a false charge against him, etc., then the evidence of what actually occurred reveals a strange pattern to her purported scheme.

It is far more reasonable to conclude that E., while not necessarily so concerned about the sexual aspects of the relationship, was nevertheless tired of the relationship, of its demands, the restraints and controls, real or exaggerated, which she felt arising from her tie to Yatauro, and that she finally sought an out from it. As for whether that relationship involved the intercourse and oral sexual components she insists it did, given the nature of her conduct, the credibility her allegations gain by the evidence supporting her story as against the evidence which does not support and in fact damages the credibility of Yatauro's defense, the credibility of the supporting testimony of A.L. and J.M. and of Mrs. E., I **FIND** by a preponderance of the credible evidence that Mr. Yatauro did engage in sexual conduct with E. It is not especially important to determine whether the sex was as frequent as E. says, as even one episode of oral sex or intercourse between the two is sufficient to condemn Yatauro, but on the whole, it is likely that E. is essentially accurate in detailing numerous sexual encounters. I **FIND** her truthful as to sexual activities occurring in her bedroom, starting the evening in June after the parade, and at his home that summer.

I **FIND** E. to be truthful as to her having called Yatauro from Florida, having been pushed by him and having been subjected to pressure and harassment by him.

Yatauro's explanation of the cryptic entry, "You know" for the July 12 lesson is not credible, as I do not believe that the whole sum and substance of that day's lesson and of his alleged concern as to her purported deficiencies in the previous week, etc., were summed up by such a limited and unclear comment, especially since Mr. Yatauro does not appear the type of teacher and guide who would have been so unclear and indirect if he was dissatisfied with E.'s performance. I credit her explanation that the comment is unclear due to the subject matter it addresses, and that the real intent was to remind her of the sexual tryst that day. That the couple ran risks in having sex in his home or her bedroom when others could possibly arrive (as indeed I **FIND** Cheryl's parents once did), or when others were at home in her house, or in school, does not eliminate the possibility of such carryings on, in fact, it would be foolhardy to suggest that the chance of discovery negates the possibility or even the probability of sex between determined lovers.

The precise details of all of these encounters are not clear from the record, but suffice it to say that I am convinced that they had some form of sexual contact in his home, at her home and in school. Further, the observations of others who did not see obvious signs of undue affection or of an illicit relationship are interesting, but they do not suffice to negate the preponderance of more persuasive and believable evidence that the two were in fact lovers. In fact, it is clear that, while Yatauro denies to this day the truth of the allegations which have followed upon earlier rumors of an improper relationship, there were enough signs of something, enough indications of a great deal of time spent together and of "something" between E. and Yatauro to prompt rumors during E.'s sophomore year. While the existence of rumors is by itself certainly not evidence of actual facts in accord with the rumors, their existence does tend to lessen the significance of evidence intended to demonstrate that nothing about their public interactions ever suggested that there could be any truth to E.'s later allegations of a sexual relationship. In the end, the observations of others cannot serve to prove the truth or falsity of E.'s claim, the truth must be pieced together from the testimony of the only two who really know and the documentary evidence which may, or may not, support either one's position.

The finding that Brian Yatauro did engage in sexual activity with E. makes any determination as to the propriety of a non-sexual relationship between the two along the lines presented by their two versions of the same superfluous. A teacher who is sexually involved with a student must be stripped of his tenure. No other result can be allowed. Whether Yatauro was too friendly, too involved, too controlling, too "parental," too concerned, are issues which pale in comparison with whether he had sex with her. It is true that even if he did not, he may well have been too involved in her life, and I **FIND** that the proofs are sufficient to establish that he was. For instance, while Yatauro could not recall why he might have written the comments on P-1 next to E.'s "I love A---.," the comments show that he was inserting himself into her social life, placing himself as the center of her existence. Even if he did not have sex with her, a position already rejected here, this type of commentary to a teen-aged student was entirely unacceptable. As for the "schedule" he prepared for her, it stands as a primary example of an over-reaching involvement far more detailed and intrusive than any request by her for some assistance in time management would call for from a teacher. (As an aside, I **FIND** Yatauro's explanation of the "receive visit" instruction not credible. Why would he write this about E. going to visit her grandfather? The far more reasonable explanation is that it meant that she would "receive" his visit.) In reality, his over-involvement appears at first to have been perhaps related to his attempt to help her, to guide her, to nurture her talent, to provide some support for her, all in themselves admirable actions if kept within reasonable bounds, but within a short time his involvement developed to an entirely inappropriate level, with a perhaps inexplicable romantic attachment to her. She was a vulnerable young woman from a single parent home, perhaps with a mother suffering from alcoholism (no proof of this was presented except that which flowed from E. herself), who had a talent which Yatauro tried to nurture, but who he appears to have become consumed with. Whatever good intentions he may have started with were overwhelmed by actions which ultimately compromised him.

Another point about Yatauro's conduct toward E. which is important to consider if no sex occurred and no romantic relationship existed, is his apparent disregard of the seriousness of the rumors which surfaced in E.'s sophomore year. As he knew that such rumors were being spread, if indeed they were untrue, he should have had the sense and judgment to moderate his conduct toward and involvement with the student so as to protect her from the risk of additional rumors

and potential damage to her, as well as his, reputation. The record shows that he did not do so, even if one accepted that he was not romantically or sexually involved with E.

It is unfortunate that this teacher, who had much to offer his students, and in fact appears to have inspired and helped many, could not control himself and limit his involvement with E. and her potential music career to more reasonable areas of activity. While a mentoring relationship may well be important, and while she may have seen him as a father figure, he should have had the judgment and self-control to stay more apart from her day-to-day life, to let her grow up as a teenager, to suggest, assist and guide, but not to seek to control and to manipulate. Above all, he needed to resist whatever urges he had to express feelings of affection, love, lust, etc., which he may have found he had towards her, but which he should have known were dangerous and forbidden. He should have avoided the issuance of cards, letters, notes etc., which were meant to convey, or could easily be mis-interpreted to demonstrate, an emotional involvement, commitment or demand which, as acknowledged by the experts and professionals who testified, had no place in a student/teacher relationship. He failed to do so. Indeed, he failed to avoid even more egregious conduct, and in the end, this failure can lead to only one conclusion.

CONCLUSION AND ORDER

I **CONCLUDE** that Mr. Yatauro acted in disregard of the standards of professional conduct expected of public school teachers, as well as the policies of his employer.[5] Given the nature and quality of his conduct, his tenure must be removed. It is so **ORDERED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

[5] Specific findings as to the policies which Yatauro violated are not necessary in view of the findings that he had a sexual relationship with his student. Nevertheless, he clearly violated the Board's policy against becoming a friend of a student. As for the restriction against "professional" or "any" contact with students following his suspension, the issue is superfluous in view of other findings of far more significant wrongdoing. Nevertheless, the circumstances of the meetings, including that at A.K.'s house, do not suggest that any serious violation of such a restriction occurred.

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 14, 1999
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

1-14-99
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 15 1999
DATE

Barbara A Hernal
OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETITIONER:

P-1 Handwritten notes on one page of ruled paper

P-2 Christmas card signed "Love Always Brian"

P-3 Two printed, self-stick notes, marked with handwritten definitions of "desire" and "friend"

P-4 Four small handwritten notes

P-5 "Happy Birthday, Sweetheart" card signed "My love and Friendship Always Brian"

P-6 Friendship greeting card with handwritten name "E.," signed "Love Forever-N-Always Brian"

P-7 Friendship greeting card signed "Love forever and always Brian"

P-8 Handwritten weekly schedule written on one side of brown paper bag with handwritten notes on reverse side

P-9 Four small handwritten notes

P-10 Handwritten note to E.K.

P-11 Three photographs, two are torn, of E.K. and Brian Yatauro

P-12 AT&T phone card for Brian Yatauro

P-13 Two pages of handwritten notes on ruled paper

P-14a Handwritten note signed "Brian Yatauro"

P-14b Greeting card unsigned

P-14c Blank envelope

P-15 Handwritten note on ruled paper

P-16 Printed music for Wolfgang Amadeus Mozart Concerto for Clarinet K. 622, with handwritten notations

P-17 Handmade Valentine's day card to "E.K." in handmade envelope

P-18 Gold chain with attached crucifix

P-19 Yellow cotton knit sweater

P-20 VHS tape "Initial Statement, Redacted Version"

P-21 VHS tape "Redacted Tape, 2nd Statement"

P-22 No exhibit

P-23 Maroon ring-binder notebook containing handwritten notes

P-24 Waiver of Rights, March 29, 1996

P-25 Waiver of Rights, April 2, 1996

P-26 Transcript of Statement of Brian Yatauro, Tape #1, taken by Peter Mills

P-27 Transcript of Statement of Brian Yatauro, Tape #2, taken by Peter Mills

P-28 No exhibit

P-29 No exhibit

P-30 Notice of Alibi, dated 3/3/97 signed by Brian Yatauro, *State of New Jersey v. Brian Yatauro*, Indictment: 96-08-00816

P-31 (Not in evidence) DYFS Report

P-32 Photograph of E.K.

P-33 Photograph of E.K. playing clarinet

P-34 Photograph of E.K. playing clarinet

P-35 Photograph of E.K.

P-36 Photograph of E.K.

P-37 Photograph of E.K. at restaurant

P-38 Photograph of E.K. (wearing a birthday hat) at restaurant

P-39 Photograph of E.K. holding a dog on a couch

P-40 Photograph of E.K. on deck

P-41 Group photograph including E.K.

P-42a Copy of Handout #14, Relationships And Power, Unit IV - Dating Violence

P-42b "Are you in an abusive relationship?" Checklist

P-42c Power and Control in Dating chart, Handout #5

P-43 Confidential memorandum from Michael T. Adamski to Richard P. Starodub dated 10/25/96, Re: Conversation with Karen D'Avino Concerning a Meeting with Brian Yatauro and LTHS Students on 10/24/96

P-44 Letter report dated 6/8/98 from Ann M. Doherty with attachments

P-45 Letter report dated 6/22/98 from Ann M. Doherty with attachments

P-46 Small "Good Luck" card with handwritten note signed "By"

P-47 Dunellen Public Schools Application of Mr. Brian Anthony Yatauro, dated 4/15/86

P-48 Dunellen Public Schools Teacher Evaluation Form of Mr. Brian Yatauro dated 10/1/86

P-49 Purple, three-ring Notebook marked "History" containing handwritten notes

P-50 Purple Mead Spiral Notebook containing handwritten notes

P-51 Blue Mead Spiral Notebook containing handwritten notes, etc., for Math

P-52 Not in evidence

P-53 a through u-Known samples of handwriting supplied by Yatauro

P-54 Illustration A-Handwriting expert's display board

P-55 Illustration B-Handwriting expert's display board

P-56 Illustration C-Handwriting expert's display board

P-57 Illustration D-Handwriting expert's display board

P-58 Illustration E-Handwriting expert's display board

P-59 Illustration F-Handwriting expert's display board

P-60 Job description for School Teacher, Lacy Twsp. Bd. of Ed., revised 9/8/81

P-61 Board Policy No. 0100, adopted 1/19/81, Lacey Twsp. Public Schools, Forked River

P-62 Board Policy No. 5000(a), adopted 1/19/81, Lacey Twsp. Public Schools, Forked River

P-63 Board Policy No. 5131(a), Lacey Twsp. Public Schools, Forked River

P-64 Board Policy No. 5140, adopted 1/19/81, Lacey Twsp. Public Schools, Forked River

P-65(a) Board Policy No. 5141.6, adopted 9/21/92, Lacey Twsp. Schools, Lanoka Harbor (2 pages)

P-65(b) Board Regulation No. 5141.6, *Administrative procedures: Suicidal Behavior*, adopted 9/21/92, Lacey Twsp. Schools, Lanoka Harbor (7 pages)

P-66 Board Regulation No. 5142(a), adopted 1/19/81, Lacey Twsp. Public Schools, Forked River

P-67 Page 9 of Student/Parent Handbook

P-68 Page 18 of Student/Parent Handbook

P-69 Page I-1 of Faculty Manual

P-70 Page I-2 of Faculty Manual

P-71 Page I-3 Lacey Township High School Goals

P-72 Page XIV-4 of Faculty Manual, Food and Beverages

P-73 Page XIV-8 thru 10 of Faculty Manual

P-74 Job description, Lacey Twsp. Schools, Guidance Counselor, revised 7/19/82

P-75 Board Policy No. 4118.13(a), 4218.13, Lacey Twsp. Public Schools, Forked River, Personnel - Certificated/Non-Certificated, pgs. XVI-25, XVI-25(a) and XVI-25(b)

P-76 Letter dated 3/27/96 to Mr. Brian Yaturo (sic) from Richard P. Starodub

P-77 Letter dated 4/23/96 to Mr. Brian Yatauro from Richard P. Starodub re: Suspension *N.J.S.A.* 18A:25-6

P-78 Letter dated 9/12/96 to Mr. Brian Yatauro from Michael T. Adamski

P-79 Letter dated 9/17/96 to Mr. Brian Yatauro from Richard P. Starodub

P-80 (also P-53U) Greeting card, "Thanks for Your Help"

P-81 Not in evidence

P-82 Not in evidence

P-83 Not in evidence

P-84 Copy of B. Yatauro's 1995/96 schedule at Lacey Twsp. High School

P-85 Letter dated 7/20/93 to Mr. Brian Yatauro from John M. Gardi Re: Letter of Reprimand

FOR THE RESPONDENT:

R-1 Not in evidence

R-2 Notice of Claim for Damages dated 4/10/97

R2(a) Report of Roberta Hogg, Summary

R-3 Not in evidence

R-4 Not in evidence

R-5 Not in evidence

OAL DKT. NO. EDU 08619-97S
AGENCY DKT. NO. 347-9/97

IN THE MATTER OF THE	:	
TENURE HEARING OF	:	
BRIAN YATAURO, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP	:	DECISION
OF LACEY, OCEAN COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties. On January 26, 1999, a letter was received from Administrative Law Judge (ALJ) Jeff S. Masin requesting that, subsequent to the Commissioner's determination of the within tenure charges, this case be remanded to him solely on the outstanding issues of back pay and moneys that the respondent claims for the period following his acquittal of criminal prosecution and money that was withheld following his suspension. ALJ Masin states that he will issue a separate initial decision on these monetary claims.

Upon a thorough and independent review of the record in this matter[1], the Commissioner affirms the determination of the ALJ, for the reasons very well expressed in the initial decision, that the Board has established its charges of unbecoming conduct against respondent by a preponderance of the credible evidence necessitating his removal from his tenured position.

[1]It is noted that the within record did not include transcripts of the 13 days of hearing conducted at the OAL.

Accordingly, the Commissioner adopts the recommended decision of the OAL and hereby orders that Brian Yatauro be dismissed from his tenured position with the Board of Education of the Township of Lacey as of the date of this decision. The Commissioner further directs that the issue of moneys which may be due and owing respondent in this case be severed from the tenure matter herein and this sole issue be remanded to the OAL for necessary determinations consistent with the request of the ALJ. The tenure matter will be transmitted to the State Board of Examiners, pursuant to *N.J.A.C.* 6:11-3.6, for action, as that body deems appropriate, against respondent's teaching certificate.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 1, 1999
Date of Mailing, March 1, 1999

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

SB/51-99

SBE #510-02/99-198
SB # 51-99

IN THE MATTER OF THE REVOCATION	:	STATE BOARD OF EDUCATION
OF THE TEACHING CERTIFICATE	:	DECISION
OF GERARD BATTLE.	:	

Decided by the State Board of Examiners, September 23, 1999

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

For the Petitioner-Respondent, Michael Walters, Deputy Attorney General (John J. Farmer, Jr., Attorney General of New Jersey)

This is an appeal from a decision by the State Board of Examiners to revoke the certification of Gerard Battle (hereinafter "respondent") as a teacher of the handicapped on the basis of a determination by the Commissioner of Education that he was guilty of tenure charges alleging inefficiency. The Commissioner's determination of the respondent's guilt and of the penalty of dismissal, in turn, was the consequence of the respondent's failure to respond to the tenure charges. While we recognize the finality of the Commissioner's determination in relation to both the tenure charges and the penalty of dismissal based thereon, we find that the Commissioner's decision alone does not in these particular circumstances provide an adequate basis to sustain the State Board of Examiners' determination to permanently revoke the respondent's license to teach.

This matter had it genesis on August 28,1998, when the State-Operated School District of the City of Jersey City certified tenure charges of inefficiency against the respondent with the Commissioner of Education. By letter of the same date, the

JAN. 3, 2001

Commissioner notified respondent of his right to file an answer to the charges. Respondent did not file an answer. Consequently, by decision of September 29, 1998, the Commissioner, acting on the basis of P.L. 1998, c. 42, effective July 1, 1998, and relying on N.J.A.C. 6:24-1.4(e), deemed each of the charges admitted. Noting that the respondent had "chosen" not to deny the charges, the Commissioner found that the respondent's actions constituted inefficiency and incapacity warranting his dismissal from his tenured position. As reflected in the Commissioner's decision, the respondent was not represented by counsel.

On October 21, 1998, the respondent wrote to the Commissioner, and on November 23, he consulted an attorney. Respondent's attorney communicated with the Commissioner in December, but, on December 29, 1998, was advised that the Commissioner had declined to reconsider his decision of September 29.

Respondent did not appeal the Commissioner's decision of September 29, 1998 directing his dismissal from his tenured position. As set forth in the Commissioner's decision, and as in all cases contested before the Commissioner that result in loss of tenure or dismissal, the matter was transmitted to the State Board of Examiners for "action as that body deems appropriate." Commissioner's decision, slip op. at 2. See N.J.A.C. 6:11-3.6(a)(1).

By order dated February 25, 1999, and mailed on March 14, 1999, the Board of Examiners directed that the respondent show cause as to why his certificate should not be revoked or suspended.

On April 5, 1999, the respondent's counsel filed an answer on his behalf. In his answer, the respondent asserted that the Board of Examiners was without any evidence

to conclude that there was a basis to revoke or suspend his teaching certificate. He also asserted that inefficiency or incapacity alone was not sufficient reason to revoke his certificate.

The Board of Examiners concluded that there were no material facts in dispute and that it would therefore hear the matter directly rather than transmit it to the Office of Administrative Law for hearing. After review of the respondent's brief, the Board of Examiners determined that the Commissioner's conclusion in his decision of September 29, 1998 provided cause to revoke the respondent's certificate.

Respondent then appealed the instant appeal to the State Board of Education, arguing that the failure by the Board of Examiners to allow him a hearing before revoking his certificate was, under the circumstances, a violation of his due process rights. Respondent also argues that the case law does not support a determination to revoke his certificate for inefficiency or incompetence alone.

The Commissioner's decision in this case was akin to a default judgment, which was given a preclusive effect by the Board of Examiners in the subsequent proceedings to revoke the respondent's certification. Generally, in judicial proceedings, a default judgment precludes a defendant from offering testimony in his defense. Douglas v. Harris, 35 N.J. 270 (1961). It does not, however, necessarily obviate the obligation of a plaintiff to furnish proof on the issue of liability. Id. Furthermore, a decision as to whether to vacate a default judgment is generally left to the discretion of the trial court. Davis v. DND/Fidoreo, Inc., 317 N.J. Super. 92 (App. Div. 1998). Even so, the court must recognize that "[all] doubts...should be resolved in favor of the parties seeking relief." Id. at 99, quoting Mancini v. EDS ex rel. New Jersey Auto Full Ins. Underwriting

Assoc., 132 N.J. 330, 334 (1993). This is the case because a motion to vacate a default judgment "should be viewed with great liberality, and every reasonable ground for indulgence is tolerated to the end that a just result is reached." Id., quoting Marder v. Realty Constr. Co., 84 N.J. Super. 313, 319 (App. Div. 1964), aff'd, 43 N.J. 508 (1964). The reason courts take such an indulgent approach towards these motions is that a default judgment deprives a party of the benefit of an adjudication on the merits. Allen v. Heritage Court Associates, 325 N.J. Super. 112 (App. Div. 1999).

We recognize that an administrative agency is not the same as a court. City of Hackensack v. Winner, 82 N.J. 1, 28-31 (1980). However, in fulfilling our quasi-judicial responsibilities, we look to judicial principles for guidance. Id. at 31-33. This is especially true when to do so is necessary to achieve an equitable result in a given case. Application of the judicial principles articulated above requires that we limit the preclusive effect of the default judgment awarded by the Commissioner to the respondent's dismissal from his tenured position. In this respect we stress that the respondent is not seeking to vacate the Commissioner's default judgment, but only to limit its preclusive effect.

Initially, we take note that although the Commissioner relied on N.J.A.C. 6:24-1.4(e) to grant summary decision in favor of the district board, he did not provide notice to the respondent as required by that regulation. N.J.A.C. 6:24-1.4(e) provided that:

> Failure to answer within the 20 day period from receipt of services [of the tenure charges] shall result in a notice to the respondent directing an answer within 10 days of receipt. Further failure to respond shall result in a second notice which shall inform the respondent that unless an answer is received within 10 days of the receipt of said notice, each count in the

> petition of appeal shall be deemed admitted and the Commissioner shall render a decision by way of summary judgment.

As set forth above, N.J.A.C. 6:24-1.4(e) provided that a respondent who did not file an answer to a petition of appeal would be sent a second notice before any consequences resulted from his failure. Under the terms of that regulation, the Commissioner had to wait ten days after providing the second notice before he could deem the allegations in a petition to be admitted. Prior to July 1, 1998, this regulation controlled the time frame for filing responses to all petitions of appeal, including tenure charges certified to the Commissioner.

Effective July 1, 1998, N.J.S.A. 18A:6-16 was amended by P.L. 1998, c. 42. Before that date, the statute, which governs the procedures to be followed after receipt of tenure charges by the Commissioner, did not include any provision relating to the filing of an answer to tenure charges. Nor were there any regulatory provisions specifically relating to the subject. Hence, as stated, the time limits and notice provisions of N.J.A.C. 6:24-1.4(e) were the sole provisions that applied to the filing of answers to tenure charges.

After July 1, 1998, N.J.S.A. 18A:6-16 mandated that a respondent to tenure charges be afforded 15 days to file an answer and required the Commissioner to determine within 15 days following that period whether the tenure charges were sufficient to warrant dismissal or reduction in salary. The effect of the statutory change was to render the time frame and notice provisions of N.J.A.C. 6: 24-1.4(e) inapplicable to cases involving tenure charges certified to the Commissioner. This is demonstrated by the fact that the Department of Education ultimately amended its rules to include new

provisions reflecting the statutory change. See N.J.A.C. 6A:3-5.4 and 6A:3–5.5 (effective April 3, 2000).

However, no regulatory change was made prior to April 3, 2000. Instead, as previously indicated, while respondents to tenure charges certified to the Commissioner, including respondent in this case, were notified that they had 15 days to file a written response, they were also notified that the Commissioner would be acting pursuant to N.J.A.C. 6:24-1.4(e) if he deemed the charges admitted and that the matter would be decided on a summary basis.[1] Retention of N.J.A.C. 6:24-1.4(e) without change during this period with specific reliance on that provision in the notice provided to respondents introduced ambiguity to that notice during this period. Basically, while making it clear that a respondent had 15 days to file an answer, the notice did not make it entirely clear that when no answer was filed, a default judgment would issue in tenure cases without the benefit of a second notice. This created the potential for confusion during the relevant period.

Regardless of such ambiguity, the respondent in this case has not challenged the application of the default judgment to the disposition of the tenure charges against him. Nonetheless, while not excusing the respondent's failure to answer the tenure charges, we hesitate to sustain revocation of his teaching credential solely on the basis of such default judgment.

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[1] The notice provided was included on a form letter sent to respondents by the Bureau of Controversies and Disputes which read in pertinent part that:

> ...pursuant to P.L. 1998, c. 42, effective July 1, 1998, an individual against whom tenure charges are certified "*shall have* **15 days** *to submit a written response to the charges to the Commissioner*" and that failure to answer within the prescribed period will, absent an extension granted for good cause shown, result in charges being deemed admitted and the Commissioner deciding the matter on a summary basis pursuant to N.J.A.C. 6:24-1.4(e);....

Nor can we ignore the fact that the respondent was not represented by counsel during the pendency of the tenure charges against him. This circumstance suggests that the respondent may well have acted without an understanding that his failure to answer the tenure charges would impact his teaching credentials. This conclusion is supported by the very limited understanding of the administrative process that is reflected in the respondent's communication to the Bureau of Controversies and Disputes following his receipt of the Commissioner's decision disposing of the tenure charges.

Quite simply, under these circumstances, the State Board of Examiners should not have taken action with respect to the respondent's teaching certificate without an adjudication of the merits of his defenses as they pertain to the issue of whether his certificate should be suspended or revoked. To hold otherwise would preclude the respondent from teaching anywhere in New Jersey without any adjudication of his teaching performance. Such a result would be inequitable.

We conclude, however, that the default judgment was sufficient to support the issuance of an order to show cause by the Board of Examiners. We therefore remand this matter to the Board of Examiners with the direction that it transmit the case to the Office of Administrative Law for a hearing on the merits of the respondent's defenses as they pertain to the retention of his certificate.

Attorney exceptions are noted.

January 3, 2001

Date of mailing JAN 04 2001

52-99

IN THE MATTER OF THE TENURE	:	
HEARING OF CLAIRE GEVEKE,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF ORANGE TOWNSHIP, ESSEX	:	
COUNTY.	:	
_____	:	

March 3, 1999

AGENCY DKT. NO. 10-1/99

IN THE MATTER OF THE TENURE	:	
HEARING OF CLAIRE GEVEKE,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF ORANGE TOWNSHIP, ESSEX	:	
COUNTY.	:	
	:	

For the Board, Nicholas Celso, III, Esq. (Schwartz, Simon, Edelstein, Celso & Kessler)

For the Respondent, William F. Koy, Esq. (Ullman, Furhman, Platt & Koy)

This matter having been opened before the Commissioner of Education on January 19, 1999 through certification of tenure charges of unbecoming conduct, insubordination, inefficiency and/or other just cause against a tenured teaching staff member, Claire Geveke, by the Board of Education of City of Orange Township; and

The Board having certified that, on January 14, 1999, it served respondent with a copy of the tenure charges via regular and certified mail, and further, on the same day, served a copy of the tenure charges upon her counsel, via Lawyer's Service; and

The Commissioner having directed respondent and her counsel, via both certified and regular mail dated January 20, 1999, to file an Answer to the tenure charges against her, which charges were identified as having been certified to the Commissioner on January 19, 1999; and

Such communication clearly having provided respondent notice that, pursuant to *P.L.* 1998, *c.* 42, effective July 1, 1998, an individual against whom tenure charges are certified

*"shall have **15 days** to submit a written response to the charges to the commissioner,"* and that failure to answer within the prescribed period will, absent granting of an extension for good cause shown, result in the charges being deemed admitted and the Commissioner deciding the matter on a summary basis pursuant to *N.J.A.C.* 6:24-1.4(e); and

Respondent's reply having been received outside the 15-day response period, as *P.L.* 1988, *c.* 42 does not, on its face, contemplate use of respondent's (or counsel's) date of receipt of the tenure charges to commence calculation of response time, (Koy's letter of February 3, 1999), and each count of the charges against respondent therefore being deemed to be admitted; and

The Commissioner's review of the tenure charges certified against respondent by the Board and the statement of evidence in support of those charges indicating that respondent, during the 1997-98 school year, was absent from her class 25 times from September 1997 through April 1, 1998, and late to her class 13 times, thus adversely affecting the instruction to students (Charge One); during the 1996-97 school year, respondent was absent from her class 14 times, thus adversely affecting the instruction to students (Charge Two); during the 1995-96 school year, respondent was absent from her class 16 times, thus adversely affecting the instruction to students (Charge Three); during the 1994-95 school year, respondent was absent from her class 32 times, thus adversely affecting the instruction to students (Charge Four); during the 1993-94 school year, respondent was absent from her class 18 times and late 15 times, thus adversely affecting the instruction to students (Charge Five); during the 1992-93 school year, respondent was absent from her class 20 times, thus adversely affecting the instruction to students (Charge Six); during the 1991-92 school year, respondent was absent from her class 18 times, thus adversely affecting the instruction to students (Charge Seven); during the 1990-91 school year, respondent was absent 15 times, thus adversely affecting the instruction to students

(Charge Eight); during the 1989-90 school year, respondent was absent on 12 and one half days, thus adversely affecting the instruction to students (Charge Nine); during the 1988-89 school year, respondent was absent from her class 21 and one half days, thus adversely affecting the instruction to students (Charge Ten); during the 1987-88 school year, respondent was absent from her class 17 times, thus adversely affecting the instruction to students (Charge Eleven); during the 1986-87 school year, respondent was absent from her class ten times, thus adversely affecting the instruction to students (Charge Twelve); and during the 1997-98 school year, respondent failed to provide effective classroom instruction (Charge Thirteen); during the 1995-96 school year, respondent failed to provide effective classroom instruction (Charge Fourteen); during the 1994-95 school year, respondent failed to provide effective classroom instruction (Charge Fifteen); during the 1993-94 school year, respondent failed to provide effective classroom instruction (Charge Sixteen); during the 1991-92 school year, respondent failed to provide effective classroom instruction (Charge Seventeen); during the 1987-88 school year, respondent failed to provide effective classroom instruction (Charge Eighteen); during the 1995-96 school year, respondent conducted herself in an inappropriate manner by sending recalcitrant, combative memos to her supervisors in response to her evaluations and to the constructive criticism offered by her supervisors (Charge Nineteen); during the 1993-94 school year, respondent conducted herself in an inappropriate manner by sending recalcitrant, combative memos to her supervisors in response to her evaluations and to the constructive criticism offered by her supervisors (Charge Twenty); during the 1991-92 school year, respondent conducted herself in an inappropriate manner by sending recalcitrant, combative memos to her supervisors in response to her evaluations and to the constructive criticism offered by her supervisors (Charge Twenty-One); during the 1987-88 school year, respondent conducted herself in an inappropriate manner by sending recalcitrant, combative memos to her supervisors in response to

her evaluations and to the constructive criticism offered by her supervisors (Charge Twenty-Two); during the 1997-98 school year, respondent conducted herself in an inappropriate manner by sending an unsealed note to another employee with a student, which note contained confidential, personal information about another student (Charge Twenty-Three); during the 1995-96 school year, respondent conducted herself in an inappropriate manner by failing to follow administrative policies and allowing students who were not registered in her class to remain in her class for entire class periods (Charge Twenty-Four); during the 1993-94 school year, respondent conducted her self in an inappropriate manner, by using inappropriate language directed at students (Charge Twenty-Five); and during the 1987-88 school year, respondent conducted herself in an inappropriate manner by discussing an evaluation report from a supervisor with a student, indicating to the student that his behavior was the cause of her poor evaluation; and

Deeming such charges to be admitted, the Commissioner finds that respondent's actions constituted unbecoming conduct, insubordination, inefficiency and/or other just cause, warranting her dismissal from her tenured position; now, therefore

IT IS SO ORDERED this _____ day of _____ that summary judgment shall be granted to the Board, and Claire Geveke shall be dismissed from her tenured position as a teacher in the Board's employ as of the date of this order. This matter shall be referred to the State Board of Examiners pursuant to *N.J.A.C.* 6:11-3.6 for action against respondent's certificate as it deems appropriate.*

COMMISSIONER OF EDUCATION

March 3, 1999
Mailing Date, March 3, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

5-2-99

C #52-99
SB #21-99

IN THE MATTER OF THE TENURE :
HEARING OF CLAIRE GEVEKE, SCHOOL:
DISTRICT OF THE CITY OF ORANGE :
TOWNSHIP, ESSEX COUNTY. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, March 3, 1999

For the Petitioner-Respondent, Schwartz, Simon, Edelstein, Celso & Kessler (Nicholas Celso, III, Esq., of Counsel)

For the Respondent-Appellant, Ullman, Furhman, Platt & Koy (William F. Koy, Esq., of Counsel)

On January 19, 1999, the Board of Education of the City of Orange Township (hereinafter "Board") certified tenure charges of unbecoming conduct, insubordination, inefficiency and/or other just cause against Claire Geveke (hereinafter "respondent"), a tenured teaching staff member. On February 3, 1999, the respondent, through her attorney, mailed her written response to the charges to the Commissioner. That response was received by the Commissioner on February 4.

On March 3, 1999, the Commissioner, concluding that respondent's response had not been submitted within the 15-day period required by N.J.S.A. 18A:6-16, deemed each count of the charges to have been admitted. Upon review of those charges, the Commissioner found that respondent's actions constituted unbecoming conduct, insubordination, inefficiency and/or other just cause, warranting her dismissal

Oct. 6, 1999

from her tenured position. Accordingly, he granted summary judgment to the Board and ordered that respondent be dismissed from her tenured employment.

Respondent filed the instant appeal to the State Board, contending that her response to the tenure charges had been filed in a timely manner. Respondent argues that N.J.S.A. 18A:6-16 is unclear as to when the 15-day filing period begins to run, alleging that she had filed her response with the Commissioner within 15 days after she had been served with the charges. In addition, the respondent maintains that she had "submitted" her response to the Commissioner in a timely manner within the intendment of the statute by mailing it on the fifteenth day following certification of the charges.

After a careful review of the record, we reverse the determination of the Commissioner and remand this matter to him for further proceedings in accordance with our decision herein. We find that the language of N.J.S.A. 18A:6-16 as amended in 1998 did not provide the respondent with clear notice that a written response to the tenure charges was required to have been received by the Commissioner within 15 days following certification of the charges.

Prior to its amendment in 1998, N.J.S.A. 18A:6-16 did not provide a timeframe for the filing of a response to tenure charges. Rather, responses were governed by the general filing rule set forth in N.J.A.C. 6:24-1.4, which requires that respondents serve an answer upon the petitioner within 20 days after receipt of the petition. See infra.

N.J.S.A. 18A:6-16 was thereupon amended by L.1998, c. 42, § 2, effective June 30, 1998, so as to require, in pertinent part, that:

> Upon receipt of such a charge and certification, or of a charge lawfully made to the commissioner, the commissioner or the person appointed to act in the commissioner's behalf in the proceedings shall examine the

> charges and certification. The individual against whom the charges are certified shall have 15 days to submit a written response to the charges to the commissioner. Upon a showing of good cause, the commissioner may grant an extension of time. The commissioner shall render a determination on the sufficiency of charges as set forth below within 15 days immediately following the period provided for a written response to the charges.... (Emphasis added.)

In this case, it is undisputed that respondent mailed her response to the charges to the Commissioner on February 3, 1999, 15 days following certification of the charges. Given the use of the word "submit" in the newly-amended statute, which gives no guidance as to whether mailing a response within 15 days would constitute compliance with that provision, we find that it would be inequitable to hold respondent to the knowledge that mailing her response within 15 days after certification of the charges would not be sufficient to satisfy the statutory deadline.

We note in that regard that at the time respondent filed her response there was no corresponding amendment to the education regulations governing the filing of a response to tenure charges. Thus, N.J.A.C. 6:24-5.3 provides that "[t]he filing and service of an answer to written charges pursuant to the Tenure Employees' Hearing Act shall be performed in accordance with N.J.A.C. 6:24-1.4," which states, in pertinent part:

> (a) The respondent(s) shall serve an answer upon the petitioner within 20 days after receipt of the petition, which shall state in short and plain terms the defenses to each claim asserted and shall admit or deny the allegation(s) of the petition. Upon written application by a party the Commissioner may extend the time for answer. Such application must be received prior to the expiration of the 20 day period.
>
> ....
>
> (e) Failure to answer within the 20 day period from receipt of service shall result in a notice to the respondent directing an answer within 10 days of receipt. Further failure to respond

> shall result in a second notice which shall inform the respondent that unless an answer is received within 10 days of the receipt of said notice, each count in the petition of appeal shall be deemed admitted and the Commissioner shall render a decision by way of summary judgment.

Moreover, we agree with the respondent that N.J.S.A. 18A:6-16 as amended is unclear as to when the 15-day period for filing a response to tenure charges begins to run, indicating only that a respondent has 15 days to submit a written response. We note, in addition, that the statute permits an extension to the filing deadline upon a showing of good cause.

Accordingly, given the current regulatory framework and the ambiguity of the amended statute, we find that the penalty imposed by the Commissioner – deeming the tenure charges admitted, resulting in respondent's dismissal from her tenured employment – was inequitable and unduly harsh under the circumstances presented.[1]

---

[1] We note that on July 7, 1999, the Commissioner, acknowledging the need to revise the regulations in accordance with statutory changes, proposed a revision to N.J.A.C. 6:24-5.3 [proposed section 6A:3-5.3] which would require, inter alia, that "[a]n individual against whom tenure charges are certified shall have 15 days from the date such charges are filed with the Commissioner to file a written response to the charges." Unlike the code currently in effect, the proposed regulations include a definition for "filing" as used in that subchapter: "'Filing' means receipt of an original paper by an appropriate officer of the department." N.J.A.C. 6A:3-1.2 as proposed by the Commissioner on July 7, 1999. In addition, N.J.A.C. 6A:3-5.1(b)6 as proposed by the Commissioner requires that a district board, following its determination that probable cause exists to credit the evidence in support of the charges, serve the affected staff member with a copy of those charges "at the same time and in the same manner as the filing of charges with the Commissioner."

In his summary included with the proposed code, the Commissioner elaborates that: "The prior rule has been completely rewritten to effectuate the expedited time frames established by P.L. 1998, c. 87. Answers to tenure charges are now due, in accordance with that law, within 15 days. This period is defined as 15 days from the date of filing of charges with the Commissioner, based upon a presumption of concurrent receipt by the employee and his or her representative as a result of the requirement for simultaneous service...."

We therefore reverse the determination of the Commissioner and remand this matter to him for further proceedings on the merits of those charges.[2]

Attorney exceptions are noted.

October 6, 1999

Date of mailing OCT 08 1999

[2] In its exceptions, the Board argues that the fine print on the standard form used by the Bureau of Controversies and Disputes to acknowledge receipt of the tenure charges provided the respondent with sufficient notice of the filing requirement, i.e.: "Respondent is required to file written response to the charges within 15 days of date certified...." That form, however, also includes the statutory language–which can be subject to various interpretations–in larger print in a highlighted box headed "IMPORTANT NOTICE." In any event, the fine print on a standard acknowledgement form used by the Department of Education cannot cure the ambiguity in the filing requirement set forth in the statute.

53-99

IN THE MATTER OF THE TENURE	:	
HEARING OF ERLENE FUQUA,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF ORANGE TOWNSHIP, ESSEX	:	
COUNTY.	:	
_____	:	

March 3, 1999

AGENCY DKT. NO. 9-1/99

IN THE MATTER OF THE TENURE	:	
HEARING OF ERLENE FUQUA,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF ORANGE TOWNSHIP, ESSEX	:	
COUNTY.	:	
	:	

For the Board, Nicholas Celso, III, Esq. (Schwartz, Simon, Edelstein, Celso & Kessler)

This matter having been opened before the Commissioner of Education on January 19, 1999 through certification of tenure charges of unbecoming conduct, insubordination, inefficiency and/or other just cause against Erlene Fuqua, a tenured teaching staff member by the Board of Education of the City of Orange Township; and

The Commissioner having directed respondent, via both certified and regular mail on January 20, 1999, to file an Answer to the tenure charges against her; and

Such communication clearly having provided respondent notice that, pursuant to *P.L.* 1998, *c.* 42, effective July 1, 1998, an individual against whom tenure charges are certified "*shall have **15 days** to submit a written response to the charges to the commissioner,*" and that failure to answer within the prescribed period will, absent granting of an extension for good cause shown, result in the charges being deemed admitted and the Commissioner deciding the matter on a summary basis pursuant to *N.J.A.C.* 6:24-1.4(e); and

In that no reply has been received from respondent in response to the Board's charges, each count of the charges against respondent is deemed to be admitted; and

The Commissioner's review of the tenure charges certified against respondent by the Board and the statement of evidence in support of those charges indicating: that respondent had been chronically absent from her teaching duties for the entire 1997-98 school year, to date, thereby disrupting the proper operation of the Orange High School, interfering with the instructional process and resulting in a detrimental impact on the educational environment in the Orange Public Schools (Charge One); that respondent had been chronically absent from her teaching duties on 26 occasions from September 1996 through June 1997, thereby disrupting the proper operation of the Orange High School, interfering with the instructional process and resulting in a detrimental impact on the educational environment in the Orange Public Schools (Charge Two); that respondent had been chronically absent from her teaching duties on 20 occasions from September 1995 through June 1996, thereby disrupting the proper operation of the Orange High School, interfering with the instructional process and resulting in a detrimental impact on the educational environment in the Orange Public Schools (Charge Three); that respondent, during the 1994-95 school year, had been chronically tardy and absent from her teaching duties on 15 occasions and 14 occasions, respectively, thereby disrupting the proper operation of the Orange High School, interfering with the instructional process and resulting in a detrimental impact on the educational environment in the Orange Public Schools (Charge Four); that respondent, during the 1993-94 school year, took a group of Orange High School students on an unauthorized field trip during the school day, took an unapproved conference day for the trip, and refused to cancel the trip upon direction from the Superintendent of Schools (Charge Five); that respondent had been chronically absent from her teaching duties on 22 occasions

from September 1993 through June 1994, thereby disrupting the proper operation of the Orange High School, interfering with the instructional process and resulting in a detrimental impact on the educational environment in the Orange Public Schools (Charge Six); that respondent, during the 1992-93 school year, had been chronically tardy and absent from her teaching duties on 11 occasions and 19 occasions, respectively, thereby disrupting the proper operation of the Orange High School, interfering with the instructional process and resulting in a detrimental impact on the educational environment in the Orange Public Schools (Charge Seven); that respondent, during the 1991-92 school year, had been chronically tardy on numerous occasions and absent from her teaching duties on ten and one-half occasions, thereby disrupting the proper operation of the Orange High School, interfering with the instructional process and resulting in a detrimental impact on the educational environment in the Orange Public Schools (Charge Eight); that respondent, during the 1990-91 school year, had been chronically absent from her teaching duties on 14 ½ occasions, thereby disrupting the proper operation of the Orange High School, interfering with the instructional process and resulting in a detrimental impact on the educational environment in the Orange Public Schools (Charge Nine); that respondent, during the 1989-90 school year, had been chronically absent from her duties on 14 occasions, thereby disrupting the proper operation of the Orange High School, interfering with the instructional process and resulting in a detrimental impact on the educational environment in the Orange Public Schools (Charge Ten); that respondent, during the 1988-89 school year, had been chronically absent from her teaching duties on 57 ½ occasions, thereby disrupting the proper operation of the Orange High School, interfering with the instructional process and resulting in a detrimental impact on the educational environment in the Orange Public Schools (Charge Eleven); and

Deeming such charges to be admitted, and noting that respondent has chosen not to deny the specific allegations contained therein, the Commissioner finds that respondent's actions constituted unbecoming conduct, insubordination, inefficiency and other just cause, warranting dismissal from her tenured position; and

The Commissioner having been thereafter informed by letter dated February 18, 1999 from counsel for the Board that respondent's application for Ordinary Disability Retirement was approved by the Board of Trustees of the Teacher's Pension and Annuity Fund, effective September 1, 1998; and

The Board, being unable, as a result of respondent's disability retirement, to move forward with the above-referenced tenure charges before the Commissioner of Education; now, therefore

IT IS SO ORDERED this _____ day of _____ that this matter be dismissed due to respondent's retirement, and that a copy of this decision shall be forwarded to the State Board of Examiners for action as it deems appropriate pursuant to *N.J.A.C.* 6:11-3.5.*

COMMISSIONER OF EDUCATION

March 3, 1999
Mailing Date, March 3, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

54-99

S. AND M.B. on behalf of minor child, A.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HOPEWELL VALLEY REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

March 4, 1999

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER ON APPLICATION
FOR EMERGENT RELIEF
OAL DKT. NO. EDU 0395-99S
AGENCY DKT. NO. 18-2/99

S. and M.B. ON BEHALF OF
MINOR CHILD, A.B.
Petitioner,

v.

BOARD OF EDUCATION OF THE
HOPEWELL VALLEY REGIONAL SCHOOL
DISTRICT, MERCER COUNTY
Respondent.

On or about February 3, 1999, petitioners filed a petition with the Commissioner of Education against respondent Board of Education of the Hopewell Valley Regional School (Board) in which petitioners asserted that their son, A.B., was subject to improper discipline by the Board and that certain school officials harassed A.B. Petitioners also filed with the Commissioner an application for emergent relief pursuant to *N.J.A.C.* 6:24-1.5. The petition and request for emergent relief was transmitted by the Commissioner to the Office of Administrative Law for hearing as a contested case on February 3, 1999. Oral argument on the application for emergent relief was held on February 17, 1999. For the following reasons I am denying the request for emergent relief and directing that the hearing in this matter be scheduled expeditiously.

This matter concerns a one day in school suspension and a grade of zero on a math test imposed upon A.B. According to the Board statement of facts, on Wednesday, December 2, 1998, A.B. and another student, J.D., were absent from the Hopewell Valley Central High School during periods one through four. That morning A.B. called the high school office posing as J.D.'s father with the stated purpose of excusing J.D.'s absence from school. Shortly thereafter, J.D., a female, called the high school office posing as A.B.'s mother with the stated purpose of excusing A.B.'s absence from school.

Between these two telephone calls, a central office staff member called J.D.'s home and spoke with her mother. J.D.'s mother told the staff member that J.D. was not excused from school and that A.B. had picked her up that morning to go to school. Accordingly, when J.D. made the call described above, she and A.B. were directed to come to school. The two students reported to the central office to sign in at approximately 10:40 a.m. Central office staff members present at the time were Edie Braham, Myra Novak and June Baker. According to the staff members, June Baker engaged in some good natured ribbing of J.D. by greeting her with the words "nice of you to come to school today" to which she replied "we didn't want to take our math test." Mrs. Baker then reminded J.D. that missing the test could result in a grade of zero for the test. According to the Board there was no exchange of words between any staff member and A.B. As A.B. exited the office, he said to J.D. "don't worry, my mother will get me out of this." The staff members who heard this remark expressed incredulity to one another about the remark but it was after A.B. left the office.

Petitioners do not deny that A.B. and J.D. made the telephone calls described above and that they did not arrive at school until approximately 10:40 a.m. on December 2, 1998, thereby missing their math class and the test. However, petitioners argue that A.B. was ill on December 2 as a result of his being without needed allergy medication and that he was suffering from congestion, headache and an inability to concentrate due to blocked sinuses. The morning of December 2, A.B.'s father was traveling out of town on business and was not available to call the school to excuse A.B.'s absence. A.B.'s mother was at work beginning at 6 a.m. When A.B. woke up, he tried to go to school even though he felt ill because neither parent was available to call the school. He tried to call his mother at work but the one line into her work was busy.

It was a difficult situation for A.B. because the math course involved (Functions, Statistics and Trigonometry, (FST)) is one he has been struggling with and he was aware that it is critical for him to pass FST in order to be enrolled in the college which has admitted him for the fall of 1999. A.B. had been tutored and had prepared for the test but the FST course causes him tremendous stress and pressure and he felt that he would not do well on the test that morning due to his physical condition. Since he could not get through to his mother, A.B. thought that J.D.'s call to the school would "get him through the morning" until he could reach his mother and obtain her permission for his absence from school.

According to petitioners, when A.B. entered the central office on December 2, the office staff belittled, embarrassed and badgered him and laughed at him which caused his comment that his mother would "get him out of this". Petitioners assert that this treatment was in violation of the Board's policy against harassment.

On December 4, 1998, the Vice Principal of Hopewell Valley Central High School, F. Jeffery Corelli, wrote A.P.'s parents that A.P. had been assigned one day of In-School Suspension to be served on December 16, 1998 for violating section 15 (truancy) of the student discipline code. Mr. Corelli further advised A.P.'s parents that December 2 reflected A.P.'s first cut in his International Relations, FST and Physical Education classes and that a third cut in any class would result in his removal from the course. In addition, A.P. was given a grade of zero on the FST test he missed.

By letter dated December 10, 1998, S. and M.P. appealed A.P.'s suspension and zero test grade to John W. Bach, principal of the high school. On December 16, 1998, the day scheduled for A.P.'s in school suspension, S. and M.P. attended an appeal conference with Vice Principal Corelli. As a result of an error, A.P.'s name was not removed from the suspension list for that day as it should have been done while the appeal was pending. Accordingly, A.P. served his one day suspension on December 16, 1998.

By letter dated December 18, 1998, Vice Principal Corelli confirmed his decision to uphold his initial determination that A.P. was truant on December 2 and that the imposition of the one day suspension and zero grade was appropriate discipline. Thereafter, S. and M.P. appealed to Principal

Bach and Carol Roche, Interim Superintendent of Schools, both of whom upheld the discipline imposed on A.P. A.P.'s parents' greatest concern is that the zero grade on the FST test might cause A.P. to fail the course and not graduate and thus not be able to enter college in the fall of 1999. In her response to the appeal Superintendent Roche advised S. and M.P. that she spent considerable time with, Kathy Radeer, the FST teacher, to ascertain what impact, if any, the zero grade would have on A.P.'s ability to pass the course. Ms. Radeer assured Superintendent Roche that a zero in a single test would not prevent A.P. from either passing or doing well in the course since there would be ample opportunities in the form of quizzes, tests, homework assignments, midterm and final examinations for him to pass the FST course. Ms. Radeer further explained that the test in question accounted for only 8% of the semester mark and 4% of the final mark for the year long course. A.B. passed the FST course for the first two marking periods with grades of 75 and 64 respectively (60 is passing). He passed the midyear exam with a grade of 61 and had an overall semester grade of 68.

In denying petitioners' appeal by letter dated January 7, 1999, Superintendent Roche advised them that they could appeal her decision to the Board of Education and by letter dated January 8, 1999 the petitioners appealed to the Board. By letter dated January 22, 1999, the Board Secretary advised petitioners that the Board considered their appeal and had voted to uphold the Superintendent's decision and deny their request to suspend the disciplinary action given to A.P. However, by letter dated January 29, 1999, the Board Secretary advised petitioners that the Board Policy Committee had been advised by the Board attorney that discipline which involves less than ten out-of-school days are not appealable to the Board and that the sanctions for cutting classes are school, not Board based, procedures.

In this application for emergent relief, petitioners are seeking an order allowing A.P. to take the test he missed and have the grade he receives considered in computing his overall grade. The Department of Education regulation governing applications to the Commissioner for emergent relief provides that the standard for granting such relief is that set forth in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982). *N.J.A.C* 6:24-1.5(b). In *Crowe*, the Supreme Court "recognize[d] that the determination to authorize preliminary relief summons the most sensitive exercise of judicial discretion. In exercising that discretion, courts have been guided traditionally by certain fundamental principles." *Id.* at 132. Those fundamental principles are as follows: (1) emergent relief should not issue except when

necessary to prevent irreparable harm; (2) emergent relief should not be granted when the legal right underlying the applicant's claim is unsettled; (3) emergent relief should not be granted where all material facts are controverted, in other words the applicant must make a preliminary showing of a reasonable probability of ultimate success on the merits and (4) emergent relief should not be granted if the party opposing the application will suffer greater harm if it is granted than the applicant will suffer if it is denied. *Crowe v. DeGioia, supra,* 90 *N.J.* at 132-34.

In the instant matter, petitioners have not satisfied the first three criteria for granting emergent relief. A.P.'s current FST grade is a passing one and thus constitutes no threat to his ability to enter college in the fall of 1999. Moreover, it cannot be said on the basis of this application that petitioners' have shown a settled legal right to the relief requested. Petitioners have not cited to any statute, regulation or case law, nor has the undersigned located any such legal authority, to support their argument that discipline of a one-day in-school suspension and zero grade for the missed test for being truant on the morning of December 2, 1998, constitutes arbitrary, capricious or unreasonable action by respondent. Perhaps if it had been firmly established that A.P. was in medical distress that morning, a conclusion that the suspension and refusal to allow A.P. to make up the test was arbitrary could be reached. However, the material facts as to that issue are much disputed and therefore petitioners have not shown a reasonable probability of ultimate success of the merits as to the third criteria. While I do not conclude that the Board would suffer greater harm than petitioners if the emergent relief were granted, the failure of petitioners' application to satisfy three of the four fundamental principles set forth above requires that their application be denied.

ORDER

For the above stated reasons, it is **ORDERED** that the application for emergent relief be **DENIED**. This matter shall be retained at the Office of Administrative Law for the holding of a plenary hearing which hearing shall be scheduled expeditiously.

This order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** either upon interlocutory review, pursuant to *N.J.A.C.* 1:1-14.10, or at the end of the contested case, pursuant to *N.J.A.C.* 1:1-18.6.

2/22/99
DATE

Barbara A. Harned
BARBARA A. HARNED, ALJ

OAL DKT. NO. EDU. 0395-99
AGENCY DKT. NO. 18-2/99

S. AND M.B. on behalf of minor child, A.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HOPEWELL VALLEY REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this emergent matter and the Administrative Law Judge's Order have been reviewed. Upon such review, the Commissioner concurs that petitioners have failed to satisfy the standard set forth in *Crowe v. DeGoia*, 90 *N.J.* 126 (1982) for obtaining emergent relief.

Accordingly, the Motion for Emergent Relief is denied and the matter shall continue at the Office of Administrative Law for proceedings on the merits of petitioners' claim.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 4, 1999
Date of Mailing, March 4, 1999

55-99

55-99E

MICHELE AND TERENCE MULLANE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF NEW PROVIDENCE, UNION COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

March 4, 1999

MARTIN R. PACHMAN, P.C.
60 East Main Street
Freehold, New Jersey 07728
(732) 780-5590
Attorneys for Respondent
New Providence Board of Education

MICHELE MULLANE and TERENCE P. MULLANE, Petitioner vs. BOARD OF EDUCATION OF NEW PROVIDENCE, UNION COUNTY, NEW JERSEY, Respondent	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDU 1084-99 AGENCY DOCKET NO. 551-12/98 ORDER DENYING APPLICATION FOR EMERGENT RELIEF

Mr. Terence P. Mullane, appearing pro se for Petitioner
Martin R. Pachman, Esquire, appearing for Respondent

This matter came before the undersigned as a result of an application for emergent relief filed with the New Jersey Department of Education on or about December 31, 1998. On January 4, 1999, the Department, pursuant to N.J.A.C. 1:1-12.6(c), forwarded the application to the Office of Administrative Law for hearing. On January 13, 1999, the undersigned conducted a hearing at which both parties were permitted to argue orally.

Based upon the application for emergent relief, the Answer filed by the Board and the oral arguments of parties, I find that Petitioner has not sustained his burden under N.J.A.C. 1:1-12.6(g) and N.J.A.C. 6:24-1.5 to meet the requirements of Crowe v. DeGioia, 90 N.J. 126 (1992). Petitioner has failed to demonstrate that the alleged irreparable harm of damaged self-esteem of their child is linked to his denial of participation in the gifted and talented program; has failed to demonstrate even a minute likelihood of

prevailing on the ultimate merits of the case; and has failed to demonstrate that the relative harm to the district consisting of having Petitioner's child placed in the gifted and talented program, thus jumping over children with higher scores than Petitioner's child, which would be a disservice to those students and would open the integrity of the gifted and talented program to challenge, is outweighed by any harm to Petitioner.

Therefore, it is on this 29th day of January 1999

ORDERED that the application for emergent relief is denied.

I hereby file this Order denying emergent relief with the Commissioner of Education for consideration.

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

Within thirteen (13) days from the date on which this recommended Order was mailed to the parties, any party may file written exceptions with the Commissioner of the Department of Education, 225 East State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Maria M. La Fiandra

MARIA M. LA FIANDRA, A.L.J.

OAL DKT. NO. EDU. 1084-99
AGENCY DKT. NO. 551-12/98

MICHELE AND TERENCE MULLANE, PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF NEW PROVIDENCE, UNION COUNTY, RESPONDENT.	:	DECISION ON MOTION

The record of this emergent matter, including the audio tape of the emergent relief proceeding at the Office of Administrative Law (OAL) and the Administrative Law Judge's (ALJ) Order, have been reviewed. Petitioners' exceptions were timely filed and have been duly considered in reaching a determination in the matter.

Upon such review, the Commissioner concurs with the ALJ that petitioners have failed to satisfy the standard set forth in *Crowe v. DeGoia*, 90 *N.J.* 126 (1982) for obtaining emergent relief for the reasons set forth by the ALJ in the audio tape of the proceedings.

Accordingly, the Motion for Emergent Relief is denied and the matter shall continue at the OAL for proceedings on the merits of petitioners' claim.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 4, 1999
Date of Mailing, March 4, 1999

* This decision, as the Commissioner's final determination on the instant motion, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

56-99 SEC

IN THE MATTER OF RICHARD LONGO	:	
AND FRANK SEDAGHI, TOMS RIVER	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION, OCEAN COUNTY.	:	DECISION
	:	

March 4, 1999

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
RICHARD LONGO and FRANK SEDAGHI, *TOMS RIVER BOARD OF EDUCATION OCEAN COUNTY*	:	**Docket No.: C05-98 and C07-98**
	:	**DECISION**

PROCEDURAL HISTORY

This matter arises from two separate complaints against the above-named members of the Toms River Board of Education for violating the School Ethics Act, N.J.S.A. 18A:12-21 et seq. Kevin Root filed this complaint on February 20, 1998. Therein, he alleges that respondents violated the School Ethics Act when they voted to reappoint the accounting firm of Cowan & Gunteski as Board Auditors in 1997 after having had an employee of that firm serve as their campaign treasurer and use the firm's address as the address of the campaign for reporting purposes.

Respondents Richard Longo and Frank Sedaghi filed separate answers on March 30, 1998 admitting the facts set forth but denying any violation of the School Ethics Act. The Commission investigated the complaint and sent notices advising the parties that the Commission would discuss the matter at its June 23, 1998 meeting. The Commission advised respondents of their right to attend, be represented by counsel and present witnesses. Both appeared before the Commission represented by Craig Wellerson, Esq..

At its public meeting of July 30, 1998, the Commission found no probable cause to credit the allegations that respondents violated N.J.S.A. 18A:12-24(e) as there were no facts to indicate that they accepted the services of the auditor based on the understanding that same were given with an intent to influence them in the discharge of their official duties. However, it found probable cause to credit the allegations that respondents violated N.J.S.A. 18A:12-24(c) by voting for the auditing firm after being elected to the board. The Commission invited the respondents to file written submissions setting forth why they should not be found in violation of the School Ethics Act. The Commission received a timely joint written submission from Mr. Longo and Mr. Sedaghi on September 11, 1998. The respondents filed a notice of motion along with their written submission, seeking to compel the Commission to reconsider its determination that probable cause exists. Richard Stanzione, Esq. of Hiering, Dupignac & Stanzione filed

the written submission on behalf of the respondents. Mr. Root also filed an unsolicited written submission with the Commission, which was also considered in rendering this decision. The Commission now consolidates these cases for the purpose of decision.

FACTS

The following facts are undisputed based on the pleadings, testimony and documents submitted. Mr. Longo and Mr. Sedaghi ran as candidates for the school board in the election of April 1997. They were advised that they were required to submit reports to the Election Law Enforcement Commission (ELEC) and that they needed a campaign treasurer. The respondents chose Darlene Ott, an employee of the Board's auditing firm, Cowan & Gunteski. Mr. Sedaghi knew Ms. Ott from having served together on the Board of Directors of the Ocean County Chamber of Commerce. She agreed to serve as campaign treasurer for Mr. Longo and Mr. Sedaghi and filed all reporting forms with ELEC. Ms. Ott used the address of Cowan & Gunteski as the campaign address on all reporting forms. The last report of the campaign, the 20-day post-election report, was signed by the respondents on May 2, 1997 and filed with ELEC on May 6, 1997.

At the reorganization meeting of the Board on April 22, 1997, Mr. Sedaghi and Mr. Longo voted in favor of reappointing Cowan & Gunteski as auditors for the Board. According to the respondents' written submission, the superintendent recommended reappointment of the firm. At the time of the meeting, the Board attorney advised that they did not have a conflict of interest in voting upon the appointment.

ANALYSIS

Based on the foregoing facts, the Commission found probable cause to credit the allegations that Mr. Longo and Mr. Sedaghi violated the Act by voting on a matter in which they had a personal involvement that might reasonably be expected to impair their objectivity or independence of judgment in violation of N.J.S.A. 18A:12-24(c). The respondents now argue in their written submissions that they should not be found in violation of the act since there are no facts to support a conclusion that Ms. Ott's services were provided based on an understanding that they were given or offered for the purpose of influencing them in the discharge of their official duties.

The issue before the Commission is whether the above facts establish that the two Board members violated N.J.S.A. 18A:12-24(c) of the School Ethics Act by voting on the reappointment of the auditing firm. Subsection (c) sets forth:

> No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

Respondents first argue that they should not be found in violation of N.J.S.A. 18A:12-24(c) because neither of them had a financial or personal involvement in Cowan & Gunteski. They argue that there is no allegation that either respondent had a direct or indirect **financial** involvement with Cowan & Gunteski. Therefore, they argue that the Commission would have to expand the definition of "personal involvement" to find that an employee of the firm serving as a campaign treasurer created such an involvement. They further argue that since the auditor's position was held by Cowan & Gunteski prior to the vote, there was no conflict in voting for the reappointment unless there was a "contradictory desire tugging the official in the other direction," citing *Wyzykowski v. Rizas*, 132 N.J. 509 (1993).

In a previous decision, the Commission set forth that in order to show a personal involvement, there would have to be facts indicating that there was more than just a casual relationship between the official and the person or entity on which he is voting. *In the Matter of Meera Malik and Elizabeth Vasil*, C06/C08-98 (September 22, 1998). However, the Commission also noted that the facts do not have to indicate that the respondents stand to derive some financial benefit from the action that the school official is taking. Rather, the Commission finds that as long as an association or relationship is demonstrated that is more than casual or collegial, then there need not be any showing of a financial benefit to demonstrate a personal involvement. This is consistent with the *Famularo* case, in which a board member was found to have a personal involvement reasonably expected to impair his objectivity when he voted to hire a principal for whom he had served as campaign treasurer for his election to city council. *In the Matter of Famularo*, C23-96 (February 24, 1998), aff'd Commissioner March 19, 1998. The Commission believes that the present case is more similar to that of *Famularo* than it is to that of *Malik and Vasil*. Unlike in the latter case, where persons may contribute money to a campaign without having any established any relationship with the candidates; the candidates must have more than a casual relationship with their campaign treasurer. They have to trust their campaign treasurer enough to be able to certify on their reports that the information that the treasurer has set forth is true and no contribution over the statutory limit has been omitted. When coupled with the use of the firm's address, the above facts demonstrate a personal involvement without a financial benefit.

In the *Famularo* case, *supra*, the Administrative Law Judge set forth a restriction that where a school official has been a prominent political official and supporter within a political campaign, he should step aside when the person whom he or she so publicly supported seeks a job with a public body on which the supporter serves. (Initial Decision at p.5). The Commission concludes that the converse also applies. Thus, where a

prominent supporter of a school official's political campaign, such as a campaign manager or treasurer, seeks a job with the public body on which the school official serves, the school official should abstain from that decision. Ms. Ott's use of the Cowan & Gunteski address on campaign reports, rather than her own, demonstrates that her service as campaign treasurer was in furtherance of her duties as an employee of the firm, not as a friend of Mr. Sedaghi. Thus, even though she was not a partner of the firm, her service was on behalf of the firm and thus, the respondents had a personal involvement with the firm under N.J.S.A. 18A:12-24(c).

Thus, the question becomes whether the personal involvement is the type that might reasonably be expected to impair the respondents' objectivity. The respondents argue that the auditor had already served the board for a number of years. Further, they argue in their submission that the auditor was recommended by the superintendent and approved by other board members. In such a case, they argue that the Commission must look to N.J.S.A. 18A:12-24(e) to see if the services were provided to influence the vote on the auditor appointment. Again, the respondents confuse the statutes. The question under subsection (c) is not whether there was actual influence, but whether the public might reasonably expect that these board members could not be objective in voting to reappoint the firm. None of the cases cited by the respondents address this unique issue. The respondents cite the Commission's decision in *Chester Township Board of Education v. Riley and Beatty*, C12-98, (June 23, 1998) for the proposition that the board members must stand to receive material or monetary gain as a result of their vote in order to find a violation of N.J.S.A. 18A:12-24(c). *Chester* is clearly inapposite as the vote in question involved a bond referendum that the respondents had challenged. In any event, one can certainly argue that Mr. Longo and Mr. Sedaghi received a material benefit from the firm in the form of the services of its employee. In the present case, the firm address was used as the contact address of their campaign and an employee of that firm performed the critical function of serving as their campaign treasurer. Further, the employee of the firm was still serving as the campaign treasurer at the time of the April 22, 1997 vote, as shown by the 20-day post-election report signed on May 2, 1997. In such a case, the Commission believes that a reasonable member of the public would expect that these board members could not be objective in their decision to reappoint the firm. Thus, the Commission concludes that respondents have been shown to have acted in their official capacity in matter in which they have a personal involvement reasonably expected to impair their objectivity in violation of N.J.S.A. 18A:12-24(c).

Last, the respondents argue that the Commission must send this matter to the Office of Administrative Law for a hearing pursuant to N.J.S.A. 18A:12-29b, which states that "If the commission determines that probable cause exists, it shall refer the matter to the Office of Administrative Law for a hearing to be conducted in accordance with the 'Administrative Procedure Act'"... In the decision, *In the Matter of Rodney Bond*, C21/24-96 (July 22, 1997), the Commission set forth in full detail its reasons that the Commission was not obligated to transmit a matter to the Office of Administrative Law when there are no facts in dispute. It declines to do so here, except to say that the purpose of such a hearing is for an administrative law judge to find facts. Where, as here,

the respondents agree with the Commission's finding that the material facts are not in dispute, there is no reason to transmit this matter to the Office of Administrative Law.

DECISION

For the foregoing reasons, the Commission finds that respondents acted in their official capacity in a matter in which they had a personal involvement which might reasonably be expected to impair their objectivity in violation of N.J.S.A. 18A:12-24(c). The Commission considers as mitigating factors the fact that the auditing firm had served the board for several years prior to the vote in question and that the Board attorney advised the respondents that they had no conflict of interest. The Commission therefore recommends to the Commissioner of Education that Mr. Longo and Mr. Sedaghi receive a sanction of reprimand.

This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction only, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini
Chairperson

Resolution Adopting Decision -- C05-98 and C07-98

Whereas, the School Ethics Commission has considered the pleadings, the documents submitted in support thereof, the testimony of the parties and their written submissions; and

Whereas, the Commission found probable cause to credit the allegations that respondents violated the School Ethics Act, N.J.S.A. 18A:12-24(c) at its meeting of July 30, 1998; and

Whereas, the Commission now concludes that respondents Mr. Longo and Mr. Sedaghi have violated N.J.S.A. 18A:12-24(c) of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of reprimand against both respondents; and

Whereas, the Commission has reviewed the proposed decision of its staff; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on October 26, 1998.

Lisa James-Beavers
Executive Director

AGENCY DKT. NO. 488-10/98

IN THE MATTER OF RICHARD LONGO	:	
AND FRANK SEDAGHI, TOMS RIVER	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION, OCEAN COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission ("Commission") have been reviewed. Comments urging rejection of the Commission's determination and recommended penalty were timely filed by respondents. Additionally, on January 20, 1999, attorney for respondents filed a motion seeking that the Commissioner stay his determination in this matter pending appeal of the underlying Commission determination to the State Board of Education. The Complainant in the matter before the Commission filed a timely objection to such stay.

Initially, the Commissioner notes that *N.J.A.C.* 6:2-1.1(a)3 expressly provides that appeal of School Ethics Commission decisions finding violation of the School Ethics Act may be taken to the State Board "at such time as the Commissioner's decision regarding the sanction has been rendered," so that a stay of determination by the Commissioner pending appeal to the State Board would be contrary to rule. Accordingly, the Commissioner denies respondents' motion to defer decision on the recommended sanction.

The Commissioner further notes that his sole role in matters of this type, as established by statute, *N.J.S.A.* 18A:12-29, is to consider whether the penalty recommended by the Commission is appropriate in view of the Commission's underlying determination that a respondent's actions constituted a violation of the School Ethics Act; that determination, which is expressly *not* reviewable by the Commissioner, is instead appealed directly to the State Board. In effect, while the Commissioner may not agree with the Commission's underlying determination, he must proceed from the premise that it is correct, and then assess whether the recommended penalty is appropriate based upon it.

Therefore, upon a thorough review of the record, given that the Commission has determined that a violation of *N.J.S.A.* 18A:12-24(c) occurred and that a penalty from among those prescribed at *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6:3-9.19(c) is warranted for each

respondent, and given that the Commissioner may not review this determination herein, the Commissioner concurs with the Commission's recommendation that the lowest penalty of reprimand is appropriate in this matter. The Commissioner additionally concludes, however, that *implementation* of such penalty is appropriately stayed until such time as the State Board rules on respondents' appeal.

Accordingly, IT IS ORDERED that, contingent upon a finding by the State Board of Education that a violation of the School Ethics Act occurred and that the penalty recommended by the Commission and herein affirmed by the Commissioner is warranted, Richard Longo and Frank Sedaghi each be reprimanded as a school official found to have violated the School Ethics Act.[1]

COMMISSIONER OF EDUCATION

March 4, 1999
Date of Mailing, March 4, 1999

[1] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

56-99

SEC #C07-98 and C05-98 (consolidated)
C # 56-99 SEC
SB # 19-99

IN THE MATTER OF RICHARD LONGO	:	
AND FRANK SEDAGHI, TOMS RIVER	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION, OCEAN	:	DECISION
COUNTY.	:	

Decided by the School Ethics Commission, October 26, 1998

Decided by the Commissioner of Education, March 4, 1999

For the Petitioner-Respondent, John Worthington, Deputy Attorney General (John J. Farmer, Jr., Attorney General of New Jersey)

For the Respondents-Appellants, Hiering, Dypignac & Stanzione (Richard D. Stanzione, Esq., of Counsel)

The determination by the School Ethics Commission that respondents violated N.J.S.A. 18A:12-24(c) of the School Ethics Act is affirmed for the reasons expressed therein. We also affirm for the reasons expressed therein the determination by the Commissioner of Education that the appropriate sanction against respondents in this instance is a reprimand.

July 7, 1999

Date of mailing JUL 08 1999

57-99

CHERYLE MALACH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

March 4, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10057-97
AGENCY DKT. NO.391-10/97

CHERYLE MALACH,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,

Respondent.

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

Thomas W. Sumners, Jr., Esq., for respondent (Sumners, George and Dorich, attorneys)

Record Closed: December 8, 1998 Decided: January 15, 1999

BEFORE **M. KATHLEEN DUNCAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on November 17, 1997, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. On March 18, 1998, the undersigned issued an order granting the motion of the Board of Education of the Mercer County Vocational-Technical School District to be dismissed as a party respondent.

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

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

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

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

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

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

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

1-15-99
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

1-19-99
DATE

DNA

Mailed to Parties:

JAN 20 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

1998 DEC -8 A 10:54

BUCCERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2440
(973) 773-5665
Counsel for Petitioner

CHERYLE MALACH,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	
v.	:	AGENCY REF. NO. 391-10/97 DOCKET NO. EDU 10057-97
TRENTON BOARD OF EDUCATION,	:	
Respondent.	:	**SETTLEMENT AGREEMENT**

Cheryle Malach, residing at 1243 Chanticleer, Cherry Hill, New Jersey 08003 (hereinafter "Ms. Malach"), and the Board of Education of the City of Trenton (hereinafter the "Board"), stipulate and agree that, in consideration of the mutual promises of the parties and in exchange for the consideration more particularly noted below, it is hereby agreed:

1. In return for compliance with this Agreement, Ms. Malach agrees to the dismissal, with prejudice, of the above-captioned litigation. Ms. Malach will continue to retain all tenure and seniority rights to which she is entitled based on all periods of service to the Board and based on the terms of this Agreement. The dismissal of this matter shall not be deemed a waiver of tenure or seniority rights which have accrued prior to its filing, or thereafter. Ms. Malach releases and waives any

and all claims to back salary and/or back benefits, except as provided in this Agreement.

2. In return for compliance with this Agreement, the Board agrees as follows:

(a) Within 30 calendar days of the approval of this settlement by the Commissioner of Education, the Board will pay Ms. Malach mitigated back salary for the 1997-98 school year in the gross amount of $13,856.66. Said amount shall be subject to all normal payroll deductions including, but not limited to, retroactive contributions to the Teachers' Pension and Annuity Fund covering the 1997-98 school year. Said pension contributions shall be submitted by the Board to the Pension Fund with an explanation designating those contributions as relating to the 1997-98 school year.

As part of the mitigation used in calculating this back salary, the Board has retained the amount of $2,856. This sum is attributable to the amount received by Ms.Malach from the New Jersey Division of Unemployment Insurance during the period July 1, 1997 through June 30, 1998. It is agreed that, upon request by the Division (whether made to Ms. Malach or the Board), the Board shall remit the withheld monies to the Division. The Board shall hold Ms. Malach harmless as to any claim by the Division of Unemployment Insurance for a refund of monies, interest or penalties as to unemployment compensation received by her during the time period specified herein. A

notice to the Division confirming the award of back pay and the retention of the funds by the Board shall be sent by Ms. Malach or her attorney within 30 days of her receipt of back salary.

(b) Within 30 days of the approval of this settlement by the Commissioner of Education, the Board will pay Ms. Malach the sum of $3,557.34 representing the cost of replacement health insurance incurred by Ms. Malach during the 1997-98 school year. This amount does not constitute back salary and shall be paid in a lump sum without any deductions of any type. Ms. Malach shall be solely responsible for payment of State and/or Federal income taxes due on this amount, if any.

(c) The Board shall credit Ms. Malach's record of accumulated sick leave days with an additional 15 days attributable to the 1997-98 school year. She shall also retain all previously accumulated but unused sick leave days for future use.

(d) For purposes of retirement only and pursuant to Article VII(E) of the collective agreement covering teaches in the district, Ms. Malach will be credited with three (3) additional sick leave days attributable to her unused personal days from the 1997-98 school year. Ms. Malach's sick leave credit for retirement purposes shall also include any previously accrued credit for retirement purposes.

(e) Ms. Malach's seniority shall be credited with one (1) additional year attributable to the 1997-98 school year.

She shall retain all previously accrued seniority and tenure rights.

(f) Ms. Malach shall be reinstated as a full-time teacher within the scope of her educational certificate and endorsement beginning with the 1998-99 school year. Her salary shall be calculated based on the collective bargaining agreement for teachers in the Trenton School District based on her previous salary guide placement together with salary guide credit for the 1997-98 school year.

(g) Effective on or before September 1, 1998, Ms. Malach shall be entitled to all of the benefits and emoluments which are normally provided to full-time teachers in the district (including, but not limited to, all forms of health and medical insurance) including all rights specified in the collective agreement, Board policy, past practice, or otherwise. For all purposes, the Board will consider Ms. Malach to have been employed on a full-time basis for the 1997-98 school year in calculating any right, benefit or emolument due to her hereafter from whatever source.

3. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Agreement and bind the Board to its terms.

4. The parties recognize that each has been represented by legal counsel of her or its own choosing and that they sign this Agreement as their own voluntary act and deed, and

that they fully understand the duties and obligations enumerated herein.

5. This Agreement shall be subject to the laws of the State of New Jersey.

6. All terms of this Agreement are deemed material. This document may not be altered, amended or modified except by an instrument executed in writing by the parties.

7. This Agreement is subject to the approval of the Administrative Law Judge and the Commissioner of Education and shall be of no force or effect unless such approval is received. In the event that such approval is not given, the parties shall be returned to the status quo existing prior to this Agreement.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals on the dates specified.

FOR PETITIONER:

Cheryle Malach

Cheryle Malach

Dated: 10/1/98

WITNESS:

Louis P. Bueceri, Esq.

FOR THE RESPONDENT,
TRENTON BOARD OF EDUCATION:

Charles R. Wilcenski

Board Secretary/
Business Administrator

Board President

Dated:

WITNESS:

Thomas W. Sumners

Thomas W. Sumners, Jr., Esq.

11/23/98

OAL DKT. NO. EDU 10057-97
AGENCY DKT. NO. 391-10/97

CHERYLE MALACH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

March 4, 1999
Date of Mailing, March 5, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

58-99

58-99DFP-B

IN THE MATTER OF THE :

DISQUALIFICATION FROM : COMMISSIONER OF EDUCATION

SCHOOL EMPLOYMENT OF J.W. : DECISION

_____:

SYNOPSIS

Matter of disqualification of a school bus driver was remanded by the State Board to the Commissioner for reconsideration and clarification because no cases existed regarding the disqualification of a school employee upon conviction for possession of drug paraphernalia, and the question presented was one of first impression. Commissioner transmitted the remanded matter to OAL for hearing and determination consistent with the State Board's February 4, 1998 decision, which limited the remand to the specific directive relating to the legal issue presented and not on the question of rehabilitation.

ALJ concluded that after analysis of the situation presented, the Legislature intended that a criminal conviction of a person for possession of drug paraphernalia disqualifies that individual from employment as a school bus driver, pursuant to *N.J.S.A.* 18A:39-19.1. ALJ granted summary decision to the Office of Criminal History Review and denied appellant's cross-application for summary decision. Appeal was dismissed subject to transmittal to the Commissioner and thereafter to the State Board.

Commissioner concurred with the ALJ's conclusion that J.W. was properly disqualified from school employment. In response to the State Board's directive that the Commissioner consider whether inchoate crimes also come within the purview of *N.J.S.A.* 18A:39-19.1 and *N.J.S.A.* 18A:6-7.1, in light of the absence of legislation on this question, the Commissioner finds that the recent amendments to those statutes, which now expressly include conspiracy to commit or an attempt to commit any of the crimes described in the act, render his consideration of this issue unnecessary for purposes of prospective agency policy. Commissioner transmitted the matter to the State Board, which retained jurisdiction.

March 8, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1829-98
AGENCY DKT. NO. 46-97

IN THE MATTER OF
THE DISQUALIFICATION FROM
SCHOOL EMPLOYMENT OF
J. W.

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

Terri A. Cutrera, Deputy Attorney General, for respondent, Office of Criminal History Review, New Jersey Department of Education
(Peter Verniero, Attorney General of New Jersey, attorney)

Record Closed: December 10 , 1998 Decided: January 19, 1999

BEFORE **ARNOLD SAMUELS**, ALJ:

This is an appeal by the petitioner, J.W., from a determination by respondent, the Office of Criminal History Review, New Jersey Department of Education, that petitioner was disqualified from further employment as a school bus driver, because a

criminal history record review revealed that on March 10, 1992 she had been convicted of possession of drug paraphernalia.

PROCEDURAL HISTORY

On March 10, 1992 the petitioner, J.W., a school bus driver for the Hudson County Schools of Technology, was convicted of possession of drug paraphernalia, *N.J.S.A.* 2C:36-2.

Five years later, in March 1997, the Office of Criminal History Review of the Department of Education notified petitioner that she was disqualified from continued employment as a school bus driver in accordance with *N.J.S.A.* 18A:39-19.1 *et seq.*, because of the conviction. The information upon which the Office of Criminal History Review acted had been disclosed following a routine fingerprint search conducted through the New Jersey State Police and the Federal Bureau of Investigation.

The petitioner filed a timely appeal from her disqualification to the Commissioner of Education (Commissioner). She did not challenge the accuracy of the criminal record, but claimed that she had been rehabilitated, in accordance with the standards enumerated in *N.J.S.A.* 18A:6-7.1e. The Assistant Commissioner of Education denied the appeal, stating that too little time had passed to find rehabilitation by clear and convincing evidence. This decision stated that petitioner was not precluded from applying for reconsideration upon the passage of additional time without further incident.

The petitioner filed an appeal from the above decision to the State Board of Education (State Board). This appeal, in addition to contesting the decision relating to rehabilitation, argued that a conviction for possession of drug paraphernalia was not a disqualifying offense under *N.J.S.A.* 18A:39-19.1.

The State Board reversed the decision of the Assistant Commissioner, and in a letter opinion dated September 3, 1997, agreed with the petitioner and found that a conviction for possession of drug paraphernalia was not a disqualifying offense under *N.J.S.A.* 18A:39-19.1.

The Commissioner of Education interceded, and in September 1997 filed a motion to participate in the matter, because of the broad policy implications at issue and because the Assistant Commissioner had not had the opportunity to consider the petitioner's "nondisqualifying offense" argument.

In February 1998 the State Board of Education agreed with the Commissioner's motion for reconsideration and clarification. The Board remanded the case to the Commissioner because no cases existed regarding the disqualification of a school employee upon conviction for possession of drug paraphernalia, and the question presented was one of first impression, which needed to be further evaluated. The question of rehabilitation was not part of the Commissioner's motion to participate or the decision to remand the matter.

On February 26, 1998 the Department of Education transmitted the remanded matter to the Office of Administrative Law (OAL) for hearing and determination consistent with the State Board's decision of February 4, 1998. The remand was limited only to the specific State Board directive relating to the legal issue presented and not on the question of rehabilitation.

The parties filed cross motions for summary decision in September and October 1998. A hearing date for oral argument on the cross motions was scheduled for December 8, 1998. Briefs and other supporting papers had previously been filed by the parties, both of whom appeared on December 8, 1998 for oral argument. They agreed that a summary decision, pursuant to *N.J.A.C.* 1:1-12.5(b) was appropriate.

FACTS

All of the pertinent and material facts are stated above, in the procedural history. The parties agreed that no genuine issues of material fact exist.

LEGAL DISCUSSION AND ANALYSIS

A Summary Decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." *N.J.A.C.* 1:1-12.5(b).

"A summary judgment proceeding is designed to allow the judge to quickly and inexpensively dispose of any case which does not present any genuine issue of material fact requiring disposition at a hearing." *Judson v. People's Bank and Trust Co. of Westfield* 17 *N.J.* 67, 74 (1954). See also, *Robin Brill v. The Guardian Life Insurance Co.* 142 *N.J.* 520 (1995).

Since the parties agree that no genuine issues of material fact remain to be resolved, this matter is appropriate for summary decision.

The single question raised in this matter is whether a conviction for possession of drug paraphernalia should disqualify a school bus driver from employment. Is the possession of drug paraphernalia the equivalent of a conviction for possession of a controlled dangerous substance? *N.J.S.A.* 18A:39-19.1 provides that a "school bus driver shall be disqualified from employment of service if the individual's criminal history record reveals a record of conviction of [certain described] crimes and offenses." Such a disqualification will occur upon proof of a crime or offense including one . . . . .

> . . . . involving the manufacture, transportation, sale, possession, or habitual use of a 'controlled dangerous substance' as defined in the 'New Jersey Controlled Dangerous Substances Act,' P.L. 1970, c. 226 (C. 24:21-1 et seq.) "
>
> *N.J.S.A.* 18A:39-19.1b.

Read literally, the statute provides for disqualification where the crime or offense involves the use of a controlled dangerous substance. It does not actually mention drug paraphernalia. Relying on a strict interpretation, the petitioner argues that the statute does not apply in the instant situation because drug paraphernalia is not mentioned. Petitioner further states that the use of the words "controlled dangerous substance" in the statute implies that the legislature intended to exclude "drug paraphernalia" from the statute, because that term was not included. According to this interpretation, petitioner reasons that the legislature's specific mention of drug paraphernalia in other statutes, but omission of that term in the subject statute, indicates it's specific intention to exclude conviction for possession of drug paraphernalia, when the statute is applied to the disqualification of school bus drivers from employment.

Part of the petitioner's argument attempts to evoke a canon of construction: *inclusio unius est exclusio alterius*, "the inclusion of one is the exclusion of another."

However, this canon is not to be applied unless it is clear that the Legislature intended the result brought about by such an analysis. As stated by the New Jersey Supreme Court, "[a]t best, this maxim is merely an aid in determining the Legislature's intent, not a rule of law." *Allstate Ins. Co. v. Malec* 104 *N.J.* 1, 8 (1986). See also *Bunk v. Port Authority of New York and New Jersey* 144 *N.J.* 176, 190 (1966), ("Canon's of construction, such as *inclusio unius est exclusio alterius*, the inclusion of one is the exclusion another, must yield to the paramount canon - that of legislative intent."); *Township Committee of Neptune v. Stagg* 312 *N.J. Super* 312, 318 (*App. Div.* 1988), ("[T]he cannon [sic] of *inclusio unius est exclusio* alterius should be applied only when

the implication is clear and compelling."). Careful application of the doctrine is necessary in order to avoid a result contrary to that intended by the Legislature.

The general rule of statutory construction requires an examination of the language of the statute to determine whether the language is clear or ambiguous and susceptible of more than one interpretation. "If the statute is clear and unambiguous on it's face and admits of only one interpretation, we need delve no deeper than the act's literal terms to define the Legislature's intent." *State v. Butler* 89 *N.J.* 220, 226 (1982); *Township Committee of Neptune v. Stagg, supra.* Language is given its ordinary and primary meaning unless there is legislative intent to the contrary. See *Kingsley v. Hawthorn Fabrics Inc,* 41 N.J. 521, 526 (1964); *Merin v. Maglaki* 126 N.J. 430, 434-435 (1992); *Service Armament Co. v. Hyland* 70 *N.J.* 550, 556 (1976); *GE Solid State, Inc. v. Director, Division of Taxation,* 132 *N.J.* 298 307 (1993). "However, if a literal reading of the statute does not lead to a sensible result, then such a reading should be rejected." *Township Committee of Neptune v. Stagg, supra*, 312 *N.J. Super* at 316.

In the instant matter, a literal reading of the statute, coupled with the canon of construction of inclusio unius est exclusio alterius, "the inclusion of one is the exclusion of another," leads to the anomalous result that one who is convicted of possession of a controlled dangerous substance can be terminated from employment as a school bus driver, but a person who is convicted of possession of the paraphernalia used in connection with that same controlled dangerous substance can remain employed as a school bus driver. Such a close and narrow reading of the language does not lead to a sensible result.

The same reasoning applies to consideration of the effect, if any, of the Legislature's actions in expressly including drug paraphernalia in *N.J.S.A.* 2C:35-16.1 and *N.J.S.A.* 2A:18-61.1. This comment is in direct response to the State Board's direction in the last sentence of the first paragraph on page 6 of it's decision of February 4, 1998. The foregoing statutes, relating to the eviction of tenants from rental premises, are of doubtful relevance to the crucial safety concerns involved in the transportation of children in school buses. The reasoning set forth by respondent on

pages 10, 11 and 12 of its brief, dated September 24, 1998, is consistent with this point of view. There simply is no nexus between the Civil Eviction Code and the qualifications for employment of school bus drivers.

As stated above, the literal close interpretation of the statute, *N.J.S.A.* 18A:39-19.1b can lead to an absurd result. If a person who is convicted of a crime involving the transportation of drug paraphernalia, that is necessarily intended to be used with a controlled dangerous substance, is not to be disqualified from employment, even though he or she is aware of the obvious and single use for the paraphernalia, a totally different result is reached from one who possesses the drugs. Timing becomes critical, and such an interpretation defies logic. The person who has the paraphernalia that is designed to be used with the drugs in another time and place is not enough of a threat to school children to exclude that individual from employment as a school bus driver; but the person who has the paraphernalia and has drugs in the same location is enough of a threat to be excluded from employment. This application of the plain statutory language, in a hypothetical example, indicates how absurd the result would be if the text of the statute is so strictly construed.

Here, the language of the statute is not as plain and clear as it may initially seem to be. Although it appears to be reasonably clear, it can nevertheless be interpreted two ways. The strict and narrow interpretation, using the precise words of the statute, disqualifies a school bus driver from employment if a criminal history reveals "[a] crime or offense involving the manufacture, transportation, sale, possession or habitual use of a 'controlled dangerous substance' as defined in the 'New Jersey Controlled Dangerous Substances Act.'" *N.J.S.A.* 18A:39-19.1b. A second interpretation of the statute, argued by respondent, is that a conviction for possession of controlled dangerous substances, or drug paraphernalia alone, triggers disqualification from employment as a school bus driver.

The Office of Criminal History Review, N.J. Department of Education states that it has long interpreted the provisions of *N.J.S.A.* 18A:39-19.1b to include convictions for possession of drug paraphernalia, as provided in *N.J.S.A.* 2C:36-2.

> It shall be unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, ingest, inhale, or otherwise to introduce into the human body a controlled dangerous substance or controlled dangerous substance analog in violation of the provisions of Chapter 35 of this title. *N.J.S.A.* 2C:36-2.

According to the Office of Criminal History Review, a conviction under *N.J.S.A.* 2C:36-2 (for use or possession of drug paraphernalia) is a conviction for a crime "involving" the manufacture, use, possession, or habitual use of a controlled dangerous substance, so that such convictions, for possession of drug paraphernalia, fall within the ambit of *N.J.S.A.* 18A:39-19.1.

Deference is granted to the long standing interpretations of a statute and regulations by the administrative agency created to enforce those statutes and regulations. See *State, Department of Environmental Protection v. Stavola*, 103 *N.J.* 425 (1986); *Malone v. Fender* 80 *N.J.* 129 (1979). It is well settled that the interpretation of a statute by the agency entrusted with the responsibility for its enforcement is entitled to weight. *Mercer County v. State, Dept. of Treasury*, *193 N.J. Super* 229, 233 (*App. Div.* 1984).

Whether according to the language of the statute or with the use of common sense, possession of drug paraphernalia is unlawful precisely because of the immutable connection between drug paraphernalia and controlled dangerous substances. Both parties agree that the possession or introduction of controlled dangerous substances into one's body is illegal and disqualifies school bus drivers from employment. It is also not disputed that drug paraphernalia is the vehicle used to introduce controlled dangerous substances into the body. Using this syllogism, the obvious conclusion is that possession of drug paraphernalia is illegal and also results in the disqualification of school bus drivers from employment.

The argument presented by the respondent necessarily favors the second, more liberal interpretation of the statute, rather than the narrow construction of the petitioner's interpretation. The second interpretation relies on the very definition of drug paraphernalia and the corollary that drug paraphernalia only exists to be used in connection with a controlled dangerous substance. To be convicted of possessing drug paraphernalia, there must also be either a controlled dangerous substance or the intent to use a controlled dangerous substance in connection with the paraphernalia. The statute makes any "crime or offense involving the manufacture, transportation, sale, possession, or habitual use of a 'controlled dangerous substance'" a predicate for disqualification from employment as a school bus driver. *N.J.S.A.* 18A:39-19.1b.

A person who is disqualified under this section may, nonetheless, be eligible for employment or re-employment as a school bus driver by proving rehabilitation.[1] However, that is a separate matter not considered herein. The petitioner was charged with and convicted of possession of narcotic equipment. The drug paraphernalia was found in her car after she had driven a friend to a specific location to buy cocaine. Although petitioner did not buy the drugs, her friend apparently did, and she drove him away from the area after he brought the drugs. The car was later stopped, and the two occupants were arrested. See, Affidavit of J.W. in Support of Appeal.

The events described by J.W. in her Affidavit in Support of Appeal constitute a "crime . . . involving the . . . transportation [or] possession . . . of a 'controlled dangerous substance.'" *N.J.S.A.* 18A:39-19.1b. Even if the conviction was limited to a conviction for possession of narcotics equipment, that conviction for possession of drug paraphernalia is one which involves the use, transportation or possession of a drug.[2]

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[1] The statute was recently amended so that evidence of rehabilitation is no longer considered. However, the form of the statute in existence at the time of the subject offense allowed proof of rehabilitation to be introduced. See N.J.S.A. 18A:39-19.1, effective July 1, 1989, which was in effect when the offense was committed. See also N.J.S.A. 18A:6-7.1 and N.J.S.A. 18A:39-19-1, as amended by the General Assembly on June 25, 1998.

[2] Respondent's argument is coherent regarding this interpretation. See Respondent's brief, page 6-8. The petitioner's summarization of respondent's argument mischaracterizes and confuses that argument. See Petitioner's brief in Support of Cross Motion for Summary Decision and in Opposition to Respondent's Motion for Summary Decision ("Petitioner's Brief"), pgs 10-11.

The focus in not solely on the words "use, transportation or possession," but rather spans the entire phrase so that it is it more broadly construed to include a crime or offense involving transportation, use or possession of drugs. As explained above, possession, transportation, or use or intended possession, transportation or use of drugs is a prerequisite to a conviction for possession of drugs paraphernalia.[3] The conviction for possession of narcotics equipment therefore is a crime involving the possession or transportation of a controlled dangerous substance.

Such an interpretation does not demonstrate that the agency acted "ultra vires by interpreting a statute beyond its clear meaning and intent," despite the insistence of the petitioner. The intent of the Legislature is not so clear as to permit only one interpretation of the statute. Strict construction of the language leads to an anomalous result and fails to consider the health, safety and welfare of school children. The Legislature's intent was to protect children by disqualifying from employment as school employees those who have criminal records involving or concerning controlled dangerous substances. Rather than allowing broad, unfettered discretion to decide when someone should be disqualified from school employment, the Legislature designated certain types of convictions, namely sexual offenses, child molestation and drug offenses or violent crimes as offenses that trigger disqualification. *N.J.S.A.* 18A:39-19.1.

Furthermore, concerning the analysis of the Legislature's intent, the New Jersey Supreme Court has noted:

> Words are to be given their common acceptance and usage; but the intent of the Legislature is to be deduced from the occasion and necessity of the law and the remedy in view, bearing in mind the subordinate rule in aid of intention that particular words may be enlarged or restricted in meaning by their associates and the evident spirit of the whole expression. We look for the sense and reason of the law. *Salz v. State House Commission* 18 *N.J.* 106, 111 (1955).

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[3] See Respondent's Appendix, Ra 20-22, outlining the Attorney General's Guidelines Governing Enforcement of the New Jersey Drug Paraphernalia Act.

See also, *In Re Marvin* 97 *N.J. Super* 62, 72 (*App. Div.* 1967), *Aff'd* 53 *N.J.* 147 (1969), *Cert. den'd.* 396 *U.S.* 821 (1969).

Viewed in terms of the public interest sought to be served by the statute, the language of *N.J.S.A.* 18A:39-19.1 is sufficiently broad, and the common understanding of the entire phrase comprising *N.J.S.A.* 18A:39-19.1b ("involving the manufacture, transportation, sale, possession, or habitual use of a 'controlled dangerous substance'") leads to a commonsensible conclusion that a conviction for possession of drug paraphernalia fits within the scope of a natural reading of the statute. The word "involving" is sufficiently expansive to support such a reasonable interpretation.

CONCLUSION

The general rule of statutory construction dictates that words be given their ordinary and well-understood meaning. However, where there is legislative intent to the contrary, and where the literal language of a statute does not lead to a sensible result, a strict interpretation of the literal text is inappropriate. Here, the language does not allow for only one interpretation, and two interpretations exist. In such a case, the Legislature's intent and common sense are to be analyzed and invoked. Such an analysis leads to a reasonable conclusion that a strict interpretation is not appropriate. The broader interpretation, as espoused by the respondent, more closely comports with the true legislative intent.

It is **CONCLUDED,** that after analysis of the situation presented, the Legislature intended that a criminal conviction of a person for possession of drug paraphernalia disqualifies that individual from employment as a school bus driver, pursuant to *N.J.S.A.* 18A:39-19.1.

ORDER

It is therefore **ORDERED** that Summary Decision be **GRANTED** to the Office of Criminal History Review. The petitioner's cross application for summary decision is **DENIED** and the appeal dismissed; subject to transmittal of this matter to the Commissioner of Education and thereafter to the State Board of Education, in accordance with its retention of jurisdiction.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 19, 1999
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

Jan. 22, 1999
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 25 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

OAL DKT. NO. EDU 1829-98
AGENCY DKT. NO. DHP-B 46-97

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF J.W.	:	DECISION
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Appellant's exceptions and the agency's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in rendering the within decision.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge's (ALJ) conclusion that J.W. was properly disqualified from school employment in that a conviction for the Possession of Narcotic Equipment, or Drug Paraphernalia, *is*

> A crime or offense *involving* the manufacture, transportation, sale, possession, or habitual use of a "controlled dangerous substance" as defined in the "New Jersey Controlled Dangerous Substances Act," P.L. 1970, c. 226 (C. 24:21-1 *et seq.*). (emphasis added) *N.J.S.A.* 18A:39-19.1b.

J.W. was convicted in 1992 for Possession of Narcotic Equipment, in violation of *N.J.S.A.* 2C:36-2. That statute provides that

> It shall be unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, ingest, inhale, or otherwise to introduce into the human body a controlled

dangerous substance or controlled substance analog in violation of the provisions of chapter 35 of this title. ***N.J.S.A. 2C:36-2

Thus, a conviction pursuant to this section is predicated upon an individual's *actual use* of drug paraphernalia with a controlled dangerous substance (CDS) or upon a person's *intent to use* the drug paraphernalia in conjunction with a CDS. Indeed, respondent notes that the Attorney General's February 9, 1981 Guidelines Governing Enforcement of The New Jersey Drug Paraphernalia Act state, in pertinent part, that "[a] prosecution for use [of drug paraphernalia] or possession with intent to use [drug paraphernalia] may not be undertaken unless the object is found near CDS or contains residue, or the possessor makes an inculpatory statement." (Respondent's Brief, Appendix at Ra21)* It can be reasonably concluded, therefore, that a person convicted under *N.J.S.A.* 2C:36-2, was either *using or intending to use* the drug equipment with a CDS and as such, has committed an offense "involving the manufacture, transportation, possession, sale or use of a CDS" so as to disqualify her from school employment pursuant to *N.J.S.A.* 18A:39-19.1b and *N.J.S.A.* 18A:6-7.1 *et seq.*, as these statutes existed prior to their amendment on July 1, 1998. The Commissioner, therefore, rejects appellant's argument that the Department of Education's interpretation of 18A:39-19.1 *et seq.* and *N.J.S.A.* 18A:6-7.1 *et seq*, "adds something" to the criminal history record check statutes which is not there in order to effectuate a policy concern. (Appellant's Exceptions at p. 5)

Moreover, as the ALJ observes *and appellant does not refute*, J.W.'s affidavit may reasonably be read to conclude that her "crime. . .involv[ed] the. . .transportation [and] possession. . ." of a CDS, as she admits that she drove a friend to a location where he could

* In this regard, the Commissioner finds it noteworthy that when adopting *P.L.* 1980, *c.* 133, the predecessor to *N.J.S.A.* 2C:36-1 *et seq.*, the Law, Public Safety and Defense Committee "agreed that requiring that an object be used or intended for use in connection with illicit drugs to determine if it can be considered to be drug paraphernalia is adequate and provides 'fair warning' to persons in possession of property potentially subject to this bill."

purchase cocaine, then, after he purchased the drugs, "drove the car away from the area." (Appellant's Brief before the State Board of Education, July 17, 1997, at Aa5; Initial Decision at p. 9) Appellant "acknowledged her guilt" as to her violating *N.J.S.A.* 2C:36-2. (Appellant's Brief at p. 3)

Like the ALJ, the Commissioner rejects the significance of the Legislature's express inclusion of the term "drug paraphernalia" in statutes such as *N.J.S.A.* 2C:35-16.1 and *N.J.S.A.* 2A:18-61.1, where such statutes bear no convincing nexus to the criminal history record check statutes. Moreover, that the Legislature has expressly included offenses involving drug paraphernalia in its recent amendments to *N.J.S.A.* 18A:6-7.1 *et seq.* and *N.J.S.A.* 18 A:39-19.1 is not necessarily dispositive of appellant's claim, as she urges, in that the Senate Education Committee in adopting the revisions specified that it "amended the bill to *further refine the list of crimes and offenses* for which an individual may be disqualified from employment in a school district." (emphasis added) (Respondent's Brief at Ra19, Senate Education Committee Statement to S. 851)

Finally, in response to the State Board's direction that the Commissioner consider whether inchoate crimes also come within the purview of *N.J.S.A.* 18A:39-19.1 and *N.J.S.A.* 18A:6-7.1, in light of the absence of legislation on this question, the Commissioner finds that the recent amendments to *N.J.S.A.* 18A:6-7.1 and 18A: 39-19.1, which now expressly include conspiracy to commit or an attempt to commit any of the crimes described in the act, (Respondent's Brief at Ra28) render his consideration of this issue unnecessary for purposes of prospective agency policy.

(Respondent's Brief, Appendix at Ra17, Assembly Judiciary, Law, Public Safety and Defense Committee, S. No. 1021)

Accordingly, the initial decision of the ALJ is modified, as set forth above. The Commissioner transmits this matter to the State Board of Education which has retained jurisdiction.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 8, 1999
Date of Mailing, March 8, 1999

59-99

JULIUS A. SEA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

March 8, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11678-97

AGENCY DKT. NO. 471-10/96

JULIUS A. SEA,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

Respondent.

Eugene G. Liss, Esq., for Petitioner

Cherie Maxwell, Esq., for Respondent (Sills, Cummis, Zuckerman, Radin, Tischman, attorneys)

Record Closed: January 15, 1999 Decided: January 15, 1999

BEFORE **THOMAS R. VENA,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on December 23, 1996, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B --1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

On the date of the hearing, the parties settled the matter and on January 15, 1999, they submitted the attached Settlement Agreement. Having reviewed the record and the settlement terms, I **FIND**:

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

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

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

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

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

JAN. 15, 1999
DATE

Thomas R. Vena
THOMAS R. VENA, ALJ

Receipt Acknowledged:

1/20/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 21 1999
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

pb

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JAN 15 12 [illegible] '99

COMMISSIONER OF EDUCATION
OAL Docket No. EDUOR [illegible]
Agency Reference No. 471-10/96

JULIUS SEA

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK

VOLUNTARY SETTLEMENT AGREEMENT

The State-Operated School District of the City of Newark ("Newark" or "District") and Julius Sea ("Sea"), agree to the following terms in full resolution of this matter

WHEREAS, the parties agree that it is in the public interest to enter into this agreement in resolution of said appeal in order to avoid the uncertainty and expense of litigation, and

WHEREAS, the parties further agree that the terms of this agreement will not present any risk of harm to students and/or the safe operation of the school district,

NOW, THEREFORE, the parties agree as follows:

1. Effective September 1, 1997, Sea shall receive reimbursement for one-half of the salary increment withheld from Sea for the 1996-97 school year Said partial increment shall be restored to Sea's future salary calculations thereafter.

2. Sea acknowledges that the payments reflected in this agreement constitute the full financial obligation of the District and that he shall receive no additional payments. In exchange for the above consideration, Sea, on behalf of himself, his heirs, successors and assigns, hereby fully releases and forever discharges the District, its representatives, agents, officers and employees, for any and all actions, claims and liabilities of whatsoever kind in character, that he has had or may now have against any of them related to his employment with the District.

3. Sea agrees to withdraw his appeal, with prejudice, Docket No. EDUOR 11678 97N, Agency Ref. No. 471-10/96

4. This agreement is subject to the approval of the State District Superintendent.

5. The parties enter this agreement voluntarily and without coercion, after consultation with their respective counsel.

State Operated School District of the City of Newark

Julius Sea Sr

JULIUS SEA

By: Bud L. Hall

1/5/99

Dated:

Dated:

OAL DKT. NO. EDU 11678-97
AGENCY DKT. NO. 471-10/96

JULIUS A. SEA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

March 8, 1999
Date of Mailing, March 8, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

60-99

BOARD OF EDUCATION OF THE BOROUGH OF OAKLAND, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF POMPTON LAKES AND BOARD OF EDUCATION OF THE TOWNSHIP OF WEST MILFORD, PASSAIC COUNTY,	:	DECISION
RESPONDENTS.	:	

March 8, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1828-98
AGENCY DKT. NO. 17-1/98

OAKLAND BOARD OF EDUCATION,
Petitioner,
v.
POMPTON LAKES BOARD OF EDUCATION
and WEST MILFORD BOARD OF EDUCATION,
Respondents.

Jessica L. Wildstein, Esq., for petitioner
(Fogarty & Hara, attorneys)

Philip E. Stern, Esq. for respondent, Pompton Lakes Board of Education
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Vito A. Gagliardi, Jr., Esq., for respondent, West Milford Board of Education
(Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen, attorneys)

Record Closed: January 11, 1999 Decided: January 11, 1999

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

Statement of Facts

This matter was transmitted to the Office of Administrative Law (OAL) on February 26, 1998, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

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

Jan. 11, 1999
DATE

Ken R Springer
KEN R. SPRINGER, ALJ

Jan. 20, 1999
DATE

Receipt Acknowledged:
M. Antanaitis/jc
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 21 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

FOGARTY & HARA, ESQS.
16-00 Route 208 South
Fair Lawn, New Jersey
(201) 791-3340
Attorneys for Respondent
Oakland Board of Education

OAKLAND BOARD OF EDUCATION, Petitioner, vs. POMPTON LAKES BOARD OF EDUCATION and WEST MILFORD BOARD OF EDUCATION, Respondents.	BEFORE THE EDUCATION COMMISSIONER OFFICE OF ADMINISTRATIVE LAW OAL Docket No.: EDUOS 01828-98N Agency Ref. No.: 17-1/98 STIPULATION OF SETTLEMENT

WHEREAS, there is an outstanding dispute before the Commission of Education, Office of Administrative Law, between petitioner, the Oakland Board of Education (hereinafter the "Oakland Board") and respondents, the Pompton Lakes Board of Education (hereinafter the "Pompton Lakes Board") and the West Milford Board of Education (hereinafter the "West Milford Board") as to the last district of residence responsible for the

education costs associated with the attendance of the students, R.B., K.B. and W.B. at the West Milford Public Schools;

WHEREAS, the West Milford Board has assessed the tuition costs for the education of the aforesaid students, during the period in question, as totalling $23,133.60;

WHEREAS, the tuition costs of $23,133.60 remain outstanding;

WHEREAS, the parties are desirous of amicably resolving their differences without the need to resort to costly and protracted litigation.

NOW, THEREFORE, in consideration of the mutual promises and covenants of the parties set forth below, the Oakland Board, the Pompton Lakes Board and West Milford Board hereby agree as follows:

1. The West Milford Board shall reduce its outstanding tuition costs in connection with the attendance of R.B., K.B. and W.B. during the period in question from $23,133.60 to $19,920.60.

2. The Pompton Lakes Board shall remit $1,500 to the West Milford Board toward the outstanding tuition costs of $19,920.60.

3. The Oakland Board shall remit $18,420.60 to the West Milford Board toward the outstanding tuition costs of $19,920.60.

4. The Oakland Board agrees to withdraw its Verified Petition of Appeal bearing O.A.L. Docket No. EDUOS 01828-98N, Agency Ref. No. 17-1/98.

5. The parties recognize that each has been represented by legal counsel or a representative of his or its own choosing, that they sign this Stipulation of Settlement as their own voluntary acts and deeds, and they fully understand the duties and obligations enumerated herein. This Stipulation of Settlement shall be subject to the laws of the State of New Jersey.

6. The undersigned representatives of the Oakland Board hereby acknowledge that they have been duly authorized by the Oakland Board to sign this Agreement and bind the Oakland Board to its terms.

7. The parties further agree that the terms and conditions set forth in this Stipulation of Settlement shall constitute the sum total of their mutual and respective rights and obligations relative to the attendance of R.B., K.B. and W.B. at West Milford Public Schools. Neither party shall have any rights or obligations as against the other except those set forth in this Stipulation of Settlement. Nothing herein, or any document executed in accordance herewith, however, shall preclude either party from bringing an action to enforce performance of any term of this Agreement should there be a default in performance.

8. A form of the Oakland Board's Resolution is attached hereto as Exhibit "A".

WITNESS:

By: Sharon Weintrob

Dated: 12/9/98

POMPTON LAKES BOARD OF EDUCATION

By: Glenn O. Riddle, Board Secy

Dated: 12/9/98

WITNESS:

By:

Dated:

WEST MILFORD BOARD OF EDUCATION

By: Midge Laun 12/15/98

Dated: 12/15/98

WITNESS:

By: Frank Buono
FRANK BUONO
Board Secretary/Business Administrator

Dated: 11/4/98

OAKLAND BOARD OF EDUCATION

By: Edward Vanderbeck
EDWARD VANDERBECK
Board President

Dated:

RESOLUTION

BE IT RESOLVED by the Oakland Board of Education as follows:

1. The terms and conditions contained in the Stipulation of Settlement in the matter of Oakland Board of Education vs. Pompton Lakes Board of Education and West Milford Board of Education, bearing O.A.L. Docket No. EDUOS 01828-98N, which is attached to this Resolution are hereby ratified and approved.

2. The Board President and the Board Secretary are hereby authorized to execute the Stipulation of Settlement and any other documents necessary to effectuate the terms contained therein.

ROLL CALL VOTE:

AYES:

NAYS:

ABSTENTIONS:

CERTIFICATION

I hereby certify that the foregoing is a true copy of the Resolution which the Oakland Board of Education passed at its meeting on December 15, 1998.

Frank Buono
Board Secretary/Business Administrator

OAL DKT. NO. EDU 1828-98
AGENCY DKT. NO. 17-1/98

BOARD OF EDUCATION OF THE BOROUGH OF OAKLAND, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF POMPTON LAKES AND BOARD OF EDUCATION OF THE TOWNSHIP OF WEST MILFORD, PASSAIC COUNTY,	:	DECISION
RESPONDENTS.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

The Commissioner approves the settlement terms agreed upon by the parties in amicable resolution of the dispute concerning their financial obligation for the education of students R.B., K.B. and W.B. during the specific period of time controverted herein. The joint stipulation of settlement is, therefore, adopted as the Commissioner's final decision in this matter. Accordingly, the matter is hereby dismissed, subject to the parties' compliance with the terms of the settlement.*

COMMISSIONER OF EDUCATION

March 8, 1999
Date of Mailing, March 8, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

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WESLEY M. SMITH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAZLET, MONMOUTH COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

March 8,1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
EMERGENCY RELIEF
OAL DKT. NO. EDU 53-99
AGENCY DKT. NO. 553-12/98

WESLEY M. SMITH,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HAZLET, MONMOUTH COUNTY,
Respondent.

Wesley M. Smith, petitioner, *pro se*

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

BEFORE **JOHN R. FUTEY**, ALJ:

This matter closed on February 10, 1999 before John R. Futey, Administrative Law Judge.

Petitioner, Wesley M. Smith, (Smith) seeks relief from the decision of the Board of Education of the Township of Hazlet, Monmouth County, (Board) which removed him as a Board member because he failed to attend three consecutive meetings of the Board. Smith contends that the actions of the Board in removing him were arbitrary, capricious and unreasonable and that he provided "good cause" to excuse him for such absences. In fact, both sides acknowledged that Smith missed four consecutive Board meetings, to wit, September 14 and 26 and October 5 and 13, 1998. He also maintains that other Board members have missed four meetings without suffering removal. The Board responds it has acted properly and its actions were not arbitrary, capricious and unreasonable under the circumstances.

NEW JERSEY IS AN EQUAL OPPORTUNITY EMPLOYER

The matter was transmitted to the Office of Administrative Law (OAL) on January 7, 1999 and was heard on an emergent basis at the Office of Administrative Law, Mercerville, New Jersey on February 8, 1999. After testimony was taken and arguments were heard, the record remained open in order to allow the Board attorney to provide a copy of the minutes of the October 22, 1998 executive closed session, at which time the issue regarding Smith's removal was raised, discussed and voted upon. Upon receipt of those redacted minutes by way of telefax (R-1), the hearing record closed on February 10, 1999.

Two witnesses testified briefly regarding the merits of the matter, being petitioner Smith and the Board's Vice-President, Richard Barney. In addition, Smith presented a hearing packet (P-1) and the Board presented a copy of the resolution adopted by the Board on October 22, 1998 (R-1), and, subsequently, a copy of the executive session board minutes as aforesaid (R-2). The relevant proofs reveal that Smith failed to attend four consecutive Board meetings, as cited hereinabove, and proferred the following explanations regarding his non-attendance for each of the meetings, to wit:

(1) September 14, 1998, "Just prior to this our household was hit with a flu-like virus. On this day, my wife, Lisa Merizio Smith, was taken ill and did not want to handle our 14-month old son and risk infecting him too. Therefore, with no family available to assist, and no one trustworthy in the area, I elected to stay home and take care of my family . . . . I did phone Tim Nogueira and Tom Sansevero to notify both of this situation."

(2) September 26, 1998, "I had in fact contracted the same flu-like symptoms and was incapable of moving let alone attend a meeting. Instead of risking infecting the rest of the Board and others, I elected to stay home. I did phone Tim Nogueira and Tom Sansevero to notify both of this situation."

(3) October 5, 1998, "My wife's company was preparing for its annual conference starting October 9 through October 14, 1998 in San Francisco. As in prior years, this usually means many late hours at work in Manhattan and unfortunately, this night was no exception. She did try to plan her day accordingly, but last minute conference details kept her at work until 9:00 p.m. With the commute home it was too late to attend this meeting. I was unable to call anyone since the meeting had already started."

(4) October 13, 1998, "Again my wife is in San Francisco at this conference, and again, with no one trustworthy in the area, I elected to stay home. Copy of airline ticket is proof of this trip. I did phone Tim Nogueira and Tom Sansevero to notify both of this situation."

Petitioner Smith also maintains that two other Board members have received different treatment in the way their absences from Board meetings have been handled. Specifically, Board member Richard Barney was absent from January 27 through April 16, 1998 and was never penalized for his non-attendance at Board meetings. Further, Board member Dorothy O'Connor missed six consecutive meetings between March 12 and April 6, 1998, with no adverse determination being made regarding those absences. However, Smith conceded that in both cases the parties were hospitalized for their afflictions. Further, he acknowledged that the absences of both of these Board members occurred in the Board year which ended in April 1998. Further, he acknowledged that even though the Board had the exact same composition as it did last year, there had been no other incidents in the current Board year which began at the end of April 1998 in which a Board member suffered any extended illnesses similar to either Barney or O'Connor.

The Board asserts that its action in demanding compliance by Smith was neither arbitrary, capricious or unreasonable. Further, it maintained that he had not provided good cause to excuse him from attending any of the four meetings cited hereinabove. Further, the fact that a prior Board may have treated absences less stringently than the present Board does not prevent the current Board from demanding steadfast adherence to the attendance policy. A review of the October 22, 1998 executive closed session reveals that the Board did discuss the issue of Smith's four absences but rejected his explanation by a seven to one vote (excluding Smith's own negative vote). At the same time, Dr. Sansevero stated that he may have been notified of Smith's absences on several occasions but he never gave Smith any approval to miss any of them. Mr. Nogueira claimed that Smith never gave him any prior notice.

ANALYSIS AND FINDINGS

Based upon all the foregoing, I have had a complete opportunity to review the testimony and arguments advanced in this matter. Emergency relief is authorized by *N.J.A.C.* 6:24-1.5 as well as *N.J.A.C.* 1:1-12.6. The standards which are applicable to a request for emergency relief in administrative proceedings are analogous to those applied in the courts of law and equity. The most relevant statement of standards can be found in *Crowe v. DeGiora*, 90 *N.J.* 126, 132-134 (1982) and may be summarized as follows:

(1) The relief should not be granted except when necessary to prevent irreparable harm, or harm for which there is no adequate legal remedy.

(2) Relief should not be granted when the legal right underlying the applicant's claim is unsettled.

(3) The applicant for relief must make a preliminary showing on a reasonable probability of ultimate success on the merits, and, finally,

(4) The relative hardship to the parties in granting or denying relief must be considered, cited specifically at pages 132 through 134 of the above cited case.

In dealing with these standards, the court pointed out that severe personal inconvenience may constitute irreparable injury, citing *Hodge v. Geiss*, 43 *N.J.Eq.* 342, 350 (Ch. 1887) and that pecuniary damages may be inadequate because of the nature of the injury or of the right affected, citing *Outdoor Sports Corp. v. American Federation of Labo*r, Local 23132, 6 *N.J.* 217, 229 and 230 (1951); as well as *Sherman v. Stern*, 93 *N.J.Eq.* 626, 631 (1922). The Court also observed that the requirement for showing a reasonable probability of success on the merits is tempered by the principle that mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo since that is the purpose of temporary relief.

N.J.S.A. 18A:12-3 states that any Board of Education member who fails to attend three consecutive meetings of the Board without good cause may be removed by it. (Emphasis added) The Board contends that the fact that it voted seven to two (including Smith's "no" vote) to remove Smith summarily indicates its rejection of his explanations regarding each of the four meetings and that should be sufficient reason to deny Smith relief at this time. In the process, it maintains that the Administrative Law Judge cannot substitute his/her judgment in favor of the Board where it has so acted. However, I **FIND** that the Administrative Procedure Act mandates a hearing de novo on issues properly transmitted by an agency to the O.A.L., which is then charged with the responsibility to conduct and present appropriate fact findings, conclusions, and recommended action back to the transmitting agency. At the same time, the Board conceded that it had no facts to dispute the excuses presented by Smith regarding his nonappearance at each of the individual meetings. Therefore they must be accepted as being true.

In addition, since the Board has failed to present or articulate any duly promulgated standards by which one could be excused from attendance (*ie.*, to demonstrate the good cause

exception), absent any such definable standards, one must employ a reasonable standard in order to gauge the adequacy of the Board's action in removing Smith.

It must be remembered that removal of a Board member after three missed meetings is not mandatory. It remains discretionary and subject to proof of good cause. There is no proof that the Board either requested medical verification of illness or challenged the legitimacy of it at all. In addition, there is no valid claim that Smith failed to timely notify them of his various absences, as distinguished generally from the matter of *Shamong Township Board of Education, Burlington County v. Elizabeth Chwaster*, EDU 476-85(1985), which was cited by the Board herein.

In that regard it is also noted that, contrary to the assertions of the Board, *stare decisis* does not apply to administrative decisions in the same way as it has in common law. As set forth by the Hon. Steven Lefelt in *Administrative Law and Practice*, 1*Ed.* 1985, 37 *N.J. Practice* §331, "An agency need not follow its earlier decisions rigidly and failure to abide by a prior decision will not alone cause a reversal by a reviewing court. Agency decisions and findings in contested cases do not have the force of administrative rules."

Based upon all the foregoing, I **FIND** that, absent any bonafide reason or to challenge the explanations given by Smith, he has produced a sufficiently plausible explanation to excuse his attendance from the September 26, 1998 meeting, to wit, that he was sick with flu-like symptoms and that was a plausible basis for him not attending the meeting on that occasion. Under the circumstances, I **FIND** that he has more than adequately met all of the standards set forth hereinabove and as mandated under *Crowe*. As a result, I **FIND** that the Board's determination to reject his illness excuse on September 26, 1998 was in fact arbitrary, capricious and unreasonable, absent any other proof to the contrary. Would they have preferred that Smith show up and potentially infect either the Board or the general public? Or, should they have preferred to allow Smith to jeopardize his own health and safety for the sake of that one meeting? The absurdity of either such consequences speaks for itself.

Or, as counsel has volunteered, would the Board really have given Smith "credit" for attending any of the other three meetings for only "one minute" with his infant child in tow in order for him to avoid the consequences of missing those meetings? It is obvious that such a result would not have contributed to instilling responsible conduct in its members if they had allowed such a procedure either.

To suggest that a Board member should be compelled to attend a public meeting when one is legitimately ill speaks volumes, at a minimum, to a callous insensitivity to one's personal

plight or, at worse, and perhaps as Smith has suggested, a deliberate effort to eliminate a lone voice crying in the wilderness. Removal from office is a most serious application of our constitutional democracy and that process should not be treated lightly since it directly impacts upon the rights of the electorate. If there is a dispute about Smith's performance overall, it should be best judged by the electorate of Hazlet through the ballot box under the circumstances.

Thus, since I have found that the Board's action relative to Smith's illness on September 26, 1998 failed to reasonably consider his good cause explanation, I **FIND** that he should be excused from attendance at that meeting. As a result, since he has not missed three consecutive meetings as set forth under *N.J.S.A.* 18A:12-3, he is to be restored to his seat as a member of the Hazlet Board of Education immediately. Therefore, it is **ORDERED** that the removal of Wesley M. Smith as a member of the Board of Education of the Township of Hazlet, Monmouth County is hereby **REVERSED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

February 10, 1999
DATE

JOHN R. FUTEY, ALJ

ph

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner:

P-1 Hearing Packet, including exhibits

For Respondent:

R-1 Resolution of the Hazlet Township Board of Education, dated October 22, 1998

R-2 Redacted Minutes of Executive closed session for October 22, 1998

WITNESSES

For Petitioner:

Wesley M. Smith

For Respondent:

Richard Barney

OAL DKT. NO. EDU 53-99
AGENCY DKT. NO. 553-12/98

WESLEY M. SMITH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAZLET, MONMOUTH COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

The record of this emergent matter, including the audiotape of the proceedings before the Administrative Law Judge (ALJ),[1] and his Order on Motion for Emergent Relief have been reviewed. By letter dated February 11, 1999, from the Director of the Office of Controversies and Disputes, the parties were provided until close of business on Wednesday, February 17, 1999, to file exceptions to the ALJ's Order, and until close of business on Friday, February 19, 1999 to submit replies. Exceptions of the Board and petitioner's reply thereto were filed in accordance with the established schedule.

The Board excepts to the ALJ's grant of emergent relief in this matter, contending that such determination was based on a misreading and misinterpretation of the applicable statute, misapplication of the standard for emergent relief, and failure to abide by prior decisions of the Commissioner on the issue. (Board's Exceptions at p. 2) Initially, in this regard, it advances that the ALJ's conclusion that, because he determined that Mr. Smith had a good cause

[1]The record reflects that the hearing in this matter was conducted on February 8, 1999.

explanation for his nonattendance at the September 26, 1998 meeting, Mr. Smith, consequently, had not missed the three consecutive meetings contemplated by *N.J.S.A.* 18A:12-3[2] which would allow the Board to remove him as a member, evidences a tortured interpretation of this applicable statute. Citing *Wingate v. Estate of Ryan*, 149 *N.J.* 227 (1997) and *Strasenburgh v. Staubmuller*, 146 *N.J.* 527 (1996), the Board avers that the primary consideration when interpreting a statute is its plain language and in no event should a statute be interpreted to produce absurd results. (Board's Exceptions at p. 4) Here, it advances, the plain language and meaning of the one sentence portion of *N.J.S.A.* 18A:12-3 involved herein is clear on its face. Such provision empowers a local board of education to remove a member at its discretion, when that member has missed a series of three meetings and has not offered what the board finds to be good cause for missing each meeting in that series of meetings. (*Id.* at p. 5) Buttressing this statutory interpretation, the Board points to language from *Shamong Township Board of Education v. Chwastek*, decided by the Commissioner July 8, 1985, wherein it was stated

> "Giving the words in the statute their ordinary meaning, any member of the Board who fails to attend three consecutive meetings of the Board may be removed by it unless the member convinces the Board that the **absences** were for good cause." *Id.* at 3. (emphasis added) (Board's Exceptions at p. 3)

Consequently, the Board reasons, contrary to the finding of the ALJ, pursuant to its plain language and the Commissioner's interpretation of this statute, an excuse for one of the three absences does not "[b]reak the chain" of absences and "diffuse the Board's power to demand a showing of good cause for the entire spree of absences, or remove the member." (*Id.* at p. 4)

Next, the Board avows, that in granting the petitioner's emergent application, the within ALJ misapplied the standard, as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982),

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[2]It is noted that the relevant portion of this statutory provision specifies "***any member who fails to attend three consecutive meetings of the board without good cause may be removed by it."

necessary for the awarding of this relief. Namely, it posits, *Crowe* requires a showing of **each** of four specific criteria:

1. The relief must not be granted except when necessary to prevent irreparable harm, or harm for which there is no adequate legal remedy;
2. Relief should not be granted when the legal right underlying the applicant's claim is unsettled;
3. The applicant for relief must make a preliminary showing of a reasonable probability of ultimate success on the merits; and
4. The relative hardship to the parties in granting or denying relief must be considered. *Id.* at 132-34 (Board's Exceptions at p. 6)

It is readily apparent, the Board avers, that criteria 2 and 3 have not been met. Given the Board's previously discussed interpretation of *N.J.S.A.* 18A:12-3, it argues, the ALJ's legally unsupported, "determination that a single excused absence in the chain of absences protects the member from removal," unmistakably evidences that the legal right underlying petitioner's claim is unsettled. (*Id.* at p. 9)

Likewise, with regard to the probability of petitioner's success on the merits, the Board advances that satisfaction of this prong cannot be seriously argued. It posits that "even with the assistance of [the ALJ's] *sua sponte* equitable findings" that petitioner had "good cause" for his failure to attend the September 26, 1998 meeting, only one of petitioner's four absences would possibly be excusable, which does not protect him from removal under the statute. (*Id.* at pp. 6-7) Additionally, the Board, citing *Shamong, supra*, asserts "[i]t is well settled that the local Board of Education, itself, is responsible for determining what constitutes such good cause [for a member's absence]." (Board's Exceptions at p. 7) As the within Board determined on

October 22, 1998 that petitioner had not presented good cause for his absences, without a showing that this determination was arbitrary, capricious or unreasonable, a trier of fact is required to defer to the Board's judgment in this regard. (*Id.* at pp. 6-7) Consequently, it argues that the ALJ's conclusion that petitioner demonstrated a substantial likelihood of success on the merits of this case was reached not in reliance on legal standards or the criteria of *Crowe*, but solely in light of the Judge's impermissibly substituting his judgment for that of the Board. (*Id.* at pp. 8-9)

Upon his careful and independent review of the record and the parties' submissions, the Commissioner determines to reverse the Order of the ALJ granting emergent relief in the instant matter. It is well settled that the grant of emergent relief is considered an extraordinary remedy which can only be awarded, as correctly advanced by the Board in its exceptions, when the party seeking such relief demonstrates the existence of **each** of the four separate criteria identified in *Crowe, supra.* Here, the Commissioner concludes that it is evident that the *Crowe* standard has not been satisfied. Specifically, his detailed review persuades him that the law underlying petitioner's legal claim is unsettled. Rejecting the Board's exception argument that the cited passage from *Shamong, supra,* is necessarily dispositive herein, the Commissioner, rather, concludes that there is no decisional law which specifically addresses and interprets the statutory intendment of the term "three consecutive meetings" or resolves the question of whether "good cause" is required for each individual board member absence or for the period of absence. Moreover, the record of this matter amply manifests that the express meaning of this statutory provision is rigorously disputed. This being so, petitioner can claim no likelihood of success on the merits, and so fails to meet at least two of the necessary criteria.

Accordingly, the recommended Order of the ALJ granting petitioner's Motion for Emergent Relief is reversed, and this matter is hereby returned to the OAL for further proceedings on petitioner's underlying claim.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 8,1999
Date of Mailing, March 8, 1999

62-99

BYRAM BUS LINES, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOUNT ARLINGTON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning Company sought order declaring Board's award of a transportation contract to Ryder as void and *ultra vires* because Ryder could not conform to material specifications (2 and 6 – dispatch facility requirement) and, thus, petitioner was the lowest possible bidder.

ALJ found that Ryder was materially and substantially in accord with the specifications. ALJ determined that the Board's award of a transportation contract to Ryder did not violate bid specifications 2 and 6 and the Department's rules and since no violations occurred, no interim measures or remedies were available to petitioner. Petition was dismissed.

Having reviewed the record and the transcript of the hearing in this matter, the Commissioner adopted findings and determination in initial decision as his own. Commissioner concurred with the ALJ that the within Board complied with applicable laws and regulations in securing, through competitive bidding, the lowest responsible bidder for its transportation contract. Commissioner further agreed that Ryder, the lowest bidder, did substantially conform to the specifications, and its variance therefrom was not material or substantial so as to preclude the Board's awarding of its transportation contract.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7608-97
AGENCY DKT. NO. 240-7/97

BYRAM BUS LINES, INC.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF MOUNT ARLINGTON, MORRIS COUNTY,
Respondent.

Gregory T. Keller, Esq., for petitioner
(Stein, Bliablias, McGuire, Pantages & Gigl, attorneys)

Vito A. Gagliardi, Esq., for respondent,
(Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen, attorneys)

Record Closed: December 6, 1998 Decided: January 20, 1999

BEFORE **ELINOR R. REINER**, ALJ:

On July 7, 1997, Byram Bus Lines, Inc., filed a petition for declaratory judgment with the Commissioner of Education seeking an order declaring that (a) the Mount Arlington Board of Education's contract award to Ryder Student Transportation Services, Inc., was void and *ultra vires* because Ryder could not conform to material specifications and was therefore not the lowest responsible bidder; and (b) Byram was the lowest responsible bidder. The Board answered on July 25, 1997. On July 29, 1997, the Commissioner decided not to consider this matter as one for declaratory

judgment; instead, the Commissioner found that this dispute was to proceed as a petition of appeal and transmitted it to the Office of Administrative Law as a contested case. The matter was transmitted to the Office of Administrative Law on August 7, 1997, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

Byram submitted a brief in support of its motion for summary decision on January 20, 1998. On February 17, 1998, the Board submitted a brief in opposition to Byram's motion and in support of its cross-motion for summary decision. Thereafter, I rendered a decision denying both Byram's and the Board's motions for summary decision. At some point during or after July 1998, the Board allegedly renewed its contract with Ryder for an additional one-year term. On August 20, 1998, the Board again moved for summary decision and a brief was submitted by Byram on August 31, 1998. The motion was denied on the record on September 14, 1998, and the matter proceeded to hearing on that date. Witnesses who testified and documents considered in deciding this case are listed in the attached appendix. The record closed after the submission of briefs.

UNDISPUTED FACTS

1. At all times relevant hereto, petitioner Byram Bus Lines, Inc., ("Byram") was a New Jersey Corporation engaged in the business of student transportation. Byram maintains its principal place of business at 19 Stanhope-Sparta Road, Hopatcong, New Jersey.

2. Byram provides student transportation services, pursuant to contracts awarded through public bidding laws, with various school districts including Lenape Valley Regional High School, Hopatcong Borough, and Byram Township.

3. In or about March 1997, the owner of Byram was a trust established for the benefit of the family of Alan Mackerley. This information was duly disclosed by Byram in its bid submission relevant to this case. Byram has not been declared

an unresponsive or irresponsible bidder by any public entity, nor has it been unable to receive surety bond coverage.

4. With the exception of respondent Mount Arlington school district ("District" or "Board"), Byram continues to provide student transportation services, either pursuant to contractual renewal or competitive bidding, to all of its prior customers.

5. At all times relevant hereto, the respondent was a public school district of approximately 400 students from grades K through 8. The District maintains two elementary schools. Mount Arlington's senior high school students are transported to Roxbury High School pursuant to a sending-receiving relationship with that district.

6. Pursuant to a series of annual contracts or renewals thereof, Byram provided the District with student transportation services from approximately September 1977 through June 1997.

7. In or about February 1997, the Board's secretary and business administrator, Beverly Sturm, issued a memorandum to all potential bidders soliciting bids for the District's 1997-1998 school year Student Transportation Contract.

8. The District's initial request solicited bids for fifteen bus routes. Byram's corporate secretary and transportation coordinator, Janet Bunnicant, brought to Ms. Sturm's attention that the Board's "Bid Sheet" only contained space to bid on thirteen routes. For this reason, no contract was awarded as a result of the February solicitation for bids.

9. In March 1997 Ms. Sturm re-issued an invitation to potential bidders for the 1997-1998 transportation contract and specifically requested bids for "Routes 1 through 13."

10. The Board's bid package, which contained a public notice, prescribed form of questionnaire, "Transportation Specifications" and a bid sheet, was prepared and issued by Ms. Sturm. In preparing this package, she re-typed the specifications previously utilized by the Board in past years. She undertook no substantive review of the specifications, and she did not make any changes, corrections or amendments to the District's prior specifications. The District's superintendent, Thomas Ficarra, did not review the specifications prior to their issuance.

11. The Board's specifications included various specific "vehicle" transportation specifications, which are set forth as follows:

(1) No bus shall be older than 10 years.

(2) Contractor shall maintain at least one spare 54 passenger bus at a location within five miles of Mount Arlington. This location shall have a phone and a dispatcher on duty between 6:00 a.m. and 5:00 p.m. on the days school is in session.

(3) Spare bus shall be no older than 10 years.

(4) All vehicles shall be systematically inspected twice within the year to insure that such vehicles and equipment are in safe and proper operating condition.

(5) Vehicles used for transportation of pupils shall be inspected by the P.U.C. or the New Jersey Motor Vehicle Department and shall be subject to periodic inspection by a representative of the Mount Arlington Public School District.

(6) Vehicles shall be outfitted with 2 way radio communication equipment with a base radio at the dispatch facility.

(7) Vehicles shall be outfitted with active video cameras. Specifications are attached.

12. Neither these specifications nor any other information promulgated and distributed by the Board specifically authorized, nor specifically forbade, the use of "park-outs" by the successful bidder or permitted the parking of a spare bus on school property in order to comply with any part of these specifications.

13. Bids were submitted by Byram and Ryder Student Transportation Services, Inc. ("Ryder") on or about March 25, 1997. They were opened on the same day by Ms. Sturm. Representatives of both Ryder and Byram were in attendance.

14. Byram's total bid for all thirteen routes was $285,689.82. It also submitted a "bulk bid" for all of the routes reflecting a discount of 20 percent, with a net cost to the Board of $228,587.86.

15. Ryder also bid on all thirteen routes, and its total bid was $326,700. It submitted a bulk bid in the amount of $169,884, representing a 48 percent discount.

16. Ryder's bid was executed by Gregory S. Walter, and set forth its office address as Westmont, Camden County, New Jersey.

17. Ryder's bid submission is P-5.

18. Byram's bid submission is P-2.

19. Byram's facility is located within five miles of the borough of Mount Arlington and serves as Byram's main office, garage and dispatch facility. Byram does not allow its drivers to take buses home, and all runs begin and end at this location. Several spare buses are located at this facility.

20. Shortly after the bids were opened, Ms. Bunnicant, on behalf of Byram, wrote to Ms. Sturm to express Byram's concern that Ryder's bid was not compliant with the Board's specifications.

21. The contract was awarded to Ryder by the Board on or about April 16, 1997, during the Board's regularly scheduled reorganization meeting. The Board does not tape record its meetings. Minutes of this meeting were prepared by Ms. Sturm; however, they do not disclose any discussion by the Board of Ryder's ability to meet its specifications.

22. Prior to the award of the bid, neither Ms. Sturm nor Superintendent Ficarra discussed with Ryder the manner in which it proposed to comply with the Board's specifications requiring a spare bus and dispatcher at a location within five miles of the borough of Mount Arlington.

23. Byram was not advised that Ryder was awarded the contract until it received an undated letter from Ms. Sturm on or about May 28, 1997.

24. In or about August 1997, Superintendent Ficarra granted Ryder's request that it be permitted to park its spare bus, required by the specifications, in the parking lot of the Mount Arlington School.

25. During the course of this contract, Ryder has employed one of its proposed drivers, Vicky Rossy, to sit in the spare bus for seven hours per day and perform as a dispatcher. Ms. Rossy resides at 27 Kadel Drive, Mount Arlington, approximately two-tenths of a mile from the spare bus. Ryder's bus is equipped with a cellular telephone and a radio.

26. Lynda Streppone, who resides in the Landing section of Mount Arlington, was designated as one of Ryder's "proposed" drivers. Ms. Streppone was previously employed by the Frank Black Bus Company at its office in Andover, New Jersey. Ryder, in 1997, assumed the operations of Black after his death and Ms. Streppone continues to work at the Andover office. At the hearing, a representative of Ryder testified that Ms. Streppone was initially designated to stay at home so as to serve as Ryder's dispatcher for Mount Arlington.

27. Ryder employee Laurie Neblick was transferred by Ryder from its Boonton facility to Andover. Sometime prior to September 1997 she moved to Mount Arlington. She, in place of Ms. Streppone, has been designated to serve as Ryder's dispatcher for Mount Arlington. Ms. Neblick provides dispatcher services in the early morning hours from her home. Thereafter, she serves as dispatcher while commuting by car to Ryder's Andover office, and for the balance of the day performs dispatching services while performing her job at Ryder's Andover office. This office is located between 10 and 12 miles from the border of the borough of Mount Arlington.

28. In or about July 1998 the Board renewed the Student Transportation Contract with Ryder for the 1998-99 school year.

TESTIMONY

First to testify on behalf of Byram was Janet Bunnicant. Of import, she testified that all Byram buses are housed at Byram's location, and she said that she or a secretary is at the location at 6:00 a.m. They have a base radio and two-way communications. They call in the buses as the drivers arrive. A spare driver can cover if a driver is late. She alleged that Byram could perform the contract for Mount Arlington. She contended that its bid would have been lower if it had known that others could bid on the contract. Ms. Bunnicant said that she signed and forwarded Byram's original bid to the Board. She said that she did not ask for a waiver of the drivers' addresses, and that there was no place on the bid that required the name of the dispatcher. She alleged that the signature indicated that Byram was ready to meet the specifications.

Beverly J. Sturm testified that Ryder's bid indicated proposed bus drivers. It did not indicate who the dispatcher was, or where Ryder would maintain a spare bus within five miles of Mount Arlington.

Superintendent Ficarro testified that he understood at the time of the award of the contract that Ryder could comply with the specifications. If a company signs the bid specifications, he assumes that it can meet them. He saw nothing in Ryder's bid that indicated that Ryder was not responsible. The addresses were all within five miles of Mount Arlington. He pointed out that he has worked with Ryder for over a year and has experienced no problems. The contract runs smoothly and the parents are pleased. He said that if the contract with Ryder is invalidated, it will cost the Board additional monies and be devastating to its educational program. He admitted that on its bid, Ryder did not indicate where its dispatcher was located. He explained that he calls "a number" and a dispatcher picks up the phone; he does not know where he is calling.

Laurie W. Neblick testified that Ryder complied with the bid specifications. There is a 54-passenger bus parked on school property. The bus driver is employed six hours a day. A spare driver is two-tenths of a mile away and there is a two-way radio on standby. She said that Vicky Rossy lives on Kadel Drive in Mount Arlington and has a two-way radio. Neblick lives in Mount Arlington across the street from the school. She has a cellular phone and a two-way radio.

Neblick explained that at the time of the bid the intent had been to park the spare bus at Kadel Drive. She and Linda Streppone were going to fulfill the specifications. She noted that the main base radio for Ryder is in Andover. Linda Streppone was to be the satellite location for Mount Arlington. She would have a bus, a phone and a two-way radio. Vicky Rossy was to work with Linda. The coverage was from 6:00 a.m. to 5:00 p.m., but would not necessarily be the same person straight through. Linda Streppone never served as the dispatcher for Mount Arlington. Streppone was listed as a driver and could be one of the spare drivers. Neblick contended that one can dispatch from a bus.

Neblick testified that today she shares the dispatching responsibilities with Vicky Rossy. Vicky Rossy is the dispatcher/driver when Neblick is at Andover. She is more than a spare driver, and ends her day at 4:30 p.m. Neblick personally receives the

calls from 6:00-7:30 a.m. while at home. She spends two to three hours per day in Mount Arlington. Drivers generally call the Andover location for a dispatch. She agreed that they would call the Andover location if a dispatch issue arose during the day.

DISCUSSION

The procedures concerning the bidding process and the awarding of transportation services contracts vis-à-vis public schools are governed by the statutory provisions entitled "Transportation to and from Schools" (hereinafter "Transportation Act"), *N.J.S.A.* 18A:39-1 to -25. Of particular relevance to the instant matter are the following statutory provisions: (a) general pupil transportation requirements, found at *N.J.S.A.* 18A:39-1; (b) bid advertisement requirements, found at *N.J.S.A.* 18A:39-3; (c) bid form requirements, found at *N.J.S.A.* 18A:39-4; (d) bid opening and/or rejection requirements, found at *N.J.S.A.* 18A:39-5; and (e) rulemaking authority of the state board, found at *N.J.S.A.* 18A:39-21 and -24. The Department of Education (DOE) has promulgated regulations concerning pupil transportation contracts under the authority of *N.J.S.A.* 18A:39-21 and -24. These regulations are found at *N.J.A.C.* 6:21-1.1 to -19.5.

In pertinent part, *N.J.S.A.* 18A:39-3, which governs bid advertisement requirements, states:

> a. No contract for the transportation of pupils to and from school shall be made . . . unless the board of education making such contract shall have first publicly advertised for bids therefor in a newspaper published in the district or, if no newspaper is published therein, in a newspaper circulating in the district, once, at least 10 days prior to the date fixed for receiving proposals for such transportation, and shall have awarded the contract to the lowest responsible bidder.

See also N.J.S.A. 18A:39-5, which states that "[n]o proposals shall be opened previous to the hour designated in the advertisement and none shall be received thereafter";

N.J.A.C. 6:21-2.1(b), which states that "[d]istricts shall advertise for bids before a determination is made to provide transportation"; and *N.J.A.C.* 6:21-15.1(a), which states:

> District boards of education shall have the option of annually bidding all transportation contracts or awarding annual extensions of an original contract. However, no contract for the transportation of pupils to and from school shall be made, when the amount to be paid during the school year for such transportation shall exceed the bid threshold limit and have the approval of the county superintendent of schools, unless the district board of education making such contract shall have first publicly advertised for bids. Such advertisement shall be published once in a newspaper circulating in the district at least 10 days prior to the date fixed for receiving proposals for such transportation. All bids shall be advertised with the time and place fixed to each advertisement for submission of proposals to the district board of education. No proposal shall be opened previous to the hour designated in the advertisement and none shall be received thereafter. The board or designated official shall unseal bids in the presence of those in attendance and publicly announce the contents.

In the instant matter, the Board advertised for sealed bid proposals on public school transportation services contracts on or about March 14, 1997. The advertisement noted that the bid proposals would be due by March 25, 1997, at which point they would be publicly opened at the Board's offices. As noted in the record, the Board "publicly advertised for bids" eleven days "prior to the date fixed for receiving proposals for such transportation," and the advertisements contained "the time and place fixed . . . for submission of proposals." Additionally, the Board neither opened the sealed bids "previous to the hour designated in the advertisement" nor "received [bids] thereafter." Accordingly, the Board's actions met the relevant statutory and regulatory provisions concerning advertising.

In addition to the information contained in the bid advertisement, the Board also noted that published specifications regarding the transportation services contracts were

available to bidders at the Board's offices. Unlike the Public School Contracts Law, which contains express specification requirements in its provisions, no such requirements in the pupil transportation services context are found in the Transportation Act; however, they are found in the regulations. Within these regulations, the following sections concern specification requirements: (a) *N.J.A.C.* 6:21-13.1; (b) *N.J.A.C.* 6:21-13.2; and (c) *N.J.A.C.* 6:21-15.1. The first of these provisions, *N.J.A.C.* 6:21-13.1 ("General requirements"), states:

> (a) The district board of education shall designate a committee, official or employee to prepare the specifications for each route or contract for which proposals are sought. A copy of the specifications shall be submitted to the county superintendent of schools prior to advertisement for bids. The specifications and advertisement for bids shall be approved and authorized by formal action of the district board of education.
>
> (b) Any specification drawn for purposes of competitive bidding shall be drafted in a manner designed to encourage free, open and competitive bidding. Specifications shall not knowingly exclude prospective bidders by reason of the impossibility of performance or bidding by any one bidder. Any contract drawn which fails to meet the requirements of this subchapter shall be set aside by the district board of education.
>
> (c) Potential or successful bidders shall not draft specifications or route descriptions.
>
> (d) Specifications shall protect against discrimination in accordance with *P.L.* 1975, c.127 (*N.J.S.A.* 10:5-31 *et seq.*).

The second of these provisions, *N.J.A.C.* 6:21-13.2 ("Prescribed transportation bid specifications"), states in pertinent part:

> a) The district board of education shall prepare transportation bid specifications to include, but not be limited to, the requirements of this chapter.
>
> . . . .

(f) The bid specifications shall include:

1. A copy of the school calendar;

2. A copy of the prescribed questionnaire form;

3. A provision for emergency closings;

4. Conditions for cancellation of contracts;

5. The limits of liability insurance;

6. The type(s) of bonding required;

7. Except for per pupil bids, a statement which clearly prohibits the commingling of students unless authorized to do so by the district board of education through the joint transportation agreement process;

8. The need for specialized equipment, if applicable;

9. Restrictions due to student classification, if applicable;

10. A statement that all equipment shall meet current specifications in accordance with Federal and State law, the rules of the State Board of Education, and any additional specifications of the district board of education;

11. A statement that all contractors shall comply with current applicable New Jersey Statutes, regulations, and policies and procedures of the district board of education governing pupil transportation;

12. A bid sheet which will be required to be submitted by bidders to the district board of education. The bid sheet shall include a provision to request bids on a per route basis for regular, nonpublic and in-district handicapped students and on a per route, per vehicle, per pupil, per mileage basis for the transportation of out-of-district handicapped students;

13. The bid sheet shall include a separate provision to request adjustments to the contract on a per mile basis for public and nonpublic regular and in-district handicapped routes and on a per mile, per pupil, per

> vehicle basis for out-of-district special education transportation contracts;
>
> 14. The bid sheet shall include a separate provision to request bulk/combination bids, if applicable;
>
> 15. A requirement for submission of an affidavit of noncollusion;
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> 16. A requirement for submission of a stockholder's disclosure statement;
>
> 17. A provision for the acceptance of bulk/combination bids, if applicable;
>
> 18. A statement that bids are to be placed in a sealed envelope and plainly marked "TRANSPORTATION BID FOR ROUTE OR CONTRACT NO. _____, SCHOOL DISTRICT OF _____" and presented to the board in session, authorized committee, designated official or employee of the board.

The last of these provisions, *N.J.A.C.* 6:21-15.1 ("Responsibility of district board of education"), states in pertinent part:

> (d) All bidding shall be designed to prevent fraud, favoritism and extravagance, to safeguard the taxpayers and protect the lowest responsible bidder.
>
> (e) The bid specifications must be definite, precise and impose common standards.
>
> (f) The bid specifications and any revisions to the bid specifications shall be furnished to all prospective bidders and shall not restrict competitive bidding.
>
> (g) Variations from the bid specifications as prescribed by the State Board must be reasonable and are subject to review by the Commissioner and the State Board of Education.
>
> (h) When bid specifications are purposely formed to deter rather than to invite genuine competition, an award to the intentionally favored bidder shall be set aside.

In the instant matter, the Board prepared specifications regarding the transportation services contracts bid upon by Byram and Ryder. The propriety of these specifications under the DOE regulations and whether Ryder met all of the specifications are the disputed issues here. Specifically, Byram contends that it has standing to challenge the Board's award of the transportation services contract to Ryder, and alleges that such award violated specification no. 2 and specification no. 6 and the DOE's rules. The Board maintains that Byram's petition should be dismissed because Byram lacks standing; specifically, (1) Byram cannot challenge the validity of the bid specifications, (2) Byram's petition fails as a matter of law because it has not named an individual taxpayer as a petitioner, and (3) Byram is not seeking the appropriate relief.

A prerequisite to determining whether the DOE rules or specifications 2 and 6 were violated is the resolution of whether or not Byram has standing to challenge the award. With respect to standing, the Board accurately states that:

> It is well-settled that unsuccessful bidders do not have standing to challenge the award of a contract to a rival bidder or to attack the validity of the specifications post-bid; a bidder cannot endeavor to take advantage of a contract to be awarded under illegal specifications and then, if unsuccessful, seek to have the contract set aside. Challenges to the bid specifications may not be made post-bid and unsuccessful bidders lack the standing to support a challenge to bid specifications after the opening of bids.
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> [Board Br. at 6 (citation omitted).]

Beginning with *Waszen v. Atlantic City*, 1 *N.J.* 272 (1949), and *Camden Plaza Parking v. City of Camden*, 16 *N.J.* 150, 158-59 (1954), the New Jersey courts have held that an unsuccessful bidder on a public contract lacks standing to challenge an award to a rival. As the Supreme Court stated in *Waszen, supra*, 1 *N.J.* at 276, "The rationale of such a holding is that one cannot endeavor to take advantage of a contract to be awarded under illegal specifications and then, when unsuccessful, seek to have the contract set aside." This principle has been consistently applied by the courts. *See*

Katinsky v. Pennsauken Township Bd. of Educ., 93 *N.J.A.R.*2d (EDU) 1, 3, where the administrative law judge (ALJ), citing to *Waszen*, held: "If petitioner had a problem with the clarity of the specifications, the time to raise that issue was before the bids were opened, not after."; *Richard Eiden Assoc., Inc. v. Fair Lawn Bd. of Educ.*, 97 *N.J.A.R.*2d (EDU) 503, 505 ("A bidder who is not the lowest responsible bidder lacks standing to challenge the award of a contract to another bidder on allegedly illegal specifications."); *Communications Workers of America, AFL-CIO v. Clymer*, 292 *N.J. Super.* 138, 145 (Law Div. 1996) ("Unsuccessful bidders have no standing to challenge specifications contained in an RFP [request for proposal] *after* bids are opened.").

This principle was also upheld in *Educational Food Management Services, Inc. v. Board of Education of the Township of Clark*, OAL Dkt. No. EDU 4724-84 (Aug. 20, 1984), *aff'd*, Comm'r of Educ. (Oct. 4, 1984). There, the ALJ found that the petitioner's challenge of the Board's award of a contract to a competitor was, in fact, a challenge to the bid specifications "which is precluded after the opening of bids as a matter of law." OAL Dkt. No. EDU 4724-84 at 5. However, the ALJ did not base his decision on the *Waszen* line of cases; instead, his decision rested on prior school law rulings which dealt with the issue of standing. In discussing his ruling, the ALJ stated:

> The Commissioner stated in *Andrews and Shearer's Dairies v. Bd. of Ed. of Camden*, 66 *S.L.D.* 147, in citing *Consumers Ice Cream Co. v. Bd. of Ed. of Camden*, 1960-61 *S.L.D.* 212:
>
> > Whenever there is any question of the validity of specifications or the manner in which competitive bids are sought the complainant should make timely protest and not wait until bids are awarded. Such objections should be made before the bid is submitted. (at 149)
>
> [*Id.* at 5-6.]

The Commissioner affirmed the ALJ's ruling, and stated: "the case cited by the judge . . . , *Andrews and Shearer's Dairies, supra*, is directly on point and is as valid now as it

was eighteen years ago, having stood the test of time." OAL Dkt. No. 4724-84, Final Decision, at 10-11.

Cases in which standing has been found have also adhered to the "timeliness" principle established in *Waszen*, *Camden Plaza Parking*, and *Andrews and Shearer's Dairies*. For example, in *Harry A. Stroh Associates, Inc. v. Hillsborough Township Board of Education*, 95 *N.J.A.R.*2d (EDU) 235, the petitioner initially brought a challenge to the bid specifications after the first set of bids was opened. The ALJ ruled that such a challenge was untimely. Subsequently, when the school board solicited bids on the same contract a second time (*i.e.*, by re-advertising its availability), the petitioner brought an immediate challenge to the bid specifications prior to the opening of the bids. In holding that the petitioner had standing to bring a challenge, the ALJ stated:

> Petitioner is now challenging the bid specifications prior to the opening of the second set of bids.
>
> The fact that this contract has been re-advertised allows petitioner to raise a challenge, whereas petitioner did not do so before the opening of the first set of bids, and could not do so after the bids were opened.
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> [95 *N.J.A.R.*2d (EDU) at 236.]

See also Sevell's Auto Body Co., Inc. v. N.J. Highway Auth., 306 *N.J. Super.* 357, 369-70 (App. Div. 1997), *certif. denied*, 153 *N.J.* 51 (1998), where the appellate court found standing, and stated:

> [T]here is also no merit to the contention . . . that Sevell's lacks standing to challenge these specifications. Sevell's commenced this action prior to the bid submission date. It therefore has not acted in disregard of *Waszen* . . . , which held that an unsuccessful bidder lacks standing to challenge the specifications under which its unsuccessful bid was submitted.

Under the guidance of the foregoing framework, challenges by Byram to the bid specifications and the award of the transportation services contract to Ryder would be untimely. Byram first raised its objection on March 26, 1997, one day after the sealed bids were opened on March 25, 1997. Byram submitted its bid proposal prior to the March 25, 1997 deadline and raised no objections to the bid specifications at that time. No challenge was raised until after the sealed bids were opened and Byram learned that it was not the lowest bidder. Moreover, Byram did not actually file the petition for declaratory judgment in this matter until well after the contract was formally awarded to Ryder at the Board meeting of April 16, 1997; Byram filed its petition on July 7, 1997. Accordingly, if Byram's objections are construed as challenges to the specifications, then it lacks standing to maintain this action.

Byram argues that it is challenging neither the validity of the specifications nor the propriety of the Board's interpretation of the specifications, but instead is merely contending that it was the "lowest responsible bidder." Byram contends that Ryder was not the "lowest responsible bidder," because it was not in full compliance with and could not have met all of the bid specifications. In particular, Byram alleges that Ryder (a) did not have a spare bus parked at a "bus depot" or "dispatch facility" with a "dispatcher" on duty during school hours, within the five-mile radius, as required by specification 2, and (b) did not have two-way radio communication equipment between a "dispatch facility" and the spare bus, as required by specification 6. Byram maintains that, unlike Ryder, it met both of these specifications, and therefore was the "lowest responsible bidder."

Byram cites to *Hillside Township v. Sternin*, 25 *N.J.* 317 (1957), and argues, "'A bidder not in compliance with specifications may not qualify to win the contract and acceptance of the bid may be reversed.'" Further, Byram cites to *University Bus Co. v. State-Operated School District of the City of Paterson*, 93 *N.J.A.R.*2d (EDU) 553, and contends, "[b]idders such as Byram, have standing to adjudicate disputes involving the ability [of] a Board of Education to waive or vary particular details contained in bid specifications, which is exactly what the Board has done." Finally, Byram cites to *N.E.R.I. Corp. v. New Jersey Highway Authority*, 147 *N.J.* 223 (1996), and argues,

"'Indeed, there are many instances when the "lowest bidders" should not receive a contract because they are not the most "responsible" bidder.'" In sum, Byram maintains that it has standing to bring this action, which it does not classify as an attack on the bid specifications, but instead considers a challenge to Ryder's status as a "responsible" bidder.

The Board counters by arguing:

> Petitioner . . . has attempted to evade the consequence of the *Waszen* "standing" rule by adding collusion allegations to their attack on specifications which it alleges to be designed to benefit Ryder unlawfully. The Appellate Division *in Saturn Constr. Co. v. Middlesex County Freeholders*, 181 *N.J. Super.* 403 (App. Div. 1981), rejected a similar attempt by an unsuccessful bidder to evade the . . . rule.
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> [Board Br. at 7.]

The Board continues its argument by stating:

> The Appellate Division stated that the issue was whether Saturn, by phrasing its complaint to request relief as the lowest responsible bidder, had standing to make what was in actuality a post-bid challenge involving interpretation of the specifications . . . [and] ruled that Saturn did not have standing . . . because its challenge . . . was on the basis of an arguable ambiguity in the bidding specifications. Saturn's "only basis for stating that it was the lowest bidder was found by interpreting the specifications to allow the County to award a contract by ignoring one of the mandatory bid items." The Appellate Division found this to be a challenge to the specifications, and further consideration of Saturn's case would not further the public's interest but would merely give Saturn another chance.
>
> [*Id.* at 7-8 (citation omitted).]

The Board concludes by applying the guidance of *Saturn* to the instant case. The Board states:

> [T]he gravamen of Byram's Petition is that Ryder is not the lowest responsible bidder . . . because only Byram is eligible to be awarded the contract under the given specifications. Byram, like Saturn, by phrasing its Petition to request relief as the lowest responsible bidder, does not have standing to make a post-bid challenge involving interpretation of the specifications. Also like Saturn, Byram does not have standing to challenge the award because its challenge to the award is on the basis of an arguable ambiguity in the bidding specifications, and the Court's consideration of this claim will not further the public's interest but would merely give Byram another chance.
>
> [*Id.* at 8-9.]

The Board extends this argument when it states:

> Although it is clear that Petitioner is challenging the validity of the bid specifications, Byram argues "the bid specifications themselves are clear, unambiguous and susceptible to only one interpretation" and that the issue is simply whether or not Byram was the lowest responsible bidder. This strained construction of the issue is apparent. Petitioner is arguing that the Board has interpreted the specifications incorrectly, because, had it interpreted the specifications correctly then Byram would have been awarded the contract. Again, Byram cannot make a *post facto* challenge to the specifications, as such objections fall squarely contrary to binding precedent such as *Saturn*, as well as public policy.
>
> [Board Reply Br. at 2 (citation omitted).]

The Board's reliance on the Saturn "disguised standing" principle, when considered in conjunction with the body of case law concerning general standing to challenge public contracts, does not compel the conclusion in the instant case that Byram lacks standing. I cannot conclude that Byram's attempt to craft its petition as one resting on the issue of the "lowest responsible bidder" is actually an attempt to circumvent the standing requirement.

Byram is not actually challenging the Board specifications. It contends that the specifications are clear, unambiguous and susceptible to only one interpretation. Byram argues that Ryder failed to comply with them. As such, this tribunal is not required to consider a challenge to the specifications. Rather, an analysis of whether specifications 2 and 6 were met, as well as whether the specifications met DOE regulations, must be undertaken.

Of great import to such an analysis are considerations of the "public interest" versus the benefit of the bidder. Such considerations are viewed as the primary purpose of the public bidding requirements. In this regard, the Court in *N.E.R.I. Corp., supra*, 147 *N.J.* at 226, stated, "Public bidding statutes exist for the primary benefit of the taxpayer not the bidder; and must be construed with 'sole reference' to the public good and rigidly adhered to by courts to guard against favoritism, improvidence, extravagance, and corruption." *See also Clymer, supra*, 292 *N.J. Super.* at 145 ("While standing is restricted as to unsuccessful bidders, it is more broadly interpreted as to taxpayers. . . . Judge Long, speaking for the [*Yacenda Food Management Corp. v. N.J. Highway Auth.*, 203 *N.J. Super.* 264 (App. Div. 1985)] court, noted: '. . . taxpayers have traditionally had standing to challenge the unlawful award of a publicly bid contract.'"). In the instant matter, as in all public bidding cases, these principles must be followed. Instructive on this point is the guidance given by the Court in *Terminal Construction Corp. v. Atlantic County Sewerage Authority*, 67 *N.J.* 403, 411-12 (1975):

> It is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived. This rule, however, does not apply to minor or inconsequential conditions. Public contracting units may resolve problems arising from such conditions in a sensible or practical way. . . .
>
> Essentially this distinction between conditions that may or may not be waived stems from a recognition that there are certain requirements often incorporated in bidding specifications which by their nature may be relinquished without there being any possible frustration of the policies underlying competitive bidding. In sharp contrast, advertised conditions whose waiver is capable of becoming

> a vehicle for corruption or favoritism, or capable of encouraging improvidence or extravagance, or likely to affect the amount of any bid or to influence any potential bidder to refrain from bidding, or which are capable of affecting the ability of the contracting unit to make bid comparisons, are the kind of conditions which may not under any circumstances be waived.

See also Home Owners Constr. Co. v. Glen Rock, 34 *N.J.* 305, 315 (1961) ("The [bidding] statutes must, of course, be faithfully observed and any attempt to evade them must be stricken down. But they must also be construed and applied fairly and sensibly so as to further rather than defeat the legislative goals."); *Aetna Supply, Inc. v. Board of Educ. of the City of Camden*, 1971 *S.L.D.* 151, 154 (In connection with the bidding process and the issue of irregularities in meeting the specifications, the Commissioner has stated that "[t]he pivotal point is whether the lowest bid was materially and substantially in accord with the specifications.").

In the instant matter, the lowest bid was obtained from Ryder, which fell far below the bid received from Byram. The net cost to the Board under Ryder's proposal was $169,884.00, while the cost under Byram's proposal was $228,557.86. *Ficarra Certif.* (attached to Cross-Motion for Summary Decision dated Feb. 17, 1998, Exhibits "B" & "C"). Accordingly, Ryder was the "lowest bidder." If cost were the only measure of "responsibility," Ryder easily would have been classified as the "lowest responsible bidder." However, other considerations, particularly adherence to the specifications, were required. *See Sternin, supra*, 25 *N.J.* at 323 ("all bids must comply with the terms imposed, and any material departure therefrom invalidates a nonconforming bid as well as any contract based upon it"), and at 324-25 (citations omitted) ("The significance of the expression 'lowest bidder' is not restricted to the amount of the bid; it means also that the bid conforms with the specifications. . . . This is because the requirements are generally considered to be mandatory or jurisdictional."). Accordingly, an analysis of specifications 2 and 6 is warranted to determine whether the specifications, and the award to Ryder, violated the DOE regulations, and whether the award to Ryder violated the specifications themselves.

The propriety of specifications 2 and 6, as well as the Board's award to Ryder, will be analyzed under the above-quoted regulations, *N.J.A.C.* 6:21-13.1, *N.J.A.C.* 6:21-13.2, and *N.J.A.C.* 6:21-15.1. The Board has met the requirements imposed by *N.J.A.C.* 6:21-13.1(a), which required the Board to "prepare the specifications for each route or contract for which proposals are sought." Likewise, the Board has met the requirements imposed by *N.J.A.C.* 6:21-13.1(b), which required specifications to be drafted "in a manner designed to encourage free, open and competitive bidding." Byram concedes this point when it states, "Byram has not now, and has never, challenged the bid specifications or their clarity. Quite to the contrary, Byram believes that the bid specifications themselves are clear, unambiguous and susceptible to only one interpretation." Byram Br. at 5.

The Board has also met the requirements of *N.J.A.C.* 6:21-13.2, which set out the "prescribed transportation bid specifications." In pertinent part, these provisions mandated that the Board "prepare transportation bid specifications to include, but not be limited to, the requirements of this chapter." *N.J.A.C.* 6:21-13.2(a). The Board's specifications, *in toto*, have met the mandatory specification requirements imposed by this provision. Moreover, the Board's imposition of specifications 2 and 6, which went beyond the scope of the required items listed at *N.J.A.C.* 6:21-13.2, was a legitimate exercise of its power to establish bid specifications. *See N.J.A.C.* 6:21-13.2(a); *Stroh Assoc., supra*, 95 *N.J.A.R.*2d (EDU) at 236 ("It is well-settled that a school district may add additional criteria to a bid advertisement"). With respect to specification 6, calling for two-way radio communication equipment, see *N.J.A.C.* 6:21-6B.6(a) ("School buses may be equipped with an electronic voice communication system, preferably not citizen band equipment").

In that the Board has met the specification requirements imposed by the DOE regulations, Byram's challenge rests upon *N.J.A.C.* 6:21-15.1, which concerns the "responsibility of [the] district board of education" vis-à-vis the bidding and award process. The Board has met the mandates of *N.J.A.C.* 6:21-15.1(e), which requires the specifications to be "definite, precise and to impose common standards." As noted above, Byram concedes that it is not challenging the validity of the specifications, and

admits that the specifications were definite, precise and imposed common standards. However, Byram maintains that Ryder, although the "lowest bidder," was not the "lowest responsible bidder," because Ryder allegedly did not and could not meet specifications 2 and 6. Therefore, Byram argues, in effect, that *N.J.A.C.* 6:21-15.1(d) was violated because the bidding did not protect the lowest responsible bidder, *i.e.*, Byram. Additionally, Byram argues, in effect, that *N.J.A.C.* 6:21-15.1(g) was violated because the Board awarded the contract to Ryder, notwithstanding that Ryder's bid allegedly contained "variations" from the specifications. On these bases, Byram contends that Ryder was not a "responsible" bidder, and therefore could not meet the definition of "lowest responsible bidder." Accordingly, Byram argues that under *N.J.A.C.* 6:21-15.1(h), the award to Ryder must be set aside.

Byram's argument that the Board's award to Ryder violated specifications 2 and 6, as well as the DOE rules, must be weighed against the legal principle that deference should be shown toward board decisions. In this regard, the Appellate Division stated, in *Colonnelli Bros., Inc. v. Ridgefield Park*, 284 *N.J. Super.* 538, 541 (App. Div. 1995), *certif. denied*, 143 *N.J.* 327 (1996), that the general presumption is that public entities act lawfully and in good faith; as such, a public entity is presumed to have acted properly in exercising its discretion in the award of a public contract. Accordingly, a reviewing court will not substitute its judgment for that of a governing public entity in such a case. *See also Stroh Assoc., supra*, 95 *N.J.A.R.*2d (EDU) at 238, where the Commissioner, in affirming the Initial Decision of the ALJ, stated:

> As correctly noted by the Board in its exception arguments, a board's reasonable exercise of its discretion is entitled to a presumption of validity absent the establishment by a challenger that such action was arbitrary, capricious, or unreasonable.
>
> [Citing to *Palamar Constr., Inc. v. Pennsauken Tp.*, 196 *N.J. Super.* 241, 250 (App. Div. 1983).]

Under this principle, the Board's discretionary action in awarding the contract to Ryder must be afforded great deference. As noted above, Ryder's bid was substantially lower

than Byram's. As such, the award to Ryder, on a strict cost-benefit basis, was a rational action by the Board. Moreover, under *N.J.A.C.* 6:21-15.1(d), this award may be viewed as "safeguard[ing] the taxpayers" by generating a cost savings of nearly $60,000.00.

As discussed above, however, cost is only one of many considerations in awarding a contract; of equal importance is the ability of the bidder to meet the specifications listed in the notice. In the instant case, Ryder has reasonably met all of the specifications, including specifications 2 and 6. Ryder has numerous spare buses within a five-mile radius of Mount Arlington, as called for in specification 2. Although Ryder admittedly does not maintain these buses at a "depot" or "dispatch facility," but instead allows them to be parked at the homes of drivers within that radius, they nonetheless are available during the prescribed school hours, and the drivers are "on call" for dispatch via telephone. Additionally, Ryder maintains one spare bus which remains parked on the school grounds.

In light of this, and as pointed out by respondent, the first issue is whether the extra bus and dispatchers are at the same "location." It is undisputed that the extra bus is less than two-tenths of a mile from Ms. Neblick's home and from extra bus driver/dispatcher Vicky Rossy's home. Thus, one could argue that the bus and dispatcher should be considered to be at the same "location," especially since the bus can be parked and had been parked in Ms. Rossy's driveway before the parties agreed to a more convenient arrangement.

Notwithstanding this, Byram argues that Ryder has no "dispatcher" and that the buses are not in queue at a "depot" or "dispatch facility." However, Byram's concerns have no foundation. Neither the statutory provisions nor the regulations contain a definition of "dispatcher"; instead, a "reasonable interpretation" of that term governs. The "reasonable interpretation" of "dispatcher" as set forth by respondent was the concept of "one person responsible for assigning buses and communicating that need to others." Under Ryder's dispatch scheme, this "reasonable interpretation" is met: the drivers of the spare buses are "on call" for potential service at the location of their

buses, and are available during the prescribed school hours for "dispatch," at the telephone request of their "dispatcher."

Further, at issue is whether the use of multiple dispatchers, namely, the use of Ms. Rossy to dispatch when Ms. Neblick is in Andover, violates the specifications. The specifications referred to "a" dispatcher, not necessarily "the" dispatcher. The fact that the Board might call Ms. Neblick in her car or in Andover instead of Ms. Rossy at the "location" for different reasons does not result in a material deviation from the specifications; a dispatcher is still assigned to the location during the requisite hours.

Additionally, the concept of "reasonable and substantial compliance" with the advertised specifications is applicable in the public bidding context. As noted in *Aetna, supra*, 1971 *S.L.D.* at 154, the Commissioner has stated that "[t]he pivotal point [in meeting the specifications] is whether the lowest bid was materially and substantially in accord with the specifications." Here, as previously discussed, Ryder "materially and substantially" complied with specification 2. The award to Ryder was a "fair and sensible" application of the bidding statutes that "further[ed] rather than defeat[ed] the legislative goals." *Glen Rock, supra*, 34 *N.J.* at 315. Additionally, even if Ryder's dispatch scheme was viewed as a "waiver" from specification 2, at most, under the applicable law, it would constitute a "minor or inconsequential" waiver that would not cause "frustration of the policies underlying competitive bidding." *Terminal Constr., supra*, 67 *N.J.* at 412; *see also Meadowbrook Carting Co., Inc. v. Borough of Island Heights*, 138 *N.J.* 307, 315 (1994), where the Court stated:

> In *River Vale, supra*, 127 *N.J. Super.* at 216, 316 *A.*2d 737, Judge Pressler set forth a two-part test for determining "whether a specific noncompliance constitutes a substantial and hence nonwaivable irregularity." As the Appellate Division observed in *L. Pucillo & Sons, Inc. v. Township of Belleville*, 249 *N.J. Super.* 536, 547, 592 *A.*2d 1218, *certif. denied*, 127 *N.J.* 551, 606 *A.*2d 364 (1991) (Pucillo), "the test of materiality has been reduced to [a] . . . two-prong analysis." It requires a determination

> "[']first, whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.[']"
>
> [Citations omitted.]

Under these standards, Ryder's dispatch scheme, even if a deviation from the specifications, did not constitute a "material waiver"; the underlying goal of the Board's specification 2 (*i.e.*, having spare buses within the district available for immediate "on-call" dispatch during school hours) was still met. Accordingly, Ryder met specification 2, and, as to that requirement, was a "responsible" bidder.

The same analysis applies to Ryder's ability to meet specification 6; as such, this point will not be discussed in great detail. Note, however, that the DOE regulations do not require two-way radio communication equipment, but rather, leave such requirement to the discretion of the boards. *See N.J.A.C.* 6:21-6B(a). Here, Ryder's buses are presumably outfitted with two-way radio communication equipment; Byram's challenge rests upon the "base radio/dispatch facility" clause. For the reasons discussed above, namely: (a) that the concepts of "dispatcher" and "dispatch facility" are left to "reasonable interpretation," (b) that the Board's discretionary award to Ryder is afforded deference, and (c) that the underlying goal of specification 6 was met, the Board's award did not violate this specification. Moreover, even if a variation from specification 6 occurred, at most it was merely a "minor" or "inconsequential" deviation. Accordingly, Ryder was also "responsible" as to specification 6, and, as such, was the "lowest responsible bidder."

CONCLUSION

For the foregoing reasons, the Board's award of a transportation contract to Ryder did not violate bid specifications 2 and 6 and the Department of Education rules. Accordingly, since no violations occurred, no interim measures or remedies are available to petitioner.

ORDER

It is hereby **ORDERED** that petitioner's appeal is dismissed and respondent's award of the transportation contract to Ryder is affirmed.

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

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

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

January 26, 1999
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

1/26/99
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 28 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

For Petitioner:

1. Janet Bunnicant
2. Beverly J. Sturm

For Respondent:

1. Thomas J. Ficarra
2. Laurie W. Neblick

List of Exhibits

For Petitioner:

P-1 Mount Arlington transportation specifications

P-2 Bid submission by Byram

P-3 Letter to Ms. Sturm from Janet Bunnicant, dated March 26, 1997

P-4 Letter to Janet Bunnicant from Beverly J. Sturm

P-5 Bid submission by Ryder

P-6 Minutes organization meeting, dated April 16, 1997

OAL DKT. NO. EDU 7608-97
AGENCY DKT. NO. 240-7/97

BYRAM BUS LINES, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOUNT ARLINGTON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of both Byram and the Board and Byram's reply were timely filed pursuant to *N.J.A.C.* 1:1-18.4, and duly considered by the Commissioner in his determination herein.

Byram's exceptions essentially recast and reiterate the arguments advanced below in support of its contention that the Board's award of its transportation contract to Ryder must be overturned as Ryder did not meet the letter of all of the contract specifications, *i.e.*, specifications 2 and 6, which it refers to as the "dispatch facility requirement." As the Commissioner determines that the relevant demonstrations proffered by Byram in this regard were fully considered and addressed by the Administrative Law Judge (ALJ) in her initial decision, they will not be revisited here.

Byram additionally advances that it disagrees with the ALJ's holding that Ryder "reasonably and substantially complied with the specifications," (Byram's Exceptions at p. 6)

and her conclusion that "any variation of its 'dispatch scheme' from the specifications were nothing more than a 'minor or inconsequential' waiver that would not cause frustration of policies underlying competitive bidding. (Initial Decision, page 26)." (*Id.*) To the contrary, it maintains, citing *Terminal Construction v. Atlantic Sewerage Authority*, 67 *N.J.* 403 (1975) as its authority, the dispatch facility requirement must be considered a "substantial condition," as Ryder's failure to satisfy these "clear and precise" specifications "placed [it] in a position of advantage over other bidders." (Byram's Exceptions at p. 7) It argues that the existence of these particular provisions "may have clearly influenced potential bidders to refrain from bidding," and the absence of such requirements would have increased the number of bidders for this particular contract. (*Id.*) Indeed, Byram advances, the record confirms that the presence of the dispatch facility requirement "clearly affected and influenced the amount [it] bid for this job." Moreover, it urges that summarily waiving these specifications "would be unfair to the taxpayers." (*Id.*)

The Board's exceptions request that the Commissioner affirm the ALJ's well reasoned opinion. (Board's Exceptions at p. 1) However, it advances, left unaddressed in the decision was the relief to be accorded Byram should the Commissioner determine to modify or overturn the recommended decision. In this regard, it avers that the only relief sought by Byram is "invalidation of the award to Ryder *and* award of the contract to Byram" (Board's Exceptions at p. 2), a relief which it asserts is unjustifiable based on the record of this matter. (*Id.*) The Board posits that, as a matter of law, at best, the only relief which Byram could be granted would be invalidation of the contract and a rebid. The Board cites *Meadowbrook Carting Co. v. Island Heights Borough*, 138 *N.J.* 307 (1994) as its authority for the proposition that, where it is determined that a contract to a successful bidder must be vacated, and the bid of the next bidder

in line is substantially higher than the bid originally awarded, as is the case in this matter, it "would unfairly disadvantage the taxpayers and would undermine the purpose of the bid laws" (citations omitted) to award the bid to the next in line. (*Id.* at pp. 3-4) In this case, it avows, the additional $60,000 it would cost the Board to transport its students in such a circumstance would result in "serious budgetary problems for the Board." (Board's Exceptions at p. 4) The Board additionally points out that if it were to be determined that Ryder's bid is ineligible, Byram would be the only remaining bidder, and it cites to a 1991 Appellate Division case which it contends supports the proposition that "a lack of competition between bidders after disqualification of the apparent low bidder is further justification for a public entity to reject the bids and readvertise." ((Board's Exceptions at p. 4)

In reply to the Board's exceptions, Byram contends that, contrary to the Board's assertions, the question of the relief to be accorded should Byram prevail in this matter was previously resolved by the ALJ in her decision on the parties' prior summary decision motions wherein she found "the Commissioner can award this contract to [Byram]. See *Consex Security Group, Inc. vs. Lakewood Township Board of Education,* 93 *N.J.A.R.* 2d (EDU) 231." (Byram's Reply Exceptions at p. 4)

Upon his careful and independent review of the record in this matter, which included a transcript of the hearing conducted at the OAL on September 14, 1998, the Commissioner concurs with the findings and conclusion of the ALJ that the within Board complied with applicable laws and regulations in securing, through competitive bidding, the lowest responsible bidder for its transportation contract and he finds Byram's contention that the Board acted improperly in this regard to be without merit. The Commissioner further agrees with the ALJ's determination that Ryder, the lowest bidder, did substantially conform to the

specifications, and its variance therefrom was not material or substantial so as to preclude the Board's awarding it the transportation contract at issue herein. In this regard, the Commissioner finds Byram's exception argument advocating a strictly literal interpretation of specifications 2 and 6 charging that the Board's more liberal interpretation of these specifications served to discourage competition and frustrate the underlying purpose of the bidding laws, disingenuous. If Byram was concerned with maintaining the integrity of the bidding laws and fostering unfettered competition, as it appears to contend herein, the appropriate manner for dealing with such concern would have been to challenge the bid specifications themselves, at the appropriate time, prior to the opening of the bids, which they failed to do. Rather, Byram now, after the fact, and subsequent to its discovery that it was not the low bidder for the contract, requests the Commissioner to adopt its unduly restrictive interpretation of the specification provisions which, coincidentally, would render Byram the only qualified bidder. The Commissioner concludes that to accede to such a request serves to thwart the intent and spirit of the bidding process. Rather, as fully recognized by the ALJ, "In connection with the bidding process and the issue of irregularities in meeting the specifications, the Commissioner has stated that '[t]he pivotal point is whether the lowest bid was materially and substantially in accord with the specifications.'" (Initial Decision at p. 21) (See *Aetna Supply, Inc. v. Board of Education of the City of Camden*, 1971 *S.L.D.* 151, 154.) Under the facts existing in this matter, the Commissioner finds, as did the ALJ, that Ryder has reasonably met all of the specifications, including specifications 2 and 6. Having so found, the Commissioner warrants it unnecessary to reach the question of whether he could have appropriately awarded the contract to Byram had it prevailed on the merits of its claim.

Accordingly, the initial decision of the OAL dismissing the instant Petition of Appeal is affirmed for the reasons well expressed therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 9, 1999
Date of Mailing, March 9, 1999

63-99

OLIVE HOLMES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BURLINGTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

March 10, 1999

OAL DKT. NO. EDU 10801-97
AGENCY DKT. NO. 435-11/97

OLIVE HOLMES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BURLINGTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

March 10, 1999
Date of Mailing, March 10, 1999

64-99

ROBERT PUTERMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MANCHESTER, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

March 10, 1999

OAL DKT. NO. EDU 2406-98
AGENCY DKT. NO. 43-2/98

ROBERT PUTERMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MANCHESTER, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

March 10, 1999
Date of Mailing, March 10, 1999

65-99

HOWARD W. SMITH,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

March 10, 1999

OAL DKT. NO. EDU 04649-98
AGENCY DKT. NO. 130-5/98

HOWARD W. SMITH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

March 10, 1999
Date of Mailing, March 10, 1999

66-99

66-99

H.K.S.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF DEMAREST, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

March 10, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3196-98

AGENCY DKT. NO. 27-2/98

HOWARD K. SIMON,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF DEMAREST, BERGEN COUNTY,

Respondent.

Andrew S. Hoffmann, Esq., for petitioner
(Wiseman, Hoffman & Walzer, attorneys)

Matthew J. Giacobbe, Esq. for respondent
(Stanton, Hughes, Diana, Salsberg, Cerra & Mariani, attorneys)

Record Closed: January 26, 1999 Decided: January 26, 1999

BEFORE **MARGARET M. HAYDEN**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on March 16, 1998, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

Prior to the hearing, settlement discussions were held and a settlement was reached.

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

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

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

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

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

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

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

January 26, 1999
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

11/29/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 1 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

jb

FULL AND FINAL RELEASE OF ALL CLAIMS
AND
SETTLEMENT AGREEMENT

THIS AGREEMENT is made and entered into as of this 15th day of December, 1998 by, among and between Howard K. Simon, his estate, heirs, successors and assigns (individually and collectively referred to as "Simon"), and the Demarest Board of Education, its members, agents, independent contractors, insurers, employees, attorneys, and benefit plans, and all of their predecessors and successors, (individually and collectively referred to as the "the Board").

WHEREAS, Simon has filed a Petition with the State of New Jersey, Commissioner of Education, Agency Docket Number 27-2/98 and OAL Docket Number EDOUS 03196-98N; and

WHEREAS, the Board has filed a Counter-Petition and Amended Counter-Petition in the same action, and;

WHEREAS, the parties hereto have agreed that it is in their mutual interest to resolve this dispute upon the terms and conditions more fully set forth hereinafter;

NOW, THEREFORE, in consideration of the mutual promises of the parties to this Full and Final Release of All Claims and Settlement Agreement ("Agreement"), the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. Simon agrees to do as follows:

(a) Simon will withdraw his Petition, Agency Docket Number 27-2/98 and OAL Docket Number EDOUS 03196-98N, with prejudice, and will not refile and/or pursue any of the claims contained therein, and will execute all documents and take all actions necessary to accomplish the withdrawal with prejudice of his Petition;

(b) Simon irrevocably and unconditionally releases and discharges the Board from any and all debts, obligations, claims, demands, judgments, and causes of action of any kind whatsoever, whether in tort, contract, by statute, or on any other basis, whether in law or in equity, whether known or unknown, for compensatory, punitive, liquidated or other damages, attorneys' fees, expense reimbursements or costs of any kind, which Simon or anyone acting through or on behalf of Simon or his estate, heirs, successors and assigns, had or asserted, or might otherwise have had or asserted, against the Board as of the date Simon signs this Agreement; and

(c) Simon hereby agrees to pay the Board One-Thousand, Three-Hundred, Sixty-Three Dollars and Twenty Cents ($1,363.20) in full payment and satisfaction for all outstanding tuition owed to the Board as a result of his son's - Matthew Simon's - attendance in the Demarest School System as of the date Simon signs this Agreement. Said payment shall be issued within fifteen (15) calendar days of the date Simon signs this Agreement

and shall be made payable in one check to: "Demarest Board of Education."

2. In return for the above commitments by Simon, the Board agrees to do as follows:

(a) the Board will withdraw its Counter-Petition and Amended Counter-Petition, Agency Docket Number 27-2/98 and OAL Docket Number EDOUS 03196-98N, with prejudice, and will not refile and/or pursue any of the claims contained therein, and will execute all documents and take all actions necessary to accomplish the withdrawal with prejudice of its Counter-Petition and Amended Counter-Petition; and

(b) the Board irrevocably and unconditionally releases and discharges Simon from any and all debts, obligations, claims, demands, judgments, and causes of action of any kind whatsoever, whether in tort, contract, by statute, or on any other basis, whether in law or in equity, whether known or unknown, for compensatory, punitive, liquidated or other damages, attorneys' fees, expense reimbursements or costs of any kind, which the Board or anyone acting through or on behalf of the Board, had or asserted, or might otherwise have had or asserted, against Simon as of the date the Board signs this Agreement.

3. Except as provided in Paragraphs 4, 5 and 6 of this Agreement, Simon and the Board agree not to discuss the terms of this Agreement, the existence of this Agreement, or the

circumstances leading up to this Agreement with anyone and/or any entity.

4. It is understood and agreed by all parties that this Settlement Agreement is a settlement of disputed claims and that neither this writing nor the fact of settlement constitutes an admission of liability or wrongdoing or breach of duty by either party. This Agreement is purely an offer in compromise and neither party by so doing is admitting acts as alleged by the other. Except to the extent necessary to enforce the Agreement it is further agreed that neither this Agreement nor any part thereof is to be construed or used or admitted in to evidence in any proceeding of any character, judicial, administrative or otherwise, now pending or otherwise instituted.

5. Simon represents and agrees that he has had the opportunity to discuss all aspects of this Agreement with counsel or other personal advisor of his choice and that he has carefully read and fully understands all of the provisions of this Agreement, and that he is voluntarily entering into this Agreement.

6. This Agreement contains and constitutes the entire understanding and agreement between the parties hereto respecting the subject matter hereof and supersedes and cancels all previous negotiations, agreements, commitments and writings in connection herewith. This Agreement cannot be released, discharged, abandoned, supplemented, changed or modified in any manner,

orally or otherwise, except by an instrument in writing of concurrent or subsequent date signed by a duly authorized officer or representative of each of the parties hereto.

7. This Agreement shall be governed and construed under the laws of the State of New Jersey.

THE UNDERSIGNED STATE THAT THEY HAVE CAREFULLY READ THE FOREGOING RELEASE AND SETTLEMENT AGREEMENT, KNOW THE CONTENTS THEREOF, HAVE HAD THE OPPORTUNITY TO DISCUSS THOSE CONTENTS WITH COUNSEL OR OTHER PERSONAL ADVISOR OF THEIR CHOOSING, FREELY AND VOLUNTARILY CONSENT TO ALL TERMS AND CONDITIONS THEREOF AND SIGN THE SAME AS THEIR OWN FREE ACT.

HOWARD K. SIMON

Howard K. Simon

Howard K. Simon

Dated: 12/27, 1998

Sworn to and subscribed before me this 27th day of December, 1998

BOARD OF EDUCATION OF THE BOROUGH OF DEMAREST

By: Diane Holzberg

President of the Demarest Board of Education

Dated: Jan 4, 1998

Witnessed by:

F. Gelchelson

Secretary of the Demarest Board of Education

Dated: Jan 4, 1998

OAL DKT. NO. EDU 3196-98
AGENCY DKT. NO. 27-2/98

H.K.S.,	:	
PETITIONER,	:	
	:	
V.		COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE BOROUGH OF DEMAREST, BERGEN COUNTY,	:	DECISION
	:	
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

March 10, 1999
Date of Mailing, March 10,1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

67-99

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

March 10, 1999

AGENCY DKT. NO. 542-12/98

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

For the Board, Thomas W. Sumners, Jr., Esq. (Sumners, George & Dortch)

This matter having been opened before the Commissioner of Education on December 12, 1998 through certification of tenure charges of abandonment of position by the Board of Education of the City of Trenton; and

The respondent, having been served, via certified mail, return receipt requested, and regular mail, with a copy of the charges, the Board's resolution, the Statement of Evidence and the Certificate of Determination on December 4, 1998; and

The Commissioner having directed respondent, via both certified and regular mail on December 7 and 11, 1998, to file an Answer to the tenure charges against him; and

Whereas, such communications clearly provided respondent notice that, pursuant to *P.L.* 1998, *c.* 42, effective July 1, 1998, an individual against whom tenure charges are certified "*shall have 15 days to submit a written response to the charges to the commissioner,*" and that failure to answer within the prescribed period will, absent granting of an extension for good cause shown, result in the charges being deemed admitted and the Commissioner deciding the matter on summary judgment pursuant to *N.J.A.C.* 6:24-1.4(e); and

In that the December 7 and 11, 1998 communications to respondent were returned to the Commissioner on December 26, 1998, marked "Unclaimed," and

In that no reply has been received from respondent in response to the Board's charges, each count of the charges against respondent is deemed to be admitted; and

The Commissioner's review of the tenure charges certified against respondent by the Board and the statement of evidence in support of those charges indicate that respondent has abandoned his position by virtue of his failure: (1) to report to work since September 30, 1997; (2) to submit to a medical examination as directed by the District in writing in January 1998; (3) to provide his supervisor or the Board's Office of Human Services with any medical documentation to justify this lengthy absence from work, despite being informed in person of the need for medical documentation by his supervisor in April 1998; and (4) to notify the Board regarding his intentions with respect to his continued employment in the District; and

Deeming such charges to be admitted, and noting that respondent has not replied to the specific allegations contained therein, the Commissioner finds that respondent's actions constitute abandonment of position, warranting his dismissal from his tenured custodian position; now, therefore

IT IS SO ORDERED this tenth day of March 1999 that summary judgment shall be granted to the Board, and Darryl Crossland shall be dismissed from his tenured custodian position as a heavy cleaner in the Board's employ as of the date of this order.*

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education, pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after date of mailing to the parties.

March 10, 1999
Date of Mailing, March 11, 1999

68-99

CHERYL B. PICCOLI AND ROBERT PICCOLI,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RAMAPO-INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners challenged Regional School District Board's revision of Attendance Policy No. 5117. The revised policy provides that students from each of the Regional District's constituent members may choose to attend whichever of the District's two high schools has the lesser enrollment. Petitioning residents of Oakland contended that the policy was arbitrary, capricious, unreasonable and discriminatory, arguing that it gave Oakland students no meaningful choice because their regular school of assignment would always be the school of lesser enrollment.

ALJ determined there was no genuine issue of material fact in dispute and granted the Board's motion for summary judgment. ALJ found that assignment of pupils and other attendance/boundary issues fall within the discretionary authority granted boards of education by the Legislature, and that petitioners failed to prove that the Board's actions were arbitrary, capricious, unreasonable or discriminatory.

Commissioner adopted findings and determination in initial decision as his own, noting that, at this point in time, there is no clear or convincing evidence that would warrant reversal of the Board's lawful action.

March 10, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT
ORAL INITIAL DECISION
OAL DKT. NO. EDU 1839-98
AGENCY DKT. NO. 21-1/98

CHERYL B. PICCOLI and ROBERT E. PICCOLI,
Petitioners,
v.
BOARD OF EDUCATION OF THE RAMAPO INDIAN HILLS REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,
Respondent.

Cheryl B. Piccoli and **Robert E. Piccoli**, *pro se*

Allan P. Dzwilewski, Esq., for respondent,
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: January 12, 1999, Decided: January 22, 1999

This is a transcript of the administrative law judge's oral initial decision rendered pursuant to *N.J.A.C.* 1:1-18.2.

BEFORE: **ELINOR R. REINER**, ALJ:

Prior to this date I received a motion for summary decision filed by respondent; I received petitioner's response to it and respondent's reply. The following constitutes my determination on the motion.

Factual Background and Procedural History

Respondent operates two high schools, Ramapo High School and Indian Hills High School, within the regional high school district, which is comprised of the constituent municipalities of Franklin Lakes, Oakland and Wyckoff.[1] Based upon the locations of the respective schools, the initial placements of students was as follows: the Oakland students, and those Franklin Lakes students within walking distance of the school, were assigned to Indian Hills, and the Wyckoff students, as well as the remainder of Franklin Lakes students, were assigned to Ramapo. In 1971, respondent formally adopted school attendance Policy #5117 which had the effect of "splitting" the Franklin Lakes students between the two schools. The "Franklin Lakes split" has been a highly contentious issue and has led to ongoing discussions and conflicts since its inception.

Against this backdrop, overcrowding has occurred at Ramapo, while under enrollment has occurred at Indian Hills. Respondent has continuously studied both the "Franklin Lakes split" issue, as well as building utilization and attendance reassignment issues since the "split" occurred in 1971. Most recently, in December 1996 respondent commissioned E.I. Architects (hereinafter "EIA") to evaluate building utilization at both facilities. In September 1997, after conducting lengthy studies of the district's facilities, EIA presented a detailed report to respondent, which evaluated the health, safety and welfare issues of the two schools, including the overcrowding issue at Ramapo and the under-enrollment issue at Indian Hills, as well as population projections for the future school years. In November 1997, after conducting studies of the district's educational programs, technology and staffing, EIA presented a detailed report to respondent, which presented its proposed modifications of the school's curriculum for the next millennium. The two reports were collectively known as the "Horizon Curriculum Project."

[1] The regional district is referred to by the acronym "FLOW" (*i.e.*) the first letters of each constituent municipality.

In July 1997, respondent hired Paul Saxton as the new superintendent of schools. Respondent determined that resolving the overcrowding and under-enrollment issues was a prerequisite to the effective implementation of the Horizon Project. Therefore, in the fall of 1997, respondent charged Saxton with developing revisions to school attendance Policy #5117. Aware that Saxton was "new" to the district, respondent provided him with a full history of the district so that he could familiarize himself with the contentious "Franklin Lakes split" issue and its potential impact on the revised Policy #5117.[2] On or about December 8, 1997, Saxton presented his first draft of the revised attendance Policy #5117, and respondent initially reviewed it that day. Throughout the next week, Saxton received ongoing informal input from respondent, which resulted in modification of his draft.

On December 15, 1997, Saxton presented the finalized draft of revised attendance Policy #5117 at respondent's public meeting. Public comments were received from both citizens and district staff members, and question-and-answer sessions were held. Respondent then moved for a second reading of the revised Police #5117, to be held at the meeting of January 5, 1998. Between the two meetings, representatives of the board met with various officials to discuss the revised Policy #5117, including the mayor of Oakland and the superintendent of the Oakland school district. The meeting of January 5, 1998 was duly noticed and open to the public. At the meeting, numerous officials addressed both respondent and the public regarding the proposed revisions to Policy #5117; among these were: Saxton, David L. Rinderknecht (School Business Administrator/Board Secretary), Michael Miello and Robert Van Sanders (athletic directors of the respective high schools). Respondent then allowed for an extensive period of public commentary on the issue. Immediately following closure of the public session, a motion to adjourn was defeated by a vote of seven to one. Thereafter, a vote was held concerning the adoption of revised Policy

[2] Saxton received numerous background materials from respondent, including prior studies of demographic trends and projections, long-range plans, and a comprehensive (i.e., 80 pages) *History of the Franklin Lakes Spilt: 1954 to 1997,* published by Frank J. McMahon. All of these materials are found in the appendices to respondent's brief of September 10, 1998.

#5117, which passed by a vote of eight affirmative to one abstention. The revised policy, which is set forth in respondent's appendix to its brief (volume two, section twelve), allows all students from the Flow district the right to choose to attend the school of lesser enrollment.

On or about January 22, 1998, petitioners filed a petition of appeal to the Commissioner of Education (hereinafter "Commissioner"), challenging the actions of respondent to implement the revised Policy #5117. The Commissioner transferred the matter to the OAL as a contested case. On September 10, 1998, respondent submitted a brief in support of his motion for summary decision, along with various appendices. On September 15, 1998, petitioner submitted a brief in opposition to respondent's motion. Thereafter, respondent responded with a letter brief, withdrawing its request for oral argument and moving for a decision on the papers.

DISCUSSION:

1. The Summary Decision Standard

The New Jersey Uniform Administrative Procedure Rules *(N.J.A.C.* 1:1-1.1 *et seq.)* provide that a party may move for summary decision upon all or any of the substantive issues at any time after a case is deemed contested. *N.J.A.C.* 1:1-12.5(a). In considering the cross-motions for summary decision, this tribunal must determine whether "the papers and discovery. . . together with the affidavits . . .show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." *N.J.A.C.* 1:1-12.5(b).[3] This language is

[3]In pertinent part, *R.* 4:46-2(c) provides:

> The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.

substantially similar to the standard for summary decision found at *R.* 4:46-2(c). Therefore, this standard is relevant to resolving motions for summary decision.[4]

In this regard, the New Jersey Supreme Court has stated, "[S]ince there are pronounced similarities in the exercise of judicial and quasi-judicial powers . . . court-fashioned doctrines for the handling of litigation do in fact have some genuine utility and relevance in administrative proceedings." *City of Hackensack v. Winner*, 82 *N.J.* 1, 29 (1980). Additionally, the Court has recognized that the OAL performs many quasi-"judicial" or "adjudicative" functions and that in doing so "[j]udicial rules of procedure and practice are transferable to administrative agencies (*i.e.*, the OAL) when these are conducive to ensuring fairness, independence, integrity, and efficiency in administrative adjudications." *Matter of Tenure Hearing of Onorevole*, 103 *N.J.* 548, 554, 555 (1986).

Recently, the Supreme Court of New Jersey held when deciding a motion for summary judgment under *R.* 4:46-2,

> . . . [a] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged dispute issue in favor of the non-moving party.
>
> [*Brill v. Guardian Life Insurance Company of America,* 142 *N.J.* 520, 540 (1995).]

The essential question is "whether the evidence presents a sufficient disagreement to require [a hearing] and whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 533. *See also N.J.A.C.* 1:1-12.5(b). "([A]n adverse party [to a

---

[4] *See* 37 *N.J. Administrative Law and Practice*, ¶ 194, at 90 (Patricia Prunty, Anthony Miragliotta and Steven L. Lefelt) (1997 Pocket Part), where the authors stated:

> Since the UAPR and summary decision, *N.J.A.C.* 1:1-12.5, closely track the court rules, it is anticipated that this standard will be applied by ALJs in deciding summary decision motions.

summary decision motion] in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding.") In the instant matter, where respondent has moved for summary decision, petitioners must raise factual issues which are sufficient to lead a rational factfinder to rule in their favor if a trial were held. Otherwise summary decision in favor of respondent is appropriate.

II. Analysis

a. Applicable Law

The New Jersey Legislature is charged with affording public school pupils a "thorough and efficient system" of education. *N.J. Const.* (1947) Art. VIII, §IV, Par. 1. See *N.J.S.A.* 18A:7A-14.1(a). ("The Legislature finds and declares that: It is the constitutional obligation of the Legislature to provide all children in New Jersey with a thorough and efficient system of free public schools.") *See also N.J.S.A.* 18A:7F-1 through -34. ("Comprehensive Educational Improvement and Financing Act of 1996"). Moreover, *N.J.S.A.* 18A:33-1 mandates that:

> Each school district shall provide, for all children who reside in the district and are required to attend the public schools therein . . . suitable educational facilities including proper school buildings and furniture and equipment, convenience of access thereto, and courses of study suited to the ages and attainments of all pupils between the ages of five and 20 years . . . in schools within the district convenient of access to the pupils . . . but no course of study shall be adopted or altered except by the recorded roll call majority vote of the full membership of the board of education.

In order to meet its obligation of providing pupils with a thorough and efficient program of education, the Legislature has delegated its authority to local and regional boards of education to carry out this constitutional mandate. *N.J.S.A.* 18A:11-1. In relevant part, the boards of education shall:

> c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the

> transaction of business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees . . . and
>
> d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district.

Although boards of education are vested with this broad-based authority, such boards are "public bodies," whose meetings must nonetheless comply with the provisions of the Open Public Meetings Act found at *N.J.S.A.* 10:4-6 through -21. In the instant case, however, petitioners do not allege any violation of the Open Public Meetings Act. Therefore, no further discussion of its provisions is warranted here.

b. Legal Arguments

With the applicable statutory provisions detailed above, a discussion of the contested legal issues is appropriate. Petitioner present the following arguments:

> (a) "The petitioners find the recent actions of the Board of Education at its January 5, 1998 meeting to be arbitrary;"
>
> (b) "The petitioners find the recent actions of the Board of Education at its January 5, 1998 meeting to be prejudiced;"[5]
>
> (c) "The petitioners find the recent actions of the Board of Education at its January 5, 1998 meeting to be discriminitory[sic];"
>
> (d) "The petitioners find the recent actions of the Board of Education at its January 5, 1998 meeting to be a potential burden on the Taxpayers of the Regional District;" and
>
> (e) "The petitioner find the recent actions of the Board of Education at its January 5, 1998 meeting to be capricious."

[5] At the pre-hearing conference of May 6, 1998, it was agreed that prejudice would not be an issue at the hearing. Accordingly, no further discussion of this issue is warranted. *See Pet. Interrog. Answer #15.*

[*Pet. Appeal to the Commr. of Jan. 22, 1998.*]

Furthermore, petitioners argue that respondent's motion for summary decision should be denied; specifically, they state:

> To go to Summary Judgement now with a motion to dismiss with prejudice, to not have the ability to approach this issue again if something goes wrong, would only be an injustice for the children. Your Honor, We respectfully request that the Motion for Summary Judgement [sic] and to dismiss this matter with prejudice be denied, and we proceed forward to the scheduled hearing dates in January. At that point, everything will be out 'on the table' and an objective decision can be rendered. We believe this matter will never be consciously resolved for the good of the children if we are not allowed our day in court. Your Honor, there had to be 'something' that was seen in our Petition of Appeal when it initially went to Trenton in order for it to be forwarded to the OAL.
>
> [*Pet. Ltr. Br. of Sept. 15, 1998, at 6.*]

Respondent counters by arguing that:

> (a) "Respondent is entitled to a grant of summary judgment;"
>
> (b) "The petition fails to state a claim upon which relief may be granted," [specifically].---
>
> (1) "The New Jersey Legislature has granted broad based powers to local boards of education;"
>
> (2) "Petitioners offer no factual or legal authority to support allegations that the adoption of Board Policy #5117 was arbitrary and capricious;"
>
> (3) "There was no affirmative obligation on the part of the RIH Board to hold additional public meetings;"
>
> (4) "Petitioners offer no factual or legal authority to support allegations that the adoption of Board Policy #5117 was burdensome to the taxpayers of the FLOW communities;" and

(5) "Petitioners offer no factual or legal authority to support assumptions that the adoption of Board Policy #5117 would have a disparate impact upon educational programs in either high school;"

(c) "Petitioners allegations that Policy #5117 is a 'potential burden' on the taxpayers is non juridicus;" and

(d) "Allegations relating to future tax increases are not ripe for judicial review."

[*Resp't. Br. at i-ii.*]

Each of the contested legal arguments will be discussed in turn, with the primary focus on whether respondent's action of amending school attendance Policy #5117 was arbitrary, capricious, unreasonable or discriminatory.

1. Arbitrary, Capricious and Unreasonable

Petitioners claim that respondent's action of amending school attendance Policy #5117 was arbitrary, capricious and unreasonable, while respondent asserts that it was not. Respondent's action to amend its policy, like that of any administrative agency, must be upheld unless it is deemed "arbitrary, capricious and unreasonable." *Non-Profit Affordable Housing v. COAH*, 265 *N.J. Super*, 475, 477 (App. Div. 1993); *Shuster v. Bd. of Educ. of Montgomery Twp.*, 96 *N.J.A.R* 2d (EDU) 670, 676 (Apr. 10, 1996), *aff'd* Comm. Ed. (May 28, 1996). A board of education's actions "are entitled to a presumption of lawfulness and good faith;" accordingly, where board actions are challenged, the challenger bears the burden of proving[6] that such actions were unlawful, or arbitrary, capricious and unreasonable. *Shuster,* 96 *N.J.A.R.* 2d at 676 [citing *Schinck v. Westwood Bd. of Educ.*, 60 *N.J. Super.* 448 (App. Div. 1960), and *Quinlan v. North Bergen Bd. of Educ.*, 73 *N.J. Super.* 40, 46 (App. Div. 1962)].

[6] In order to overcome the "presumption of correctness," a challenger of a board action must prove by a preponderance of the credible evidence that such action was arbitrary, capricious and unreasonable. *South Mountain Civic Ass'n. v. Bd. of Educ. of Millburn Twp.,* OAL Dkt. No. EDU 0589-83 (July 13, 1983), p. 9, *aff'd.* Comm. Ed. (Aug. 28, 1983).

Under this standard, the reviewing court must consider three factors: (1) whether respondent's actions violated the enabling act's express or implied legislative policies; (2) whether there is substantial evidence in the record to support the findings on which the action was based; and (3) whether, in applying the legislative policies to the facts, respondent clearly erred by reaching a conclusion that could not reasonably have been made on a showing of the relevant facts. *Edison Twp. Bd. of Educ. v. Edison Twp. Principals and Supvs. Ass'n.*, 304 *N.J. Super.* 459, 463 (App. Div. 1997) [citing *In re Musick*, 143 *N.J.* 206, 216-17 (1996); *Matter of Warren*, 117 *N.J.* 295, 296-7 (1989) [citing *Campbell v. Dep't. of Civil Service*, 39 *N.J.* 556, 562 (1963)].

Notably, however, the "arbitrary, capricious and unreasonable" standard of review is narrow in its scope, and consequently imposes a heavy burden on challengers of board actions. This standard has been defined by the New Jersey courts as follows:

> In the law, "arbitrary" and "capricious" means having no rational basis . . . Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached. . . Moreover, the court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling.
>
> [*Bayshore Sewage Co. v. Dept. of Envtl. Protection*, 122 *N.J.. Super.* 184, 199-200 (Ch. Div. 1973), *aff'd.* 131 *N.J. Super.* 37 (App. Div. 1974) (internal citations omitted).]

As such, "absent a *clear showing of abuse of discretion*," the Commissioner will not "substitute his judgment for that of the Board of Education." *Massaro v. Bd. of Educ. of the Borough of Bergenfield*, 1965 *S.L.D.* 84, 85 (Comm. Ed., June 10, 1965). In *Kopera v. Bd. of Educ. of West Orange*, 60 *N.J. Super.* 288, 294 (App. Div. 1960), the Appellate Division discussed the "well established rule that action of the local board [of education] which lies within the area of its discretionary powers may *not* be upset

unless patently arbitrary without rational basis or induced by improper motives." In this regard in a similar challenge to board action, an ALJ stated:

> It is the management prerogative of boards of education that will not be usurped or assumed by the Commissioner of Education absent a definitive showing of bad faith or arbitrary actions taken in bad faith without a rational basis.
>
> [*GM v. Roselle Park Borough Bd. of Educ.*, 95 *N.J.A.R 2d* (EDU) 107, 109 (Dec. 15, 1993), *aff'd.* Comm. Ed. (Jan. 26, 1994) (citing *Paddock v. Bd. of Educ. of the Borough of Demarest*, 1974 *S.L.D.* 435).]

Likewise, in *Brodie v. Bd. of Educ. of Saddle Brook Twp.*, 93 *N.J.A.R.* 2d (EDU) 694, 700 (July 27, 1993), *aff'd* Comm. Ed. (Sept. 3, 1993), an ALJ quoted from the Commissioner's recitation of the law on this point as follows:

> [a]s long as...a board of education...acts within the authority conferred on...it by law the courts are without power to, or will not, interfere with, control, or review...its action and decisions in matters involving the exercise of discretion, in the absence of clear abuse thereof or error; nor is the wisdom or expediency of an act, or the motive with which it was done, open to judicial inquiry or consideration, where power to do it existed.
>
> [*Brodie*, 93 *N.J.A.R. 2d* (EDU) at 700 (quoting Commissioner in *Barnes v. Bd. of Educ. of Jersey City*, 1961-62 *S.L.D.* 122, 125, *aff'd.* State Bd., 1963 *S.L.D.* 240).]

Although the New Jersey courts have handled numerous challenges to actions by boards of education under this "arbitrary, capricious and unreasonable" standard, the challengers have been generally unsuccessful in their efforts to overturn such actions. In most cases, as long as the record reflected a rational basis for the action, as well as the absence of bad faith, the courts were likely to uphold the boards' actions. For example, in *Red Bank Teachers Ass'n. v. Bd. of Educ. of Red Bank*, OAL Dkt. No. EDU 5328-80 (Apr. 30, 1981), *aff'd.* Comm. Ed. (June 15, 1981), the ALJ upheld the board's approval of a new "Mastery Learning" curriculum as a "valid exercise of its managerial prerogative" that was rationally arrived at. Likewise, in *G.M.*, 95 *N.J.A.R.*

2d (EDU) 107, the ALJ found that the board's decision to change geographic boundaries for kindergarten pupil placement, with a goal of evenly distributing the pupils at different schools within the district, was a reasonable exercise of its authority. In *Shuster,* 96 *N.J.A.R.* 2d (EDU) 670, the ALJ determined that it was within a board's discretion to make a change from a two-story plan for construction of a new school, to a one-story plan. There, the record reflected that notwithstanding the approval of the two-story plain in a referendum, the board had a reasonable basis to believe that a one-story plan, at a substantially similar cost, would be educationally superior to a two-story plan. Accordingly, its decision was not disturbed.

Of particular relevance to the instant matter are cases concerning redistricting and/or reorganization of schools, where the courts have generally upheld such actions by boards of education as valid exercises of their authority under *N.J.S.A.* 18A:11-1 and *N.J.S.A.* 18A:33-1. Among these cases are the following, which will be discussed in turn: (a) *Marcewicz v. Bd. of Educ. of Pascack Valley Regional High School Dist.*, 1972 *S.L.D.* 619 (Comm. Ed.); (b) *Parents United for Better Learning in the Community v. Hamilton Twp. Bd. of Educ.,* OAL Dkt. EDU 3503-85 (July 12, 1985), *aff'd.* Comm. Ed. (Aug. 13, 1985); (c) *Fullen v. Middletown Twp. Bd. of Educ.*, 1985 *S.L.D.* 582, *aff'd.* Comm. Ed. 1985 *S.L.D.* 603; and (d) *Hussnatter v. Bd. of Educ. of Newton*, 1986 *S.L.D.* 2667, *aff'd.* Comm. Ed. 1986 *S.L.D.* 2688. In *Marcewicz,* the regional high school district contained two high schools: the "Hills School" and the Valley School." The board approved a high school redistricting plan after concluding, through various studies, that the Hills School had reached an "intolerable" level of "over capacity," which was projected to worsen in the upcoming school years. When the board's passage of the plan was challenged, the Commissioner determined that the plan was not arbitrary, capricious and unreasonable, and upheld the board's action as a valid exercise of its authority. The Commissioner stated that "the Board acted in a reasonable, deliberate and thorough manner to examine the enrollment projections over a period of weeks prior to the time of its final action." *Marcewicz,* 1972 *S.L.D.* at 625. The Commissioner noted that the board, although not required to, invited public comment and discussion on the redistricting issue prior to taking its final action; in this regard, the Commissioner stated, "It is the Board alone which is empowered by

N.J.S.A. 18A:11-1 to make rules for its own 'government' and the 'government' of the public schools entrusted to its supervision." *Id.*

A similar situation occurred in *Parents United*, where the challenged board action consisted of a plan to change school attendance/boundary areas for the upcoming school year, in an effort to alleviate severe overcrowding at the middle school level. All parties conceded that overcrowding existed at the township's two middle schools. After a referendum to construct a new middle school was defeated, the board proposed boundary changes to address the overcrowding issue. Over the course of the following month, the board held various meetings and accepted public comments on the issue; thereafter, it passed the proposal. Finding that there was no affirmative showing that the action was arbitrary, capricious or unreasonable, the ALJ upheld the board's action, and the Commissioner affirmed. The ALJ noted that while emotions ran rampant when such board action was proposed, challengers nonetheless had to meet the "arbitrary, capricious and unreasonable" standard in order to have the action overturned. In this regard, he stated, "[T]here are certain questions which arise in the life of a community which generate high feelings. No matter how emotional the question, however, as the petitioner correctly observes, it still must meet the [arbitrary, capricious and unreasonable] standard." *Parents United*, OAL Dkt. EDU 3503-85.

Similarly, *Fullen* and *Hussnatter* both dealt with the issues of school overcrowding and redistricting plans. The boars' actions in approving the plans were upheld for substantially the same reasons as in the aforementioned cases. Additionally, the ALJ in *Fullen* stated the following, which provides guidance in the instant dispute:

> [T]he evidence clearly demonstrates that the Board's plan is reasonably intended to accomplish legitimate goals of providing a thorough and efficient program of education for all pupils enrolled in the Middletown Township pupil schools. *While pupils have a constitutional right to receive a thorough and efficient program of education, there is no corollary right to receive such education in a specific schoolhouse in the district.*

[*Fullen*, 1985 *S.L.D.* at 601 (emphasis added).]

In the instant matter, as in the cases discussed above, the record reflects that respondents action of amending school attendance policy #5117 was not arbitrary, capricious or unreasonable. As noted above, the attendance Policy #5117 revisions were a product of multiple studies on the issues of overcrowding at Ramapo, under-enrollment at Indian Hills, the "Franklin Lakes split," future utilization of the district's capital resources, and future educational programs. In short, they were made as an integral step in the implementation of the comprehensive Horizon Project. The revisions were formally presented to the respondent board, as well as the constituents of the FLOW district, at two separate public meetings nearly one month apart. Respondent allowed for extensive public commentary on the issue, and made a concerted effort to adequately address the concerns of the FLOW district constituents. Furthermore, the procedural rules for proper board action were met, when a majority of the board members affirmatively adopted the revised Policy #5117 at a duly noticed meeting.

As discussed, *supra*, the determinations of school attendance areas and boundaries for pupil placement are well within the province of respondent's authority as a board of education under *N.J.S.A.* 18A:11-1 and 18A:33-1. Moreover, the relevant case-law abounds with instances where similar actions by other boards of education were upheld, as being within their delegated authority under these provisions. Even petitioners concede that they have no affirmative evidence of any specific wrongdoing or deviation from lawful board of education activity. See Pet. Interrog. Answer #14(b) ("Petitioners have no knowledge of how the respondents deviated from authorized Board activity"). Additionally, petitioners acknowledge that the January 5, 1998 board meeting was duly noticed, and they were aware that respondent intended to vote on the revised Policy #5117 at that time. There is simply no evidence in the record that respondent's actions were made in "bad faith" or were otherwise "arbitrary, capricious or unreasonable."

Notwithstanding this, petitioners allege that respondent's action was arbitrary because it delegated the drafting of the revisions to Superintendent Saxton, who "has only been working in the District for the past 4 months," and who was "not knowing the strife of the three towns over the past 27 years." (Pet. Appeal to the Commr. at 1). Petitioners address this point further when they state:

> It raises a lot of questions in our minds when you have a new Superintendent who enters a Regional High School District with no high school experience. He is charged to come up with a new attendance policy in the fall...and presents it in December and voted on in January. He also, after only being within the district for approximately 8 months received a *very substantial* pay increase in the spring.
>
> [*Pet. Ltr. Br. of Sept. 15, 1998, at 5.*]

Petitioner's allegations on this point are groundless. Respondent properly exercised its discretionary authority by delegating the drafting of Policy #5117's revisions to Superintendent Saxton. As noted above, respondent was fully aware that Saxton lacked specific knowledge of the ongoing conflict in the District when he began his tenure as Superintendent. However, respondent's actions of educating Saxton and bringing him "up to speed" were reasonable under the circumstances. Additionally, petitioners concede that Saxton had a rational basis for his determination, when they state:

> The Board advised him that attendance lines should take into consideration the number of students in an area in relation to the relative capacities of the schools, the equalization of enrollments in classrooms, transportation facilities and demographic factors....*It would seem the best way to devise a policy not knowing the strife of the three towns over the past 27 years, would be to base a decision strictly on a numbers rationale*.
>
> [*Pet. Appeal to the Commr. at 1* (emphasis added).]

By conceding that Saxton's revisions to Policy #5117 were based on the aforementioned factors and "strictly on a numbers rationale," petitioners effectively

concede that his proposal was objective and not based on emotion. Instead, a thorough reading of the record reflects that the crux of petitioners' arguments are based on emotion, as they have no factual or legal bases. Mindful of the guidance provided by the ALJ in *Parents United*, petitioners arguments, while highly charged and emotionally laden, cannot stand absent a definitive showing that respondent's action was arbitrary, capricious or unreasonable. Accordingly, summary decision on this point is granted in favor of respondent.

2. Discriminatory

Petitioners entire argument that respondent's action of amending school attendance Policy #5117 was discriminatory is as follows:

> The new Police #5117 provides, "All students from Oakland, Wyckoff and Franklin Lakes may choose to attend the school of lesser enrollment. Oakland [sic][7] will always have the lesser enrollment.
>
> [*Pet. Appeal to the Commr. at 2.*]

See also Pet. Ltr. Br. of Sept. 15, 1998, at 5, where petitioners state:

> When you have a new attendance policy effecting [sic] 3 communities, Franklin Lakes, Wyckoff and Oakland within the Regional High School District, and only Franklin Lakes and Wyckoff have the "choice" of what High School they would like to attend, makes it a very big issue to us who live in Oakland. We call that....Discrimination.
>
> [*Pet. Ltr. Br. of Sept. 15, 1998, at 5* (emphasis added).]

Petitioners argument rests on the assumption that Indian Hills will always be the school of lesser enrollment; such an assumption is speculative at best. According to

[7] It appears that petitioners meant to say that *Indian Hills* will always have the lesser enrollment, and because Oakland students are already assigned to Indian Hills, they have no real choice.

the express language of this portion of the attendance Policy #5117, all students have the choice of attending the school of lesser enrollment. Admittedly, however, depending on which school has the lesser enrollment, the choice made by Oakland or Wyckoff students may not change their existing placements. In other words, by virtue of where the schools are situated, Wyckoff students attend Ramapo and Oakland students attend Indian Hills. Therefore, assuming *arguendo* that Ramapo has the lesser enrollment, the "choice" by a Wyckoff student to attend Ramapo would be meaningless (*i.e.*, he would already be in attendance there). Conversely, assuming *arguendo* that Indian Hills has the lesser enrollment, the "choice" by an Oakland student to attend Indian Hills would also be meaningless (*i.e.*, since he is already in attendance there). Although the practical effect of this arrangement could be to give either the Oakland students or the Wyckoff students no "real choice" (depending on which school has the lesser enrollment), this does not rise to the level of "discrimination." In this regard, Policy #5117 is not discriminatory in its application. As the ALJ stated in *Fullen*:

> *While pupils have a constitutional right to receive a thorough and efficient program of education, there is no corollary right to receive such education in a specific schoolhouse in the district.*
>
> [*Fullen*, 1985 *S.L.D. at 601* (emphasis added).]

In short, both Ramapo and Indian Hills are high schools within the FLOW district. The assignment of pupils and other attendance/boundary issues fall within the discretionary authority granted respondent by the Legislature. Furthermore, there is no affirmative evidence of any disparities in resource allocation or course offerings between the two schools. In fact, even if they were, the policy apparently covers this. Moreover, the type of alleged "discrimination" raised by petitioners (*i.e.*, discrimination on the basis of geographic location) is not contemplated in any of the antidiscrimination statutes. See, for example, the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 through 10:5-49, which provides broad protections on the basis of race, creed, color, national origin, ancestry, age, sex, affectional or sexual orientation, marital status, liability for service in the Armed Forces of the United States, or nationality, as well as

handicap, but *does not* provide such protection for geographic location. Accordingly, the claim that respondent's action of adopting Policy #5117 was discriminatory fails, and summary decision on this point is granted in favor of respondent.

Conclusion

For the foregoing reasons, there is no genuine issue of material fact in dispute, and respondent is entitled to summary decision as a matter of law.

Order

It is hereby **ORDERED** that respondent's motion for summary decision is granted and petitioner's appeal is dismissed.

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

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

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

I, **Anna M. Leggett**, certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Elinor R. Reiner's oral decision as edited by the ALJ for forum but not substance, rendered in the above matter on January 12, 1999.

January 27, 1999
Date

ANNA M. LEGGETT, Secretary

January 28, 1999
DATE

ELINOR R. REINER, ALJ

Receipt Acknowledged:

1/26/99
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 28 1999
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

al

OAL DKT. NO. EDU 1839-98
AGENCY DKT. NO. 21-1/98

CHERYL B. PICCOLI AND ROBERT PICCOLI,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RAMAPO-INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision issued by the Office of Administrative Law (OAL) have been reviewed. Exceptions were timely filed by the parties pursuant to *N.J.A.C.* 1:1-18.4. as were respondent's reply exceptions.[1]

Petitioners object to this matter having been decided by the Administrative Law Judge (ALJ) on a summary judgment basis, questioning how such a ruling can be made when all the facts and affidavits were not disclosed to the judge[2] and averring that they had witnesses ready to testify, such as respondent's two athletic directors, two directors of guidance, the president of the Ramapo-Indian Hills Education Association, the Mayor of Oakland and others,

[1] On February 22, 1999, petitioners filed a reply to the Board's reply exceptions. There is no provision in *N.J.A.C.* 1:1-18.4 for filing a reply to reply exceptions; therefore, petitioner's February 22, 1999 filing cannot be considered by the Commissioner in rendering his final decision in this matter.

[2] Petitioners' exceptions include a number of documents which were not part of the record before the ALJ when she rendered the initial decision. Petitioners state in their exceptions that they submitted the documents in question to Board Counsel during the time the parties were attempting to develop a joint stipulation of facts but Board Counsel determined not to submit them to the ALJ. It is noted that a stipulation of facts was not submitted to the ALJ by the parties. In accordance with the provisions of *N.J.A.C.* 1:1-18.4(c), evidence which was not part of the record before

who would support the allegations in their petition. Petitioners also except to the determination of the ALJ that respondent's actions in this matter approving the revised attendance Policy No. 5117 were neither discriminatory nor arbitrary, capricious, or unreasonable. They maintain that it was unreasonable for respondent not to meet with Oakland's K-8 Elementary Board of Education and Town Council regarding the revised policy and object to the ALJ's conclusion that they offer no factual or legal authority to support assumptions that the revised policy would have a disparate impact on educational programs at either Ramapo or Indian Hills High Schools. Petitioners reiterate that the District's two directors of guidance and two athletic directors could have testified with respect to disparate impact but their testimony was never heard by the ALJ. Petitioners further allege that their witnesses who are employed by respondent needed to be subpoenaed because respondent's counsel "strong armed" their witnesses when he told them "not to communicate with [them] for the purpose of giving information." (See Petitioners' Letter of September 15, 1998 to the ALJ at p. 3.)

Petitioners argue that the revised attendance policy will result in an enrollment shift which violates Policy No. 5117 because the numerical difference in enrollment between the two high schools will be greater than 100 and, thus, will not be considered equivalent as specifically stated in the policy. Moreover, they contend that the enrollment shift will jeopardize the delivery of a thorough and efficient education for all students because it will not be conducive to a learning environment in which children will get a thorough and efficient education. Petitioners object to the ALJ's conclusions that they effectively conceded that the superintendent's proposal was objective and not based on emotion, averring that their position is in fact just the opposite. Of this, petitioners state in their exceptions

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the ALJ may not be submitted with an exception, nor may it be incorporated or referred to within an exception; therefore, such documents cannot be considered by the Commissioner in rendering his final decision in this matter.

> ***In our Petition we stated that his decision **should** be based *strictly* on a numbers rationale. How could the Superintendent by looking at the enrollment numbers from last year, seeing the steady increase at one high school and the steady decrease at the other, (which has also manifested itself again with the new enrollment numbers this year) put in place such a policy. It defies all logic and reasoning. Furthermore, while the Board brought Mr. Saxton "up to speed" through the review of consultants reports, demographic trends and projections, long-range plans and History of the Franklin Lakes Split, he missed out on the **most valuable resource** he had at his disposal. All the years of experience and hands on knowledge from the Educators within the Regional High School District. (emphasis in text) (Petitioners' Exceptions at p. 4)

Petitioners except to the ALJ's finding that the revisions to the attendance policy were made as an integral step in the implementation of the comprehensive Horizon Project, averring, *inter alia,* that such a finding was based on speculation and an idea not to come to fruition for years. They further contend that "***[t]o turn a Regional High School District upside down with a decision on attendance which [affects] not only all the students at both schools, but all the Educators as well, is totally unreasonable and without any educational merit at this point in time." (*Id.* at p. 9) Petitioners also contend that the University Programs which may start next September at Indian Hills High School are only being offered to fill up the enrollment disparity which they believe is inevitable if the revised attendance policy goes into effect because Ramapo High School will not be able to support any of the program due to overcrowding.

Petitioners reject the ALJ's reliance on *Marcewicz, supra; Parents United for Better Learning in the Community, supra; Fullen, supra; and Hussnatter, supra,* asserting that these cases are not applicable herein because they all dealt with redistricting due to overcrowding at one of the schools in those districts, while in the instant matter, revised Policy No. 5117 was

not passed to alleviate overcrowding but only compounds the overcrowding at Ramapo High School.

Respondent urges that the initial decision be affirmed, averring, *inter alia*, that the ALJ appropriately determined that petitioners had no legal or factual basis to successfully challenge its revised attendance policy. It states that notwithstanding petitioners' numerous allegations that various individuals, including staff members of the Regional High School District, Board members and town council members from constituent districts, were unhappy with the revisions to Policy No. 5117, they cite no affirmative legal obligation for the respondent Board to consult with these individuals prior to the development or implementation of any new Board policy. Of this, respondent states

> The [ALJ] has duly noted that the New Jersey Legislature has expressly delegated the authority to make, amend and repeal rules for its own government, the transaction of business and the government and the management of school property to local and regional boards of education [Initial Decision at p. 6-7]. Having demonstrated that the Board duly exercised that authority, Petitioners fail to establish any prima facie allegations against it. Consequently, they are entitled to no relief. (Respondent's Reply Exceptions at p. 4)

Respondent further argues that petitioners misconstrue the purpose of a stipulation of facts, averring that petitioners' allegations relative to this attempts to sidestep petitioners' legal obligation to demonstrate each and every allegation that respondent acted in violation of its duty by clear and convincing evidence. Respondent goes on to state that "[n]otwithstanding Petitioners' repeated statements, that they, and others similarly situated, disagree with the revision of Board policy, Petitioners failed to demonstrate by clear and convincing evidence that the Board's actions were arbitrary, prejudiced, discriminatory, capricious or burdened the taxpayers of the District." (Respondent's Reply Exceptions at p. 4) Moreover, respondent

strongly rejects petitioners' allegation that the Board prevented them from speaking with their witnesses, calling such an allegation specious at best. Of this, respondent states

> The witnesses in question are employees of the Ramapo-Indian Hills High School District. [The witnesses] had no contact with either Petitioner prior to the initiation of the instant action. Petitioners' attempt to contact Board employees in reference to this litigation violated fundamental rules of representation. (*See* RPC 4.2). Petitioners were authorized to interview any and all Board employees upon prior notification, and an opportunity by a designated Board representative to observe these contacts. Petitioners' characterization of this common litigation courtesy as "obstruction and tampering" of their witnesses is absurd. Petitioner Cheryl Piccoli was given any and all documents requested, was granted ample opportunity to meet with Superintendent Saxton. Further, the only objection made by the District was that Petitioners would not interview potential Board employed witnesses during school hours. This was agreed to by Petitioners. (*Id.* at pp. 4-5)

Lastly, respondent contends that petitioners' allegations regarding enrollment projections do not demonstrate arbitrary, prejudicial, discriminatory or capricious behavior by the Board.

COMMISSIONER'S DETERMINATION

After thorough consideration of the record of this matter, the Commissioner agrees with the conclusion of the ALJ that summary judgment be granted to respondent, essentially for the reasons set forth in the initial decision.

The appropriate standard for summary decision as set forth by the Courts in *Brill, supra,* allows for summary judgment even in the face of evidence opposing the motion, as long as that evidence is not sufficient to allow a rational factfinder to resolve the dispute in favor of the non-moving party. *Brill, supra* at 540. As correctly stated by the ALJ at page 5 of the initial decision

> Recently, the Supreme Court of New Jersey held when deciding a motion for summary judgment under *R.* 4:46-2,

> ...[a] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged dispute issue in favor of the non-moving party. [*Brill, [supra]* at 520, 540]
>
> The essential question is "whether the evidence presents a sufficient disagreement to require [a hearing] and whether it is so one-sided that one party must prevail as a matter of law. *Id.* at 533.

After reviewing the arguments made by the parties and the documentary evidence in support thereof, the Commissioner finds that the ALJ correctly determined under the *Brill* standard that this matter is appropriate for summary decision as no genuine issue of material fact exists. The record unequivocally establishes that for nearly three decades the various Boards of Education of Ramapo-Indian Hills School District examined the issue of attendance areas. (See *History of Franklin Lakes Split.*) The record also establishes that respondent considered the issue of enrollment shifts which could result from the revisions to the attendance policy proposed by its superintendent. The uncertified transcripts of the both the December 15, 1997 and January 5, 1998 Board of Education meetings document that respondent considered the educational impact on the programming for both educational program offerings and athletics. For example, Superintendent Saxton stated in pertinent part at the December 15, 1997 meeting

> ***We looked at the impact of that programming, we spent many days, our administrative team, in reviewing the impact of that programming, looking at the pros and the cons, looking at the impact of the athletic conference, does it change our athletic conference, what's the impact*** we looked at the consequences of all of these actions and a cause and effect relationship and felt very strongly and felt very confidently that it's not going to have a negative impact in terms of our operation as a regional school district.*** Dr. Stein [Director of Curriculum] did a review of our program, even reviewed the programs in the context of our current program format. What would happen ***if this policy were in

> effect right now, what would happen to our existing courses? Would we be able to implement our existing programs, especially in terms of the singletons***. (Uncertified Transcript of December 15, 1997 meeting at p. 5)

In response to this question, Dr. Stein indicated that all courses currently running at Indian Hills would continue to run. (*Id.* at p. 7) Further, the uncertified transcript of the December 1997 meeting indicates that, at that time, there were 978 students at Ramapo and 747 at Indian Hills High Schools, and, even if the unlikely scenario comes about where all students from Franklin Lakes opted for Ramapo High School, there would still be 638 students at Indian Hills. (*Id.* at p. 6)

Moreover, the record also unequivocally establishes that there can be no question that respondent had an overwhelming amount of input from a wide spectrum of its constituencies before acting to revise Policy No. 5117. As correctly noted by respondent, the fact that there are segments of those constituencies that disagree with the revisions it adopted does not make its actions arbitrary, capricious, unreasonable or discriminatory.

The standard of review for arbitrary, capricious or unreasonable is narrow in its scope and consequently imposes a heavy burden on those who challenge actions of boards of education. The standard defined by the New Jersey Courts states

> In the law, "arbitrary" and "capricious" means having no rational basis. Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached. Moreover, the court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling. (internal citations omitted) (*Bayshore Sewerage Co. v. Dept. of Envt. Protection*, 122 *N.J. Super.* 184 199-200 (Ch. Div. 1973), aff'd 131 *N.J. Super.* 37 (App. Div. 1974))

In applying this standard to the instant matter, the Commissioner could not substitute his judgment for that of the Ramapo-Indian Hills Board of Education, even if he believed an erroneous conclusion had been reached by respondent because the record establishes that respondent did not take willful or unreasoning action, without consideration and in disregard to the circumstances. This is not to say that petitioners' concerns about the impact of enrollment shifts are not legitimate. The record shows that at least one Board member, Mr. Rork, acknowledged their concerns which prompted him to abstain from the vote which otherwise carried affirmatively by the remainder of the Board. Mr. Rork stated as he cast his vote, "I would like to make sure that my vote sends two messages. One, for the superintendent, I support in the strongest way possible. The other message I wanted to say is that I hear the concerns from many of these people in the district, and I want to make sure that they understand that as long as I'm on the Board, although we come and go, that I will maintain vigilance over the educational opportunities for every kid in this district. Therefore, I'll have to abstain." (Uncertified Transcript of January 5, 1999 Board meeting at p. 32) Board Member Madigan spoke to the issue of equity in numbers and educational opportunity as well, commenting at the same Board meeting

> I support this proposed policy. But while I am concerned about the student growth of Ramapo, with or without additional Franklin Lakes students, I am confident that this policy is the right course. It is my expectation that all three towns now will be united, and will re-affirm their commitment to putting the educational goals of this district forefront. I know that the academic reputation and the achievement of both schools can only be enhanced. The most important task before us is the Horizon Educational Curriculum and Facilities Study. Objective and focused, this Board and the community can map out the strategic future of our district. The superintendent has wholeheartedly endorsed this policy and is committed to equity in program. He has made it clear that equity and quality in program do not require equity in numbers. As a proud parent of children who have attended both high schools, I know the programs of both high schools, and I have been equally

> impressed and this is why I can endorse this policy without reservation and because of my confidence in the superintendent, two strong principles in the united Board. So I applaud the superintendent for his foresight in initiating this policy. I commend my fellow Board members for their conviction and their commitment to the educational excellence. And I, too, challenge this community to hold this Board and future Boards accountable for channeling their efforts in the strategic, educational goals and objectives. (*Id.* at p. 30)

Notwithstanding the fact that petitioners express legitimate concerns relative to the enrollment shifts, a thorough review of the record convinces the Commissioner that, at this point in time, there is no clear and convincing evidence that would warrant reversal of the Board's lawful action.

Consequently, the Commissioner adopts as his own the initial decision rendered by the OAL granting respondent's Motion for Summary Judgment. The Petition of Appeal is, therefore, dismissed.[3]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 10, 1999
Date of Mailing, March 11, 1999

[3] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

69-99

D.R., on behalf of minor children, J.R. AND J.R.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parent contested the Board's residency determination. Board contended the petition was filed untimely.

ALJ found that the Board's motion to dismiss on the basis of untimeliness had to be granted as the petition was filed out of time; petitioner had shown the judge no good cause as to why the time should be enlarged; and petitioner had not complied with any direction given by the judge. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

March 10, 1999

Program (IEP) he attends and out-of-district placement, the Delaware Valley School. J. R. the younger is presently incarcerated in the Mercer County Youth House awaiting trial on criminal charges. The Mercer County Special Services School District is providing educational services to him.

Irrespective of the outcome of the present case, the pupils' educational programs are unlikely to change. A residency investigation began in December 1997. The Board received a comprehensive report. It covered extensive surveillance at both D. R.'s alleged residence in Ewing and at the pupils' mother's address in Trenton. Neither pupil has ever been observed emerging from the Ewing address on any of the school days on which surveillance occurred. Conversely, both young men were consistently and repeatedly observed emerging on school mornings from their mother's home in Trenton. More than seventeen (17) instances were reported. Based on the extensive surveillance, the investigators formed the conclusion that the pupils were residing in Trenton. The Superintendent of Schools recommended to the Board of Education that the pupils be disenrolled because of non-residency.

The Board directed that a special committee conduct several residency hearings at a special meeting held on June 29, 1998. This matter was one of those on the agenda. Notice was sent via certified mail, return receipt requested and by a U.S. Postal Service Priority Mail to Mr. [R.] at his Ewing address. The Board received a certified mail return receipt and a Priority Mail receipt. The Priority Mail envelope was not returned undelivered. The Priority Mail notice was also sent to two other addresses where Mr. [R.] has resided from time to time and to Mrs. [R.] at her Trenton address. None of these pieces of mail was returned undelivered.

No one appeared on behalf of the [R.] family at the hearing on June 29, 1998. The committee reviewed the report of the attendance officer and, based on the report, recommended disenrollment to the Board. The Board heard the committee recommendation at its regularly scheduled meeting on July 13, 1998. Based on the evidence, the Board adopted the resolution for the disenrollment. On July 16, 1998, a copy of the resolution was mailed to Mr. [R.] together with an explanatory cover letter. The letter and resolution were mailed to three separate addresses, as above. Mailings were sent by both certified and first class mail. None of the mailings was returned undelivered. In addition, the fact that Mr. [R.] filed a petition before the

Commissioner of Education shows clearly that Mr. and Mrs. [R.] received notice of the Board's decision. Both the resolution and the July 16, 1998 cover letter advised Mr. and Mrs. [R.] of the need to appeal the Board's determination within twenty-one (21) days. *N.J.S.A.* 18A:38-1.b.(2).

Mr. [R.] filed his petition with the Commissioner of Education on September 3, 1998. Mr. [R.] attested before a Notary Public on August 31, 1998, thereby verifying the petition. However, under the statute cited above, the time in which to file this petition expired August 7, 1998. The petition was filed out of time and the petitioner has shown this judge no good cause why the time should be enlarged. The petitioner has not complied with any direction given by this judge.

In consideration of the foregoing, I **FIND** and **CONCLUDE** that the Ewing Board of Education motion to dismiss on the basis of timeliness must be **GRANTED**. The times established in Administrative Code for filing petitions and objections are strictly construed. *Riely v. Board of Education of Hunterdon Central High School District*, 178 *N.J. Super.* 109 (App. Div. 1980).

Accordingly, it is **ORDERED** that this petition of appeal be and is hereby **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

JAN 25 1999
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

1/26/99
DATE

DNH
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 27 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

ph

OAL DKT. NO. EDU 10227-98
AGENCY DKT. NO. 396-9/98

D.R., on behalf of minor children, J.R. AND J.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon his careful and independent review of this matter, the Commissioner concurs with the determination of the Administrative Law Judge, that, based upon the facts existing in this matter, the Board's motion to dismiss the within Petition of Appeal as untimely is appropriately granted.

Accordingly, the recommended decision of the OAL is adopted for the reasons stated therein and the within Petition of Appeal is hereby dismissed.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

March 10, 1999
Date of Mailing, March 11, 1999

69-99

EDU #10227-98
C # 69-99
SB # 22-99

D.R., on behalf of minor children, J.R. AND J.R.,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, March 10, 1999

Decision on motion by the Commissioner of Education, May 4, 1999

For the Petitioner-Appellant, D.R., pro se

For the Respondent-Respondent, John G. Dyer, III, Esq.

On March 10, 1999, the Commissioner of Education adopted the recommended decision of an administrative law judge ("ALJ") and granted the Ewing Board's motion to dismiss the petition in this matter. The Commissioner agreed with the ALJ that D.R. (hereinafter "appellant") had failed to file his petition, which challenged the Ewing Board's determination that his children were not entitled to a free public education in the district, in a timely manner pursuant to N.J.S.A. 18A:38-1b(2).[1]

On April 7, 1999, the appellant, acting pro se, filed a notice of appeal with the State Board of Education.

[1] We note that the appellant did not respond to the Ewing Board's motion to dismiss his petition.

July 7, 1999

On May 4, 1999, the Commissioner, noting his concern that appellant's children not be penalized with a disruption in the continuity of their education during the pendency of his appeal, granted the appellant's motion for a stay of the Commissioner's decision pending a determination by the State Board.

Pursuant to N.J.A.C. 6:2-1.11(a), the appellant's brief in support of his appeal to the State Board was due on April 27, 1999, 20 days after he filed his notice of appeal. Appellant was notified of that deadline in a letter dated April 14, 1999 from the Director of the State Board Appeals Office. Appellant, however, failed to file a brief by that date. By letter dated April 28, 1999, the Director of the State Board Appeals Office notified appellant of his failure to file a brief and informed him that this matter was being referred to the Legal Committee of the State Board for consideration of his failure to perfect the appeal.

Appellant has still failed to file a brief in support of his appeal, more than two months after the deadline for such filing. Nor has he offered any explanation for his failure to file or requested an extension of time for such filing. As a result, we dismiss the appeal in this matter for failure to perfect. N.J.A.C. 6:2-1.12(a). See Paszamant v. Board of Education of the Borough of Highland Park, decided by the State Board, April 1, 1992, aff'd, Docket #A-4812-91-3 (App. Div. 1993).

July 7, 1999

Date of mailing JUL 09 1999

70-99

BETSY RIEDER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF CALDWELL-WEST CALDWELL, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, former Spanish teacher who was riffed in 1976, alleged that the Board improperly appointed a nontenured person to fill a position to which she was entitled.

ALJ concluded that the Board's appointment of another individual to the position of teacher of Spanish on June 30, 1997 violated petitioner's reemployment rights under *N.J.S.A.* 18A:28-12. ALJ determined that even though petitioner remained silent after becoming aware in September 1995 that another individual had been appointed teacher of Spanish, this circumstance standing alone did not warrant the inference that petitioner intended to waive her right to remain on the preferred eligibility list for the position of teacher of Spanish. Moreover, the ALJ found that petitioner was qualified for the position, within the intendment of *N.J.S.A.* 18A:28-12 in that she holds the appropriate certification and endorsement for the position. ALJ ordered the Board to employ petitioner as a teacher of Spanish, awarding her back pay, benefits and post-judgment interest.

Commissioner concurred with the ALJ and directed reinstatement of petitioner with back pay and emoluments as of June 30, 1997.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7609-97
AGENCY DKT. NO. 258-7/97

BETSY RIEDER,

Petitioner,

v.

BOARD OF EDUCATION OF
CALDWELL-WEST CALDWELL,
ESSEX COUNTY,

Respondent.

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

Russell J. McEwan, Esq., for respondent
(Grotta, Glassman & Hoffman, attorneys)

Record Closed: December 22, 1998 Decided: January 22, 1999

BEFORE **RICHARD McGILL**, ALJ:

This matter involves a petition by Betsy Rieder (petitioner) in which she alleges that the Board of Education of Caldwell-West Caldwell (respondent) improperly appointed a non-tenured person to fill a position to which she was entitled in violation of her tenure and

preferred eligibility rights. Respondent denies that its action have violated petitioner's tenure or preferred eligibility rights.

PROCEDURAL HISTORY

Petitioner filed her petition with the Commissioner of Education on July 14, 1997, pursuant to the Commissioner's authority conferred by *N.J.S.A.* 18A:6-9 to hear and determine controversies and disputes arising under the school laws. Respondent filed an answer on August 4, 1997, and the matter was transmitted to the Office of Administrative Law on August 7, 1997, for determination as a contested case.

The issues in this case were stated in the prehearing order dated November 18, 1997, as follows: (1) whether respondent violated petitioner's tenure/seniority rights by hiring a non-tenured teacher for the position of Spanish teacher, (2) whether petitioner waived her reemployment rights, (3) whether the petition should be dismissed on the basis of any of the separate defenses set forth in respondent's answer, and (4) if petitioner's rights were violated, whether the relief requested in the petition should be granted. The separate defenses included assertions by respondent that the petition was not filed within the ninety-day time limit contained in *N.J.A.C.* 6:24-1.2(c), that the petition is barred by the doctrine of laches and that petitioner is not "qualified" within the meaning of *N.J.S.A.* 18A:28-12 for the position of Spanish teacher.

On May 14, 1998, respondent filed a motion for summary decision seeking dismissal of the petition, and on May 26, 1998, petitioner filed a cross-motion for summary decision. By Order dated August 4, 1998, respondent's motion to dismiss was denied, and partial summary decision was granted in favor of petitioner.

In addition to identifying certain facts which are not in dispute, the Order dated August 4, 1998, decided three issues as a matter of law and identified two factual issues which could not be resolved on the basis of the papers submitted by the parties. The first determination

was that the petition should not be dismissed for failure to comply with the ninety-day time limit set forth in *N.J.A.C.* 6:24-1.2(c). The second determination was that the petion should not be dismissed due to application of the doctrine of laches. The partial summary decision in favor of petitioner reflects a third determination that petitioner is qualified within the meaning of *N.J.S.A.* 18A:28-12 for the position of teacher of Spanish. One unresolved factual issue is whether petitioner waived her tenure or reemployment rights. The other unresolved factual issue relates to petitioner's claim for pre-judgment interest and is whether respondent's action was taken in bad faith or in deliberate violation of a statute or rule.

ISSUES

The main issue in this proceeding is whether respondent violated petitioner's tenure and reemployment rights by hiring a non-tenured teacher for the position of Spanish teacher. The determination in regard to this issue turns on the question whether petitioner waived her reemployment rights. If petitioner's rights were violated, the other issue is whether the relief requested in the petition should be granted. The only form of relief subject to a specific factual issue is pre-judgment interest.

FACTS

a. Undisputed Facts

The general course of events in this matter is undisputed. As summarized in the Order dated August 4, 1998, petitioner was employed by respondent as a teacher of Spanish during the school years from 1970-71 through 1974-75. During that time, petitioner achieved tenure as a teacher of Spanish.

Petitioner was on a maternity leave from September 1, 1975, through August 31, 1976. While petitioner was on the maternity leave, respondent notified her by letter dated April 1,

1976, that her teaching position had been eliminated. Petitioner did not challenge the reduction in force (RIF) at that time.

Respondent does not maintain seniority lists prior to 1991. However, each list from June 1991 to June 1995 included petitioner's name with five years and zero months of seniority.

In August 1995, Norman Gallof, a tenured teacher of Spanish, died. Gallof's death created a vacancy. Respondent did not notify petitioner of the vacancy but rather appointed Adriana Shonk to the vacant teacher of Spanish position. Petitioner became aware of Shonk's presence in the school because petitioner's husband is also employed there. Petitioner did not challenge the appointment of Shonk to the vacant position.

Petitioner's name remained on the seniority lists prepared by the Board in June 1996 and June 1997. Shonk was employed by respondent for only two years, and respondent advertised for a teacher of Spanish in or about April 1997. By letter dated April 7, 1997, petitioner applied for the position. On June 30, 1997, respondent appointed Sara Ruffman to the vacant teacher of Spanish position. Ruffman had no prior employment with respondent and was a non-tenured employee. Respondent notified petitioner by letter dated July 2, 1997, that respondent would not employ her. Petitioner filed her petition with the Commission of Education on July 14, 1997.

b. Findings

Petitioner was the only witness to testify at the hearing. Her testimony was credible, and the following summary is **FOUND AS FACT.**

Petitioner began her employment with respondent in 1970, and she obtained tenure in 1974. By letter dated April 1, 1976, respondent's superintendent of schools informed

petitioner that the teaching position which she held prior to her maternity leave had been eliminated.

From 1976 to 1993, petitioner held a variety of jobs, but she was not employed as a Spanish teacher. During this time and for a total of thirty years, petitioner's husband was employed by respondent as a science teacher. Petitioner had no contact with the teachers union from 1976 to 1993.

After working part-time as a Spanish teacher in North Arlington, petitioner sought full-time employment in the spring of 1995 as a Spanish teacher. Petitioner attempted to find a position by checking newspaper advertisements. Petitioner did not contact respondent in regard to a position as a Spanish teacher, and respondent did not contact her. Petitioner had several interviews, and she accepted a full-time position as a Spanish teacher with the Randolph Township Board of Education.

On the first day of school for teachers in or about September 1995, petitioner's husband informed her that there was a new teacher of Spanish. Upon receiving this information, petitioner did not inquire about her rights to the position of Spanish teacher with respondent. Petitioner left her employment with the Randolph Board of Education after two years.

LAW AND ANALYSIS

A board of education may reduce the number of teaching staff members employed in the district for reasons of economy or under various other circumstances. *N.J.S.A.* 18A:28-9. However, a teaching staff member dismissed as the result of such a reduction remains "upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified . . . ." *N.J.S A.* 18A:28-12.

Here, petitioner was on the preferred eligible list for the position of teacher of Spanish with respondent as the result of the elimination of her position in April 1976. Unless petitioner waived her right to remain on the preferred eligible list, she has reemployment rights to the position of teacher of Spanish to which respondent appointed another individual on June 30, 1997. Respondent's main contention in this proceeding is that petitioner waived her reemployment rights to the position of teacher of Spanish.

"Waiver" is the intentional relinquishment of a known right. *West Jersey Title, &c., Co. v. Industrial Trust Co.*, 27 *N.J.* 144, 152 (1958). A waiver requires a clear, unequivocal and decisive act by a party. *Ibid.* The intention to waive need not be manifestly expressed but may be inferred from circumstances. *Goodpasture v. Goodpasture*, 115 *N.J. Super.* 189, 198 (Chan. Div. 1971). The question whether a waiver has occurred involves a highly factual determination. *Van Allen v. Bd. of Com'rs of Tp. of Bass Riv.*, 211 *N.J. Super.* 407, 411 (App. Div. 1986).

Here, petitioner remained silent after becoming aware in or about September 1995 that another individual had been appointed teacher of Spanish. However, this circumstance standing alone does not warrant the inference that petitioner intended to waive her right to remain on the preferred eligible list for the position of teacher of Spanish. Therefore, I **FIND** that petitioner did not waive her right to remain on the preferred eligible list for the position of teacher of Spanish. Under the circumstances, I **CONCLUDE** that respondent's appointment of another individual to the position of teacher of Spanish on June 30, 1997, violated petitioner's reemployment rights under *N.J.S.A.* 18A:28-12.

In addition to a determination that respondent's actions violated her tenure and preferred eligibility rights, petitioner seeks the following relief: (1) an order directing respondent to employ petitioner, (2) back pay and benefits for the period of time during which respondent improperly failed to employ petitioner, (3) pre-judgment and post-judgment interest, and (4) such other relief as the Commissioner may deem appropriate. The only factual issue in regard to the requested relief relates to pre-judgment interest. In accordance

with *N.J.A.C.* 6:24-1.16(c)1, pre-judgment interest shall be awarded only when the denial of a monetary claim was an action taken in bad faith and/or in deliberate violation of a statute or rule. Here, petitioner has not established that respondent's action was taken in bad faith or in deliberate violation of a statute or rule. It follows that the relief granted in this case should not include pre-judgment interest. The other relief requested by petitioner is appropriate.

Accordingly, it is **ORDERED** that:

1. Respondent shall employ petitioner as a teacher of Spanish.
2. Petitioner is awarded back pay and benefits for the period during which respondent improperly failed to employ her.
3. Post-judgment interest shall be available if warranted in accordance with the standard set forth *N.J.A.C.* 6:24 - 1.16(c)2.
4. Petitioner's request for pre-judgment interest is denied.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE**

DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Jan. 22, 1999
DATE

Richard McGill
RICHARD McGILL, ALJ

Receipt Acknowledged:

1/29/99
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 1 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

CML

APPENDIX

WITNESS LIST

For petitioner:

None

For respondent:

Betsy Rieder

EXHIBIT LIST

P-1	Petitioner's employment contract with the North Arlington School District	Evidence
P-2	Excerpt from the collective negotiation between the Caldwell-West Caldwell Education Association and the Board of Education of Caldwell-West Caldwell (teacher salary guide)	Evidence
R-1	Letter dated April 1, 1976, from Edward M. McKeon to Betsy Rieder	Evidence

OAL DKT. NO. EDU 7609-97
AGENCY DKT. NO. 258-7/97

BETSY RIEDER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF CALDWELL-WEST CALDWELL, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. The Board's exceptions and petitioner's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4.

The Board excepts to the Administrative Law Judge's (ALJ) conclusion that petitioner did not waive her right to reinstatement in September 1995, since the Board asserts that petitioner's inaction in 1995, despite actual notice that the Board had hired a new teacher for the Spanish position, was sufficient to establish that she had waived such right. (Board's Exceptions at p. 2) The Board reasons that "Petitioner's indifference to the exercise of her statutory right to reinstatement in 1995 constitutes a waiver; and, having relied to its detriment on Petitioner's indifference, [it] should not now be forced to accommodate her long-dormant interest in the district." (*Id.* at p. 3)

Additionally, the Board objects to the ALJ's conclusion, as found in his Interlocutory Order of August 4, 1998, that petitioner was "qualified" to teach the Spanish

classes in question, pursuant to *N.J.S.A.* 18A:28-12, notwithstanding her lengthy absence from the profession. In this regard, the Board renews its contention as argued before the ALJ that the authority relied upon by the ALJ should not control, as none of the legal cases therein cited involved a 20-year gap between RIF and reinstatement. The Board further contends that none of the cases relied upon by the ALJ were decided during a period of "significant educational reform," as exists today, and maintains, therefore, that the instant matter is analogous to cases in which a riffed teacher demands reinstatement to a position involving different qualifications. (*Id.* at p. 4) It concludes that the ALJ's interpretation of the law will lead to absurd consequences that could not have been intended by the Legislature.

In reply, petitioner underscores that, despite the fact that she was on the Board's recall list for the position in question in 1995, the Board never communicated with her in any way and never offered her the job. She asserts that the waiver of her tenure rights, in that they are statutory, "must involve something more than failing to file a claim over the Board's abuse of power in 1995." (Petitioner's Reply at p. 2)

Additionally, petitioner contends that *N.J.S.A.* 18A:28-12 compels her reinstatement, as she is a tenured Spanish teacher who was riffed and placed on the preferred eligible list and had "an absolute right" to the vacancy. (*Id.* at pp. 3, 4) Petitioner maintains that her certificate and endorsement in Spanish provide the relevant scope of her tenure rights in this matter, and the Board could not lawfully deny her reemployment while hiring a nontenured teacher. (*Id.* at p. 5) As to the Board's "novel argument" that she, despite her tenure and placement on the preferred eligible list, is "not qualified," petitioner asserts,

> Happily, there is no legal support for the Board's argument. Indeed, the Board's argument amounts to a desire for local district nullification of the State Board of Examiners, which has the authority to issue certificates and endorsements to teaching staff

> members (*N.J.S.A.* 18A:6-38), the Department of Education which, by virtue of the adoption of *N.J.A.C.* 6:11-6.2(a)(9)(ii) authorizes the petitioner to teach Spanish in "*all* public schools" (emphasis added) *** and the Legislature, which adopted *N.J.S.A.* 18A:28-12. (*Id.* at p. 6)

Upon careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusions of the ALJ in both his Interlocutory Order, as rendered August 4, 1998, and his recommended decision. Like the ALJ, the Commissioner declines to find that petitioner's failure to assert her right to the Spanish position in 1995 constitutes "'a clear, unequivocal, and decisive act ***'" (*West Jersey Title, supra* at 152) from which one may reasonably and fairly infer that she intended to relinquish her right to remain on the preferred eligible list for the position of Spanish teacher.

Further, like the ALJ, the Commissioner finds that petitioner is qualified for the position of Spanish teacher, within the intendment of *N.J.S.A.* 18A:28-12 in that she holds the appropriate certification and endorsement for the position. Here, the Commissioner recognizes that

> The relevant inquiry regarding certification is not what a person can teach, but what a person may teach. The answer must be found in the regulations and the case law, not in a review of the endorsement holder's college transcript. Accordingly, in the context of tenure and seniority rights following a RIF, any discussion concerning who is more suited to teach a particular course or who is more qualified is unnecessary and inappropriate. If the riffed teacher has an endorsement which authorizes, *i.e.,* permits, her to teach a course, she may exercise her tenure and seniority rights to claim it. *Ulrich v. Board of Education of the Monmouth County Vocational School District,* 96 *N.J.A.R.* 2*d* (EDU) 290, 293.

(*See also, Dombloski v. Board of Educ. of the Town of Belvidere, Warren County*, 94 *N.J.A.R.* 2*d* (EDU) 348, 349, aff'd, 95 *N.J.A.R.* 2*d* (EDU) 347, citing *Lichtman v. Ridgewood Bd. of Ed.*, 93 *N.J.* 362, 364 (1983), establishing that a tenured teacher with proper certification can claim, as

against a nontenured teacher, seniority rights to a position that is within the tenured teacher's certificate.)

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein, and amplified above. The Board is directed to reinstate petitioner as a teacher of Spanish, and to award her back pay and related emoluments for improperly failing to employ her as a Spanish teacher as of June 30, 1997.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 10,1999
Date of Mailing, March 10, 1999

70-99

EDU #7609-97
C # 70-99
SB # 23-99

BETSY RIEDER,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF CALDWELL-WEST CALDWELL, ESSEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, March 10, 1999

For the Petitioner-Respondent, Bucceri & Pincus (Gregory T. Syrek, Esq., of Counsel)

For the Respondent-Appellant, Grotta, Glassman & Hoffman (Russell J. McEwan, Esq., of Counsel)

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

July 7, 1999

Date of mailing JUL 09 1999

71-99

G.E.A., on behalf of minor child, J.G.A.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent contested the Board's residency determination. Board sought appropriate amount of tuition due and owing for the time petitioner attended its schools illegally.

ALJ concluded that as a matter of law, petitioner was not a bona fide resident of the City of Atlantic City from October 1997 through June 1998. ALJ concluded that petitioner's son, J.G.A., was not entitled to a free public education at Atlantic City High School during that period and, therefore, was subject to the payment of appropriate tuition for his education. ALJ concluded that the Board was due the educational cost, as determined by the Department of Education, for the education provided J.G.A. from October 1997 through June 1998. Petition was dismissed.

Commissioner concurred with the ALJ that petitioner was responsible for the tuition payment to the Board for J.G.A.'s education expenses for the period J.G.A. was a nonresident pupil in the Board's school. Commissioner, however, could not agree that dismissal of the petition was appropriate because the amount of tuition costs petitioner had to pay to the Board had not been calculated. Commissioner's decisions in residency matters cannot be deemed final until the amount of tuition to be paid has been determined and ordered. (*Cranford Bd. Of Ed. v. A.McG. and L.McG.*) Thus, the Commissioner remanded the matter to OAL for calculation of tuition due.

March 10, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4297-98

AGENCY REF. NO. 77-3/98

G.E.A. on behalf of minor child, J.G.A.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,

Respondent.

G.E.A., petitioner, *pro se*

Michael Epps, Esq., for respondent

Record Closed: December 29, 1998 Decided: January 29, 1999

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals from a determination by the Board of Education of the City of Atlantic City (Board) which found that pupil, J.G.A., attended the Board's public schools while residing out of the Atlantic City School District. The Board now seeks an order from the Commissioner of Education (Commissioner) for the appropriate amount of tuition due and owing for the time petitioner attended its schools illegally.

The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The hearing was held on December 29, 1998, at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City, New Jersey. The hearing record closed on December 28, 1998.

FINDINGS OF FACT

Based upon the testimony and other evidence adduced at the hearing and having given fair weight thereto, and having assessed the credibility of the witnesses, I **FIND** the following **FACTS.**

Petitioner, J.G.A., has been a pupil attending the Board's public schools from kindergarten through high school. The issue in the instant matter commenced in October 1997, during petitioner's senior year at the Atlantic City High School for the 1997-98 school year.

In late October 1997, the house in Atlantic City in which petitioner's family resided experienced a major plumbing problem when the water pipes burst. Petitioner's family were no longer able to live on the premises due to water damage to the house; *i.e.,* the ceiling was destroyed and the cost to repair the damage was excessive, or more than G.E.A. could afford.

Petitioner's father owned another property at 314 Bayview Avenue, Pleasantville, New Jersey. Petitioner's father G.E.A., testified that he had no other choice but to move his family to the second home in Pleasantville. After the family moved to the Pleasantville residence, G.E.A.

needed someone to watch the Atlantic City house. G.E.A. granted a Ms. Phillips the opportunity to live in the Atlantic City residence, for rent.

Petitioner's father testified that in September 1997, a Mrs. Wooley, from the Atlantic City High School, instructed petitioner J.G.A. to prove that he was a resident of Atlantic City and that he lived within the Board's school district. He asserted that Mrs. Wooley advised J.G.A. that he needed to produce one gas, telephone, electric, tax or sewerage bill to verify his residency. Petitioner's father presented Mrs. Wooley with a sewerage and tax bill to prove his school district residency.

Petitioner's father admits that during the school year, he transported J.G.A. from Pleasantville to the Atlantic City High School. He also testified that he advised Mrs. Phillips, of the Atlantic City property, that his son, J.G.A. would occasionally be staying in a back room of the residence during the school year.

G.E.A. testifed, among other things, that even when J.G.A. lived in Atlantic City, the father transported J.G.A. to and from the Atlantic City High School because of problems pupils created on the school bus. The father did not want J G.A. to get into any trouble with the school authorities.

G.E.A. is a single parent with two sons and is employed by the City of Atlantic City, Department of Health. He works from 11:45 p.m. until 7:45 a.m. in its alcohol and drug detoxification unit. The working hours allow him to sleep on the job from time to time. The work hours also permits him to transport J.G.A. to and from school on a daily basis.

G.E.A. testified that in January 1998, he appeared before the Board, which was attempting to exclude J.G.A. from its high school because he was a non-resident. G.E.A. argued that J.G.A is a honor student, who has experienced his whole primary, elementary and secondary education in the Atlantic City schools. J.G.A. has never been in trouble during his attendance in the Board's school. J.G.A. graduated from the Atlantic City High School in June 1998.

The Board asserts that the meeting between it and petitioner occurred on March 3, 1998, rather than in January as petitioner testified. The Board asserts that several meetings took place between the Atlantic City High School administration and G.E.A. prior to the March 3, 1998, meeting where the Board determined that J.G.A. was attending its school while residing out of the school district. It asserts that G.E.A. took no action to remove J.G.A. from its school after being advised that J.G.A. was not entitled to a public education within the Board's schools.

The Board's truancy department conducted an investigation after it was observed that J.G.A. was being dropped off on the highway near the school. The truancy department visited the Atlantic City property owned by petitioner, however, it failed to find G.E.A. in residence. Individuals who answered the door indicated that they were renters and that the owner lived elsewhere.

The Board asserts that J.G.A. is not entitled to a free public education simply by virtue of the fact that his father, G.E.A., is the owner of property and is a taxpayer in the school district. The Board found that J.G.A. was not properly domiciled in the Atlantic City School District as required by *N.J.S.A.* 18A:38-1. The Board observes that in the instant appeal, the burden of proof rests with petitioner, and that the standard of proof is by a preponderance of the credible evidence. It further observes that the evidence, including G.E.A.'s own testimony, is that the present place of domicile is in Pleasantville, New Jersey.

CONCLUSIONS

The controlling statute in this matter is found at *N.J.S.A.* 18A:38-1, which provides that:

> Public schools shall be free to the following persons over five and under 20 years of age:
> (a) Any person who is domiciled within the school district.

The term "domicile" is defined by **BLACK'S LAW DICTIONARY** (5th Ed.) as:

> That place where a man has his true, fixed and permanent home and principle establishment, and to which whenever he is absent he has

> the intention of returning (citation omitted). The permanent residence of a person or the place to which he intends to return even though he may actually reside elsewhere. A person my have more than one residence but only one domicile . . . *Id. at 435.*

As our New Jersey Supreme Court held in *Mansfield Township Board of Education v. State Board of Education,* 101 *N.J.L.* 474 (1925) that:

> A child, in law, can have no residence of its own, and can only lawfully acquire one when it has been emancipated. Its residence under school law follows that of its parent or guardian or other person having legal control of it. *Id.* 479-480

Even if petitioner J.G.A. had occasionally stayed in the Atlantic City house owned and rented by G.E.A, his legal domicile still remains in Pleasantville. *Mansfield, supra. See, also, Bd. of Ed., Tp. of Little Egg Harbor v. Bds. of Ed., etc* 71 *N.J.* 537 (1976).

The undisputed facts demonstrate that from about October 1997 through June 1998, petitioner J.G.A.was not domiciled within the Board's school district. Nor was any evidence produced by petitioner that he intended to return to his Atlantic City residence once he had left it. The known property was occupied by renters.

I **CONCLUDE**, therefore, as a matter of law, that petitioner was not a bona fide resident of the City of Atlantic City from on about October 1997 through June 1998. I **CONCLUDE** that J.G.A. was not entitled to a free public education at the Atlantic City High School during the period October 1997 through June 1998 and, therefore, is subject to the payment of the appropriate tuition for his education.

I **CONCLUDE** that the Board of Education is due the educational cost, as determined by the Department of Education, for the education expense provided to J.G.A. for the period October 1997 through June 1998.

ORDER

Accordingly, it is **ORDERED** that G.E.A. is responsible for the tuition payment to the Board for J.G.A.'s education expenses for the period J.G.A. was a nonresident pupil in the Board's school. It is **FURTHER ORDERED** that the herein petition of appeal is hereby **DISMISSED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

29 January 1999
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

Feb. 2, 1999
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 3 1999
DATE

Barbara A Herrel
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

FOR PETITIONER:

G.E.A.

FOR RESPONDENT:

None

DOCUMENTS IN EVIDENCE

FOR PETITIONER:

None

FOR RESPONDENT:

None

OAL DKT. NO. EDU 4297-98
AGENCY DKT. NO. 77-3/98

G.E.A., on behalf of minor child, J.G.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and initial decision issued by the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon consideration of the record herein, the Commissioner adopts as his own the findings and conclusions of the Administrative Law Judge (ALJ) that petitioner's son, J.G.A, was not entitled to a free public education at Atlantic City High School during the period October 1997 through June 1998 when he graduated. The Commissioner cannot agree, however, that dismissal of the petition is appropriate at this time because the amount of tuition costs petitioner must pay respondent has not been calculated. The matter must, therefore, be remanded to the OAL for further proceedings for the reasons stated below.

The initial calculation of the education costs owing and due to respondent, as well as the documentation upon which such calculation is based, must be brought to the record by the Atlantic City Board of Education, the party seeking said payment. Upon review of the information relative to calculation of tuition costs submitted by respondent, the ALJ will make a recommendation to the Commissioner as to the amount of damages petitioner should be ordered

to pay to respondent. Further, in accordance with the New Jersey Appellate Court's decision in *Board of Education of the Township of Cranford v. A. McG. and L. McG.*, 95 *N.J.A.R.* 2d (EDU) 74, aff'd 96 *N.J.A.R.* 2d (EDU) 140, rev'd and remanded Appellate Division, February 10, 1998, A-4742-95T3, slip opinion at pp. 8-10, the Commissioner's decision in residency matters such as herein cannot be deemed final until the amount of tuition to be paid has been determined and ordered.

Therefore, pursuant to the provisions of *N.J.A.C.* 1:1-18.7(a), this matter is hereby remanded to the OAL for calculation of tuition due.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 10, 1999
Date of Mailing, March 10, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

71-99

EDU #2004-99
C # 71-99
C # 31-00
SB # 14-00

G.E.A., on behalf of minor child, J.G.A., :

PETITIONER-APPELLANT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY, : DECISION

RESPONDENT-RESPONDENT. :

Decided by the Commissioner of Education, March 10, 1999

Decided by the Commissioner of Education, January 18, 2000

For the Petitioner-Appellant, G.E.A., pro se

For the Respondent-Respondent, Michael C. Epps, Esq.

The decision of the Commissioner of Education dated January 18, 2000, in which he determined that the petitioner was responsible to the Atlantic City Board of Education for tuition in the amount of $9,149.40, is affirmed for the reasons expressed therein.[1] We observe in so doing that the petitioner has not challenged the Commissioner's

[1] The petitioner's notice of appeal, which was filed on February 15, 2000, also challenged the Commissioner's decision issued on March 10, 1999, in which he concluded that the petitioner was not domiciled in Atlantic City and, as a result, that his son was not entitled to a free public education in that district. The Commissioner remanded the matter to the Office of Administrative Law for further proceedings for the limited purpose of calculating the amount of tuition due and owing by the petitioner to the Atlantic City Board. On January 18, 2000, the Commissioner adopted the ALJ's calculation. Upon consideration of the late filing date of the petitioner's notice of appeal, see N.J.S.A. 18A:6-28, our Legal Committee determined that the petitioner could proceed to brief this matter solely on the merits of that portion of his appeal relating to the amount of tuition due to the Atlantic City Board as determined by the Commissioner in his decision of January 18, 2000.

July 5, 2000

calculation of the amount of tuition due, but, rather, maintains that he does not have the financial means to satisfy such an award. We note in that regard that this agency is not the proper forum for the petitioner to attempt to excuse his obligation to the Atlantic City Board on financial grounds.

Arnold G. Hyndman abstained.

July 5, 2000

Date of mailing JUL 07 2000

72-99

IN THE MATTER OF THE TENURE	:	
HEARING OF WENDE STUART,	:	
SCHOOL DISTRICT OF THE TOWN-	:	COMMISSIONER OF EDUCATION
SHIP OF IRVINGTON, ESSEX COUNTY.	:	DECISION ON REMAND
	:	

March 10, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3668-98

OAL DKT. NO. EDU 1185-97

(On Remand)

AGENCY DKT. NO. 442-9/96

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,

Petitioner

v.

WENDE STUART,

Respondent

Raymond L. Hamlin, Esq., petitioner
(Hunt, Hamlin & Ridley, attorneys)

Christopher M. Hartwyk, Esq., for respondent

Record Closed: January 6, 1999 Decided: February 2, 1999

BEFORE **ARNOLD SAMUELS**, ALJ:

This matter involves the settlement of a contested case before the Office of Administrative Law (OAL) that was remanded by the Commissioner of Education in a

decision dated March 26, 1998. The relevant details were set forth in the Initial Decision/Settlement, OAL DKT. NO. EDU 1185-97, decided February 19, 1998. Both of the above decisions are incorporated herein by reference. This decision amends the prior disposition of the matter.

The Commissioner's comments in his Decision and Order of Remand are duly noted, particularly the need for the settlement to meet the *Cardonick* standards for settlement of tenure matters. *(In Re Cardonick*, decided by the Commissioner Apr. 7, 1982, *Aff'd State Bd, of Educ.* Apr. 6, 1983, 1990 *SLD* 842, 846.)

The agreement was accordingly remanded to the OAL for revision of the settlement in a manner that would be consistent with the Commissioner's concerns, or for plenary hearing on the merits, if such a modification could not be reached.

After consultation by and between counsel, it was decided that a revision of the settlement agreement to reflect the Commissioner's concerns could be accomplished. A hearing date for that purpose was scheduled for January 6, 1999, at which time an appropriate revised Stipulation of Settlement was agreed upon, signed by counsel for the parties and filed. A copy of the revised Stipulation of Settlement is attached hereto.

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

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

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

The revised agreement conforms with the *Cardonick* standards and with the concerns of the Commissioner of Education, as set forth in his March 26, 1998 decision. I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-

19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**, subject to the Commissioner's approval.

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

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

February 2, 1999
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

2/5/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 9 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

LAW OFFICES OF CHRISTOPHER M. HARTWYK
111 Blanchard Road
South Orange, New Jersey 07079
(973) 762-4946 Telefax (973) 762-9593
Attorneys for Wende Stuart

EDU 3668-98
ON REMAND FROM

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	**OAL DOCKET NO. EDU 1185-97**
Petitioner,	:	**AGENCY DOCKET NO. 442-9/96**
v.	:	
WENDE STUART	:	**STIPULATION OF SETTLEMENT**
Respondent.	:	

1. Wende Stuart, respondent resigned her position as of December 16, 1997;

2. Irvington Board of Education (hereinafter the "Board") representatives will assist in processing a disability retirement application to the Division of Pensions;

3. The Board has determined that in view of the fact that Ms. Stuart has resigned her position with the Board, the matter has become moot insofar as the Board is concerned any continuation of the case by the Board would entail the expenditure of substantial legal and administrative costs, plus personal time for no purpose other than that already accomplished by respondent's resignation;

4. Upon review the Board approved a paid leave of absence for the respondent and due to respondent's medical/psychiatric condition she failed to inform the Board of her continued desire for a leave of absence and ultimately of her desire to retire and pursue a medical disability;

5. Given the Board's approval of the paid leave of absence, the respondent's medical condition, her re-location to the Southwest United States and her subsequent resignation, it is the

Board's position that pursuit of the tenure charges is no longer in the public interest and would resu' in substantial and needless expenditure of legal costs and administrative resources;

6. The respondent has been informed and understands the Commissioner's duty, pursuant to *NJAC* 6:11-3.6(a)(1) and In re Cardonick, April 7, 1982, affirmed State Board of Education April 6, 1983, 1990 S.L.D. 842, 846, concerning referral to the State Board of Examiners for review and possible action regarding Ms. Stuart's teaching certification;

7. This Stipulation of Settlement is subject to the acceptance by and approval of the Commissioner of Education.

By: _____
Raymond L. Hamlin
Hunt Hamlin & Ridley
Attorneys for Petitioner
Irvington Board of Education

By: _____
Christopher M. Hartwyk
Attorney for Respondent, Wende Stuart

OAL DKT. NO. EDU 1185-97
AGENCY DKT. NO. 442-9/96

IN THE MATTER OF THE TENURE	:	
HEARING OF WENDY STUART,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF IRVINGTON,	:	DECISION
ESSEX COUNTY.	:	
	:	

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

Upon careful and independent review of the full record of this matter and the terms of the proposed settlement agreement, the Commissioner is compelled to reject such agreement as it is currently structured since he cannot be satisfied by the present record that the proposed settlement meets the *Cardonick* standards for settlement of tenure matters. (*In re Cardonick*, decided by the Commissioner April 7, 1982, affirmed State Board of Education April 6, 1983, 1990 S.L.D. 842, 846.)

It is well established that, having once taken up the burden of tenure charges, the Board may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges can no longer be pursued or why it is now in the public interest not to pursue them. (*In the Matter of the Tenure Hearing of Kenneth Smith, School District of the City of Orange*, Essex County, decided by the Commissioner March 22, 1982, decision on remand June 16, 1983, affirmed with modification by the State Board of Education

November 2, 1983, affirmed Superior Court January 30, 1986.) The present record contains no such explanation.

Further, there is no indication that the within teaching staff member was advised of the Commissioner's duty, pursuant to *N.J.A.C.* 6:11-3.6, to refer tenure determinations for possible revocation of certificate.

While the Commissioner does not preclude the possibility of settlement in this matter, he stresses that in order for him to meet his own obligation to the school and children of this state, he must be assured that any settlement is consistent with appropriate standards for setting aside tenure matters as expressed in *Cardonick, supra.*

Lastly, it appears that the terms of the settlement have already been effectuated through respondent's resignation. The parties are, therefore, admonished that settlement agreements of controverted matters are of no force and effect and may not be implemented absent the Commissioner's approval pursuant to *N.J.A.C.* 1:1-19.1.

Accordingly, the proposed settlement is rejected for the reasons expressed herein. The Commissioner hereby remands this matter to the Office of Administrative Law for further settlement negotiations consistent with the concerns herein expressed. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to a plenary hearing.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MARCH 26, 1998
DATE OF MAILING MARCH 26, 1998

Due Date
4/6/98
TARGET DATE
3/23/98

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1185-97
AGENCY DKT. NO. 442-9/96

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,

Petitioner,

v.

WENDE STUART,

Respondent.

Denise P. Coleman, Esq., for petitioner
(Schwartz, Simon, Edelstein, Celco & Kessler, attorneys)

Christopher M. Hartwiyk, Esq., for respondent

Record Closed: January 26, 1998 Decided: February 17, 1998

BEFORE **ARNOLD SAMUELS**, ALJ:

In September 1996 the petitioner, Board of Education of the Township of Irvington, Essex County, filed a certificate of determination and written charges against

the respondent, pursuant to *N.J.S.A.* 18A:6-11 and *N.J.A.C.* 6:24-5.1 *et seq.*, seeking dismissal of the petitioner from her tenured position, for unbecoming conduct, incapacity, and other just cause (more specifically, excessive absenteeism and abandonment of position), pursuant to *N.J.S.A.* 18A:6-10 *et seq.* The respondent filed an answer with the Commissioner of Education on December 24, 1996.

On January 10, 1997 the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) for hearing and determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 to 13.

Prehearing conferences were scheduled several times, but were adjourned for various reasons, including difficulties experienced by respondent's attorney in reaching and conferring with his client, who was located, for the most part, in the Southwestern part of the United States. A plenary hearing was ultimately scheduled for December 18 and 19, 1997 at the OAL in Newark, New Jersey. However, prior to the hearing counsel advised that the matter had been settled by and between the parties and that respondent's attorney had obtained Ms. Stuart's consent to the settlement. The petitioner, Irvington Board of Education, also approved of the terms. A letter from respondent's attorney to counsel for the petitioner contained the full and complete terms of settlement, which were approved on behalf of the Board and by counsel for petitioner. A copy of the letter of settlement, filed in the OAL on January 26, 1998, is attached hereto and made a part hereof.

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

1. The parties have voluntarily agreed to the settlement as evidence by the signatures of their attorneys.

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

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

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

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

February 17, 1998
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

2/20/98
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

sej

SCHWARTZ SIMON EDELSTEIN CELSO & KESSLER

COUNSELLORS AT LAW

(A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION)

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JOHN B. MARIANO, JR. †
RAYMOND W. FISHER
BURTON ZITOMER*
ALLAN P. DZWILEWSKI
PAUL H. GREEN

JACOB GREEN
COUNSEL

GLENN C. GURITZKY*
SCOTT A. ELK +
MIGUEL A. MAZA°
OF COUNSEL

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LYNNE E. CRAWFORD*
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JUDITH L. KOROLEWICZ

* ALSO MEMBER OF NY BAR
† ALSO MEMBER OF PA BAR
+ MEMBER OF FL BAR ONLY
° ALSO MEMBER OF PR BAR
¤ ALSO MEMBER OF DC BAR
◊ ALSO MEMBER OF FL BAR

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
JAN 26 11 28 AM '98

REPLY TO: **Florham Park Office**

January 23, 1998

VIA LAWYERS SERVICE

Hon. Arnold Samuels, A.L.J.
State of New Jersey
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

Re: Bd. of Ed. of the Twp. of Irvington, Essex Cty. v. Wende Stuart
OAL DKT. No. EDU 1185-97

Dear Judge Samuels:

Enclosed please find an original and two copies of the settlement in the above matter. Please be advised that the Irvington Board of Education approved the settlement at its January 21, 1998 regular Board meeting. By copy of this letter I am informing counsel for Ms. Stuart of the Board's approval.

Respectfully,
SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER

By: _____
Denise P. Coleman

Encl.
c: Belinda Smiley, Dir. Human Resources (w/encl.)
Christopher M. Hartwyk, Esq. (w/encl.) (Via Fax & Lawyers Service)

January 23, 1998
No. 25433

STATE OF NEW JERSEY
OFFICE OF LAW
JAN 28 11 22 AM '98
RECEIVED

CHRISTOPHER M. HARTWYK
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TEL. (973) 762-4946
FAX: (973) 762-9593

Via Telefax (973) 301-0203 and Regular U. S. Mail

December 16, 1997

Denise P. Coleman, Esq.
Schwartz, Simon, Edelstein, Celso & Kessler
10 James Street
Florham Park, New Jersey 07932

Re: Board of Education of the Township of Irvington v. Wende Stuart
OAL Docket No.: EDU 1185-97
Agency Docket No.: 442-9/96

Dear Ms. Coleman:

Please accept this letter as my client's, Ms. Wende Stuart, notice of Retirement from the Irvington School District. Further, please accept this letter as confirmation of our phone conversation this date, where we (You and I, as representatives of the above referenced parties) specifically agree to and understand the following:

1. Wende Stuart will resign effective immediately upon receipt of this letter;

2. Irvington Board of Education representatives will assist in processing a disability retirement application to the Division of Pensions;

3. This will resolve the tenure charges and this matter will be dismissed; and

4. You will communicate/notify Judge Samuels of the settlement.

In the interest of expediency please sign where indicated below acknowledging receipt and acceptance of the terms of settlement stated herein. Upon completion please telefax an executed copy of this letter to my attention.

Thank you for your cooperation in this regard. Should you have any questions please do not hesitate to call. My warmest regards for the Holiday Season.

Very truly yours,
LAW OFFICES OF CHRISTOPHER M. HARTWYK

By: Christopher M. Hartwyk
Christopher M. Hartwyk
Counsellor At Law

CMH/pfb

By signing below I, Denise P. Coleman acknowledge receipt and acceptance of the terms set forth herein, subject to the approval of the Irvington Bd. of Education and the Commissioner of Education.
Schwartz, Simon, Edelstein, Celso & Kessler

By: Denise P. Co
Denise P. Coleman, Esq

OAL DKT. NOS. EDU 3668-98 and EDU 1185-97 (ON REMAND)
AGENCY DKT. NO. 442-9/96

IN THE MATTER OF THE TENURE	:	
HEARING OF WENDE STUART,	:	
SCHOOL DISTRICT OF THE TOWN-	:	COMMISSIONER OF EDUCATION
SHIP OF IRVINGTON, ESSEX COUNTY.	:	DECISION ON REMAND
	:	

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

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

COMMISSIONER OF EDUCATION

March 10, 1999
Date of Mailing, March 10, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

73-99

ASBURY PARK HOMEOWNERS ASSOCIATION, INC.,	:	
PETITIONER,	:	
AND	:	
CATHERINE M. MELLINA,	:	
PETITIONER-INTERVENOR,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY, AND KIM A. FELLENZ, BOARD ATTORNEY,	:	
RESPONDENTS.	:	
	:	

March 11, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2260-98
AGENCY DKT. NO. 11-1/98

ASBURY PARK HOMEOWNERS ASSOCIATION, INC.,
Petitioner,
and
CATHERINE M. MELLINA,
Petitioner-Intervenor,
v.
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY, AND KIM A. FELLENZ, BOARD ATTORNEY,
Respondents.

James T. Hundley, Esq., for petitioner Mellina (Hundley & Parry, attorneys)

Kathleen Smallwood-Johnson, Esq., for respondent Board of Education (Hill Wallack, attorneys)

Kim A. Fellenz, Esq., and/or **Robin Perry,** Esq., for respondent Kim A. Fellenz

Record Closed: January 21, 1999 Decided: January 29, 1999

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter was transmitted to the Office of Administrative Law on March 9, 1998, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

By order entered July 30, 1999, the Asbury Park Homeowners Association, Inc., was dismissed as a party petitioner.

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

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

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

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

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

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

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

Jan 29, 1999
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

Feb. 3, 1999
DATE

D. N. Cantanaitis Jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 4 1999
DATE

Barbara A Hernal
OFFICE OF ADMINISTRATIVE LAW

cc

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

1999 JAN 21 A 6:57

STIPULATION OF SETTLEMENT

1. The Petitioner, Kate Mellina, will dismiss the Petition of Appeal in its entirety and be solely responsible for the cost incurred in bringing suit.

2. The Respondent, Asbury Park Board Education, acknowledges that the legal fees of the former Board Attorney, Mr. Kim Fellenz and his billing practices are currently the subject, inter alia, of an audit investigation.

3. The Board will reaffirm its bylaw number 0148 entitled Board Member Indemnification, at its next regularly scheduled board meeting.

4. The Board is currently being monitored by the State Department of Education. Therefore the Board will seek their review of the expenditure of legal fees and services for the present and former board members as part of the state's monitoring paradigm. Should the State Department, in its monitoring find that there were any inappropriate charges of payment of legal fees, the Board will take appropriate action to recover any overpayment or improperly paid legal fees.

5. This Stipulation is not an admission of wrongdoing on the part of the Defendants hereto or attorneys.

Signatures:

Petitioner: Kate Mellina and/or
her attorney James T. Hundley

12/7/98

Respondent: Asbury Park BOE
by Kathleen Smallwood Johnson, Esq.
Hill Wallack

Respondent: Kim Fellenz
by Mr. Fellenz, Esq. and/or Robin Perry, Esq.

OAL DKT. NO. EDU 2260-98
AGENCY DKT. NO. 11-1/98

ASBURY PARK HOMEOWNERS ASSOCIATION, INC.,	:	
PETITIONER,	:	
AND	:	
CATHERINE M. MELLINA,	:	
PETITIONER-INTERVENOR,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY, AND KIM A. FELLENZ, BOARD ATTORNEY,	:	
RESPONDENTS.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

March 11, 1999
Date of Mailing, March 11,1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

74-99

SARA CEDENO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

March 11, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10740-97

AGENCY DKT. NO. 413-10/97

SARA CEDENO,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT

OF THE CITY OF NEWARK, ESSEX COUNTY,

Respondent.

Charles Auffant, Esq., for Petitioner

Cherie L. Maxwell, Esq., for Respondent
Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: December 28, 1998 Decided: January 27, 1999

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on December 15, 1997, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

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

January 27, 1999
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

Feb. 3, 1999
DATE

N Cantanaitis/jb
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 4 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

jb

CHARLES I. AUFFANT
Attorney at Law
661 Franklin Avenue
Nutley, New Jersey 07110
973-661-4545
Attorney for Petitioner

SARAH CEDENO,	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW**
Petitioner,	**OAL DOCKET NO. EDOR-10740-97N** **AGENCY REFERENCE NO. 410-10/97**
vs.	***CIVIL ACTION***
NEWARK PUBLIC SCHOOLS,	**STIPULATION OF SETTLEMENT**
Respondent,	

The above captioned parties agree to settle this matter on the following terms and conditions:

1. Petitioner Sarah Cedeno will resign her permanent teaching position with the Newark Public Schools by letter of resignation dated June 30, 1998. Said letter will be held in escrow by the Petitioners attorney until final approval of this stipulation by the Newark Public Schools.

2. The Newark Public Schools will pay Petitioner her entire withed increment for the 1997-1998 academic year.

3. Petitioner will apply for retirement with the Teachers Pension and Annuity Fund. Respondent, Newark Public Schools will assist Petitioner, if required, in obtaining, executing and delivering any and all documents within their possession and control required by the Pension Board.

4. Upon payment of the entire withheld increment in this matter, Petitioner will withdraw the above referenced action.

5. I have read foregoing understand same and agree to be bound by the terms and conditions contained therein.

Dated:

X Sara Cedeno
Sarah Cedeno

Dated: 10/27/98

Newark Public Schools

(Please Print)

Dated: 10/5/98

Notary Public

JUANA PEREZ
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires

Dated:

Notary Public

CHARLES I. AUFFANT
ATTORNEY AT LAW

661 FRANKLIN AVENUE
NUTLEY, NEW JERSEY 07110

201 661-4545
201 661-4646 FAX

New Area Code (973)

December 21, 1998

Hon. Maria Mancini LaFiandra, ALJ
State of New Jersey Office of Administrative Law
185 Washington Street
Newark, NJ 07102

Re: Sarah Cedeno v State Operated School District, Newark OAL Docket No. EDU10740-97

Dear Judge LaFiandra:

Enclosed please find a fully executed stipulation of settlement in the above referenced matter. Upon the filing of this stipulation petitioner respectfully requests that her appeal in this matter be withdrawn.

Please feel free to contact me if you have any questions or concerns regarding this matter.

Very truly yours,

Charles I. Auffant, Esq.
Attorney at Law

CIA/jmh

c: Cherrie L. Maxwell, Esq.

OAL DKT. NO. EDU 10740-97
AGENCY DKT. NO. 413-10/97

SARA CEDENO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

March 11, 1999
Date of Mailing, March 11, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

75-99

GUISEPPE CINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UNION COUNTY REGIONAL SCHOOL DISTRICT *ET AL.*, UNION COUNTY,	:	DECISION
RESPONDENTS.	:	
	:	

March 11, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9167-97

AGENCY DKT. NO. 236-7/97

GUISEPPE CINO,

Petitioner,

v.

BOARD OF EDUCATION OF THE UNION COUNTY REGIONAL SCHOOL DISTRICT, ET ALS.,

Respondents.

Gail Oxfeld Kanef, Esq., for petitioner (Balk, Oxfeld, Mandell & Cohen, attorneys)

Vito A. Gagliardi, Jr., Esq., for respondent (Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen, attorneys)

Record Closed: February 2, 1999 Decided: February 3, 1999

BEFORE **EDITH KLINGER**, ALJ:

On September 15, 1997, this matter was transmitted to the Office of Administrative Law for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13. A hearing was scheduled for January 5 and January 15, 1999.

Prior to the hearing dates, the parties resolved this matter. On February 2, 1999, the parties entered on the record the attached Settlement Agreement indicating the terms of agreement which are incorporated herein by reference.

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

1. The parties have voluntarily agreed to the settlement as evidenced on the record and by the signatures of the parties or their representatives.

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

I CONCLUDE that the agreement meets the safeguard requirements of *N.J.A.C.* 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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

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

February 3, 1999
DATE

Edith Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged:

Feb 5, 99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 9 1999
DATE

Barbara A Hamek
OFFICE OF ADMINISTRATIVE LAW

md

RAVIN, SARASOHN, COOK,
BAUMGARTEN, FISCH & ROSEN,
A Professional Corporation
103 Eisenhower Parkway
Roseland, New Jersey 07068-1072
(973) 228-9600
Attorneys for Respondent
Berkeley Heights Board of Education
in its capacity as L.E.A. for the
dissolved Union County Regional
High School District No. 1

GIUSEPPE CINO, Petitioner, v. UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1 BOARD OF EDUCATION; BERKELEY HEIGHTS BOARD OF EDUCATION; CLARK BOARD OF EDUCATION; GARWOOD BOARD OF EDUCATION; KENILWORTH BOARD OF EDUCATION; MOUNTAINSIDE BOARD OF EDUCATION; and SPRINGFIELD BOARD OF EDUCATION, Respondents.	BEFORE THE COMMISSIONER OF EDUCATION OAL DOCKET NO. EDU-9167-97N AGENCY DOCKET NO. 236-7/97 **SETTLEMENT AGREEMENT**

This matter having come before the Commissioner of Education on Petition of Appeal filed by Petitioner through his counsel Balk, Oxfeld, Mandell & Cohen, P.A.; and Respondents having filed an answer denying the allegations of the Petition; and the parties having amicably resolved this matter, it is hereby agreed as follows:

1. Respondent Berkeley Heights Board of Education in its capacity as L.E.A. for the now-dissolved Union County Regional High School District No. 1 ("Berkeley Heights") agrees to pay Petitioner retroactive salary at the annualized rate of $33,233.28 for the period July 1, 1997 through June 30, 1998. Said payment totals $33,233.28.

2. Berkeley Heights further agrees to pay Petitioner retroactive salary at the annualized rate of $37,885.94 for period July 1, 1998 through December 31, 1998. Said payment totals $18,942.97.

3. Berkeley Heights further agrees that since these payments are wage replacement, it will make all appropriate payroll deductions and pension contributions.

4. Berkeley Heights shall make the above described payments to Petitioner within 30 days of the Commissioner of Education's approval of the within settlement, said approval being understood to be a prerequisite to this settlement.

5. In exchange for the above, Petitioner agrees to withdraw the within Petition of Appeal with prejudice.

6. For and in consideration of the mutual promises set forth herein, Petitioner, for himself, and for his agents, heirs, executors, administrators, and assigns, fully, irrevocably, and unconditionally releases and discharges Respondents from any and all claims, demands, causes of action and liabilities of any kind, including claims for fees and expenses, related to the matters at issue in this action. This release specifically includes any claim of entitlement to a tenured position, or any other type of employment, with any of the Respondents.

7. The parties recognize and agree that the making of this Stipulation of Settlement is not intended to and does not constitute or imply an admission of liability of any type of wrongdoing by any party, or of any violation of any federal, state or local statute, regulation or ordinance, or violation of any other right by any party, upon any legal or equitable theory, whether contractual, common law, statutory or otherwise.

The parties agree that this Stipulation of Settlement may not be used to establish precedent in any future proceeding of any type whatsoever and that it shall be inadmissable in any such proceeding, other than a proceeding to enforce or prove the existence of same.

Vito A. Gagliardi, Jr.
VITO A. GAGLIARDI, JR., ESQ.
RAVIN SARASOHN COOK BAUMGARTEN
FISCH & ROSEN
Attorneys for Respondent
Berkeley Heights Board
of Education in its capacity
as L.E.A. for the now-dissolved
Union County Regional High School
District No. 1

2-2-99

Giuseppe Cino
GIUSEPPE CINO

Rosalia Cino
ROSALIA CINO

Gail O. Kanef
GAIL OXFELD KANEF
Attorney for Petitioner
Giuseppe Cino

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OAL DKT. NO. EDU 9167-97
AGENCY DKT. NO. 236-7/97

GUISEPPE CINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UNION COUNTY REGIONAL SCHOOL DISTRICT *ET AL.*, UNION COUNTY,	:	DECISION
RESPONDENTS.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

March 11, 1999
Date of Mailing, March 11, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

NORMAN HAYES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY	:	DECISION
RESPONDENT.	:	
	:	

March 11, 1999

OAL DKT. NO. EDU 03501-98
AGENCY DKT. NO. 345-9/97

NORMAN HAYES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on December 17, 1998, providing them ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by the parties, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 11, 1999
Date of Mailing, March 11, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

77-99

JUDE VALLES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

March 11,1999

OAL DKT. NO. EDU 1279-98
AGENCY DKT. NO. 358-9/97

JUDE VALLES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

For Petitioner: Randi Doner April, Esq. (Balk, Oxfeld, Mandell & Cohen)

For Respondent: Raymond Hamlin, Esq. (Hunt, Hamlin & Ridley)

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-14.4, along with an explanation for such disposition, have been reviewed. Given that petitioner failed to appear at the hearing, notwithstanding the fact he had been provided the date of the January 1999 hearing in May 1998, and given the inability of petitioner's attorney to reach him in the State of Georgia at either the address or phone number he provided to her, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.*

IT IS SO ORDERED.

March 11, 1999
Date of Mailing, March 11, 1999

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

78-99

BOARD OF EDUCATION OF THE WARREN HILLS REGIONAL SCHOOL DISTRICT, WARREN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
DONALD E. MATLOCK, JR. AND ROBIN L. MATLOCK,	:	DECISION
RESPONDENTS.	:	

March 12,1999

AGENCY DKT. NO. 527-11/98

BOARD OF EDUCATION OF THE WARREN HILLS REGIONAL SCHOOL DISTRICT, WARREN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
DONALD E. MATLOCK, JR. AND ROBIN L. MATLOCK,	:	DECISION
RESPONDENTS.	:	

For Petitioner: David G. Ross, Esq. (Broscious, Glynn & Fischer)

This matter, having been brought before the Commissioner of Education by the Board of Education of the Warren Hills Regional School District (Board) by way of a Petition of Appeal (Petition) filed on November 23, 1998, requesting that respondents be ordered to pay the Board tuition in the amount of $17,479; and

Whereas, respondents having been served via certified mail with the Petition by the Board on November 20, 1998; and

Whereas, the Commissioner having directed respondents on November 24 and December 24, 1998 to submit an Answer to the Petition pursuant to *N.J.A.C.* 6:24-1.4; and

Whereas, the Commissioner having notified respondents, by regular and certified mail, on January 14, 1999 that if they failed to file an Answer, each count of the Petition would be deemed admitted and the matter may then be decided on a summary judgment basis pursuant to his authority granted by *N.J.A.C.* 6:24-1.4(e); and

Whereas, neither respondents, nor any attorney on their behalf, have filed an Answer to the charges against them, and each count of the charges against respondents having been deemed to be admitted; and

Whereas, the Commissioner's review of the Petition indicates that (1) respondents' daughter, R.M., attended Warren Hills Regional High School during her junior (1996-1997) and senior (1997-1998) years of high school while not residing within the Warren Hills Regional sending district and (2) on May 5, 1998, respondents' attorney reached a Stipulation of Settlement and Release (Settlement), wherein respondents agreed, *inter alia*, to pay the Board the sum of $4,500 in full payment of tuition on behalf of R.M. at the rate of $900 per month commencing June 15, 1998 through October 5, 1998; and

Whereas, the Settlement also clearly stated that in the event respondents defaulted on their payment of $4,500, the Board reserved the right to petition the Commissioner to order additional tuition payment by respondents in an amount not to exceed $18,600; and

Whereas, respondents having failed to remit any tuition payments to the Board after the initial June 15, 1998 payment of $900, thus breaching their agreement with the Board and having failed to file an Answer to the Petition herein; now therefore,

IT IS ORDERED on this 12 day of March 1999, that summary decision shall be granted to the Warren Hills Regional Board of Education and that respondents shall pay tuition in the amount of $17,479, as requested by the Board, for the period of time in which their daughter, R.M., was ineligible for a free education in the Warren Hills Regional School District.*

COMMISSIONER OF EDUCATION

March 12, 1999
Date of Mailing, March 12,1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

79-99

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST MILFORD,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

March 17, 1999

OAL DKT. NO. EDU 01368-98
AGENCY DKT. NO. 295-8/97

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST MILFORD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

March 17, 1999
Date of Mailing, March 17, 1999

80-99

BRIAN ELLIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SPOTSWOOD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

March 17, 1999

OAL DKT. NO. EDU 4399-98
AGENCY DKT. NO. 110-4/98

BRIAN ELLIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SPOTSWOOD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

March 17, 1999
Date of Mailing, March 17,1999

81-99

CESARINA EARL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUDSON COUNTY SCHOOLS OF TECHNOLOGY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

March 17, 1999

OAL DKT. NO. EDU 01010-98
AGENCY DKT. NO. 461-11/97

CESARINA EARL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUDSON COUNTY SCHOOLS OF TECHNOLOGY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

March 17, 1999
Date of Mailing, March 17, 1999

82-99

LEONARD W. TOMPKINS, JR. AND ANDREA L. TOMPKINS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF RIDGEFIELD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

March 17, 1999

OAL DKT. NO. EDU 7285-98
AGENCY DKT. NO. 356-7/98

LEONARD W. TOMPKINS, JR. AND ANDREA L. TOMPKINS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF RIDGEFIELD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

March 17, 1999
Date of Mailing, March 17, 1999

83-99

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning District contested the Division's determination that petitioner was the district of residence responsible for the 1996-97 educational costs for D.W., a child placed with a center in Pennsylvania by Division of Youth and Family Services (DYFS).

ALJ concluded that petitioner had not proved that it was unreasonable, arbitrary or capricious for the Division to rely on DYFS's records which plainly indicated that D.W.'s mother was a resident of Newark until February 1989. ALJ concluded that the Division's determination that Newark was the district of residence of D.W.'s mother prior to the original placement was reasonable. Moreover, the ALJ concluded that *N.J.A.C.* 6:20-5.3(b) did not require the Division to conduct its own independent investigation. ALJ affirmed the Division's determination that Newark was the district of residence for D.W. at the time of the initial placement in May 1988.

Commissioner concurred with the ALJ; petition was dismissed.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1370-98

AGENCY DKT. NO. 432-11/97

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,

Respondent.

Kelly Ann Guariglia, Esq., appearing for petitioner
Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Terri A. Cutrera, Esq., appearing for respondent
Peter Verniero, Attorney of New Jersey, attorney)

Record Closed: December 16, 1998 Decided: January 29, 1999

BEFORE **MARGARET M. HAYDEN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner State-Operated School District of the City of Newark (District or Newark) challenges the determination made by the New Jersey Department of

Education, Division of Finance (Division) that Newark is the responsible district for the year 1996-97 for the educational cost of placement of a student known as D.W. The Division made the final determination on July 30, 1997, that Newark was the district of residence for D.W. at the time of the initial placement with DYFS. On November 3, 1997, the District filed a petition of appeal with the Commissioner of Education challenging this decision.

On January 28, 1998, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) for a hearing as a contested case. The OAL scheduled a hearing for September 29, 1998, which was adjourned at the request of the parties. A hearing was held on November 30, 1998. The record was kept open for the submission of final arguments and briefs. Upon receipt of the final brief on December 16, 1998, the record was closed.

ISSUE

The issue to be determined is whether Newark has established by a preponderance of the credible evidence that the Division's determination that Newark was the district of residence prior to D.W.'s placement was arbitrary, capricious, or unreasonable.

FACTUAL DISCUSSION

The following facts are undisputed and I **FIND** them to be **FACTS** in this case.

D.W., born February 10, 1978, was placed with the Division of Youth and Family Services (DYFS) in May 1988. His mother, who was his legal guardian, resided in Irvington at least from 1989 to 1996. D.W. was placed by the State in Arthur Brisbane Child Treatment Center from June 1988 to September 1988. He was then placed in another placement called Somerset Hills from September 1988 to August 1989. In

September 1989, he was placed in an out-of-state placement at Devereaux Kanner Center in Pennsylvania, where he currently remains.

In 1996 Irvington, which paid D.W.'s tuition from 1989 to 1996, was unable to locate D.W.'s mother. Irvington asked the Division to relieve it from paying D.W.'s tuition at Devereaux for the 1996-97 school year. The Division contacted DYFS to find out particulars of D.W.'s mother prior residence. Richard Lee, Administrative Assistant in the Bloomfield office, was assigned to D.W.'s case. In 1996, he had been investigating the whereabouts of the mother for a sibling of D.W. also in DYFS's custody. After getting the inquiry, he filled out a form called District of Residence Determination for a Child Placed by a State Agency in a Group Home, Private School or an Out-of-State Facility. On the form he listed the date of placement as August 16, 1988 and the public school involved in the placement as Newark. In another part of the form, he listed the initial placement as taking place in September 1988, listed the mother's residence at the time as Irvington, and listed the public school involved at the time as Irvington.

As a result of the request from the Division for clarification of the District of Residence form, Mr. Lee wrote a memo explaining that DYFS's records showed that D.W.'s mother lived in Newark until February 8, 1989. She next lived briefly in Elizabeth and then moved to Irvington that same month. DYFS was not aware when she left Irvington and had had no recent contact with her. As a result of a request for further clarification, on January 30, 1997, Mr. Lee wrote to Holly Ricker of the Division that DYFS records showed that "D. was placed in Brisbane on 6/21/88. Our records show that his mother lived at 136 Sylvan Avenue, Newark, New Jersey at the time. The aunt who signed the placement agreement in 5/88 lived at 12 Sheffield Dr., Newark, New Jersey." In order to come up with this information, Mr. Lee examined the entire DYFS case file and went to the DYFS computer for an address listing. The computer listing showed that D.W.'s mother resided at 12 Sheffield Drive in Newark until February 1989. Mr. Lee's recent review of the case file before testifying at the hearing did not reveal to him where he found the Sylvan Avenue address in 1997. The

computer showed that D.W.'s mother had lived at the Sheffield Drive address from January 18, 1987 to February 8, 1989.

Mr. Lee explained that the information on the form listing both Newark and Irvington as the public school involved was ambiguous, because the form had been confusing to him. Subsequently, he clarified for the Division that the records plainly showed that D.W.'s mother lived in Newark at the time of the original placement He relied both on the computer printout and case record to ascertain the mother's address as Newark up to February 1989. He had not personally attempted to locate the mother lately.

The Irvington School District sent the Division a copy of a form that they had in their possession from the Newark Board of Education, Division of Child Guidance which was entitled "Transfer from District." The form stated that D.W. effectively transferred from Newark on January 12, 1990 because the guardian had move to Irvington. The form also noted that D.W. was a classified student.

On February 10, 1997, the Director of the Bureau of School Finance sent a letter to Beverly Hall, the State District Superintendent of the Newark Board of Education, to inform her that it had determined Newark to be the responsible school district for D.W. Efthimia Christie, who was at the time Associate Superintendent for Special Services, checked for available records for D.W. and was unable to find any. When a child transferred or left the District, the records generally went with the child. The District maintained the child's records at each individual school but the District was unable to search the individual school records since there was no information as to what school C.W. had attended. Ms. Christie sent someone from the attendance department to the 12 Sheffield Drive address but the attendance department was not able to find anyone who was recalled either the mother or the aunt living there. Although D.W. was classified as eligible for special education, Ms. Christie did not check the Special Education records as they are incomplete so far back. The computer system that kept track of classified children was only created in 1990, so D.W. would not have been included in that system.

Based on its inability to locate any records, Newark filed an appeal on February 25, 1997, with the Division, contesting the determination. The Division upheld its original determination that Newark was the responsible school District.

LEGAL DISCUSSION AND CONCLUSION

Pursuant to the State Facilities Education Act, *N.J.S.A.* 18A:7B-1 to -13, any child who is a resident of a district and is a resident of a state facility shall be educated by the district of residence. The district of residence is the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to the state facility but "if this cannot be determined, the district of residence shall be the district in which the child resided prior to such admission or placement." *N.J.S.A.* 18A:7B-12(b). If the district of residence cannot be determined according to the criteria in the statute or is out-of-state, the State assumes financial responsibility for the tuition of the child. *N.J.S.A.* 18A:7B-12(d).

Both parties agreed that the District challenging the determination of the Division has the burden of proof in this matter. See *City of Wildwood v. Department of Education,* 97 *N.J.A.R.* 2d (EDU) 273. While producing no direct evidence itself, petitioner argued that the failure of Newark to have any records for the pupil demonstrates that the parent was not a residence of Newark in 1988-89. Newark argued that the fact that D.W. may have been living with his aunt in Newark was not proof that his mother was residing in Newark at the time. Newark also argued that there is no proof that D.W.'s mother was unable to be located in 1996 as the Division did not make a specific search for her. Additionally, Newark argued that it should not be obliged to pay for the tuition because Newark was not consulted before the placement.

I **FIND** the testimony of the social worker, Mr. Lee, credible that he reviewed the entire DYFS file and that it clearly stated that the mother lived in Newark from 1987-89.

The fact that Newark was unable to produce any records of this student when it looked in 1997 does not prove that the student was never there, given the fact that the records generally go to the new school district and individual schools were not searched for C.W.'s record. Ms. Christie noted that Newark's special education records were not searched and in fact Newark's records were incomplete as the State had taken some special education records. The fact that eight years later no one remembered the family at the Sheffield Avenue address in 1997 is scant evidence that the family did not live there eight years ago.

I **CONCLUDE** that in the absence of any evidence to the contrary it was reasonable for Newark to rely on DYFS's records concerning where C.W.'s parent lived at the time C.W. was originally placed by DYFS. Hence, I further **CONCLUDE** that petitioner has not borne its burden of proving that it was unreasonable, arbitrary, or capricious for Division to rely on DYFS's records which plainly indicated that D.W.'s mother was a resident of Newark until February 1989. I further **CONCLUDE** that the Division's determination that Newark was the district of residence of C.W.'s mother prior to the original placement was reasonable.

Newark argued that the Division was under duty to search for the absent parent in 1996 when Irvington discovered that she was missing from the Irvington District. I find no support in the law or regulations requiring such a search. I **CONCLUDE** that by requiring the Department of Education to determine residence based upon information received from the Department of Human Services, *N.J.A.C.* 6:20-5.3(b), the regulation inferentially did not require the Division to conduct its own independent investigation. To require such a search in the absence of an express requirement would put an additional and unnecessary burden on the Division. The Division also had a right to rely on Irvington's representation that the mother was missing, which was confirmed by DYFS which had no current address for the mother at that time.

In the petition filed in this case on November 3, 1997, Newark appealed the determination that Newark was the place of residence; the relief it requested was a

reversal of the Division's decision determination and a finding that the district of residence for D.W. was Irvington. In its post-hearing brief, for the first time, Newark raised another issue by claiming that it was not financially responsible for C.W.'s tuition because the agency making the placement did not consult with the District prior to the placement. In addition to not raising it in the petition, there was no indication that this was ever raised before the Division. As this issue was not part of the petition nor part of the hearing, it was not properly before me and I do not address it.

ORDER

Accordingly, I **ORDER** that the Division's determination that Newark was the district of residence for C.W. at the time of the initial placement in May 1988 is hereby **AFFIRMED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Jan 29, 1999
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

2/3/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 4 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

jb/al

APPENDIX

EXHIBITS

J-1 Memo to Deborah Boyd from Richard Lee

J-2 District of Residence Determination

J-3 Memo to Holly Ricker from Lee, December 23, 1996

J-4 Memo to Lee from Ricker, January 30,1997

J-5 Memo to Ricker from Lee, January 30, 1997

J-6 Letter to Peter Carter, Superintendent from Melvin Wyns, Director, February 6, 1997

J-7 Letter to Beverly Hall, State Dist. Superintendent from Wyns, February 10, 1997

J-8 Letter to Mike Azzara, Director from Efthimia Christie, Assoc. Superintendent, February 25, 1997

J-9 Letter to Christie from Azzara, March 3, 1997

J-10 Letter to Melvin Wyns, Director from Ronald Brennan, Board Secretary, April 21, 1997

J-11 Letter to Azzara from Monica Palestis, April 23, 1997

J-12 Letter to Brennan from Wyns, April 28, 1997

J-13 Memo to Ricker from Wyns, July 8, 1997

J-14 Computer printout - location history, July 14, 1997

J-15 Letter to Palestis from Azzara, July 30, 1997

J-16 Letter to Cutrera from Wade, November 12, 1998

J-17 Memo to Board Secretaries from Azzara, November 20, 1996

OAL DKT. NO. EDU 1370-98
AGENCY DKT. NO. 432-11/97

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. The District's exceptions and the Division's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4.

The District excepts to the Administrative Law Judge's (ALJ) determination that it should be responsible for D.W.'s educational costs for the 1996-97 school year, essentially contending that: (1) contrary to the ALJ's findings, the records maintained by DYFS did not plainly indicate that C.W., D.W.'s mother, was a resident of Newark from 1987 until 1989; (2) contrary to the ALJ's finding, the Division's reliance upon the records maintained by DYFS was arbitrary, capricious and unreasonable; and (3) the failure of both the Division and DYFS to search for C.W. rendered the Division's determination arbitrary, capricious and unreasonable. (Petitioner's Exceptions at pp. 2, 3)

In reply, the Division contends that the ALJ properly found that the records maintained by DYFS indicate that D.W.'s mother was a resident of Newark until February 1989,

and argues that the District presented no credible evidence to contradict the testimony of DYFS case worker Richard Lee. Neither did the District, according to the Division, prove that the Division's reliance upon the DYFS records was arbitrary and capricious or unreasonable, where relying on DYFS "***is exactly the procedure for district of residence determinations which is set forth in the regulations. *N.J.A.C.* 6:20-5.3(b)." (Division's Reply at p. 3) The Division asserts that since Lee was a credible person with direct access to D.W.'s case file, its reliance upon the information he provided was entirely reasonable. (*Id.*) Finally, the Division maintains that it is not required by either statute or code to conduct a formal search for a missing parent in a district of residence determination, and requiring it to do so would place an unreasonable burden on the resources of the Department of Human Services. (*Id.* at p. 4)

Upon careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusions of the ALJ. Notwithstanding that the form entitled "District of Residence Determination for a Child Placed by a State Agency in a Group Home, Private School or an Out-of-State Facility" (J-2) initially completed in 1996 by Richard Lee contained data which contradicted later reports,[1] the Commissioner finds that Lee's subsequent clarification (J-5), together with his testimony regarding the same, is sufficiently reliable evidence.[2] Like the ALJ, the Commissioner finds it noteworthy that the District produced no documentary or testimonial evidence in support of its claim. Additionally, although the District, apparently, could find no records confirming D.W.'s enrollment (initial decision at

[1] It is noted that on page 3 of the initial decision, the ALJ summarizes the data provided by Lee on J-2 and erroneously states that D.W.'s date of placement (at the Devereux Kanner Center) was August 16, 1988, rather than August 16, *1989*.

[2] With respect to the District's exceptions regarding the facts determined by the ALJ based on Lee's testimony and the credence she ascribed to such testimony, the Commissioner notes that the record before him does not include transcripts of the hearing conducted at the OAL in this matter. Challenges to the factual findings predicated upon credibility determinations made by an administrative law judge require the party to supply the agency head with the relevant and necessary portion of the transcript. See *In re Morrison*, 216 *N.J. Super.* 143, 158 (App. Div. 1987). In the absence of transcripts from the hearing, due regard should be given to the person who heard the live testimony and assessed the witnesses' behavior at the hearing. *Close v. Kordulak Bros.*, 44 *N.J.* 589, 599 (1965).

p. 4), the within record shows that the former Newark Board of Education did, in January of 1990, complete a "Transfer from District" form identifying D.W. as a classified student, with an identification number, enrolled in the District. The form indicates that C.W. moved from Newark to Irvington.[3] Under these circumstances, the Commissioner concurs with the ALJ that the District has failed to meet its burden of proving that the Division's determination was arbitrary and capricious, or without a reasonable basis.

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein, and the Petition of Appeal is dismissed. The Division's determination that the State-Operated School District of the City of Newark is responsible for D.W.'s educational costs for the 1996-97 school year, pursuant to *N.J.S.A.* 18A:7B-12(b), is affirmed.[4]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 22, 1999
Date of Mailing, March 22, 1999

[3] This form was submitted by the Interim Board Secretary of the Irvington School District to the Division of Finance, by letter dated April 21, 1997.

[4] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

84-99

C #84-99L
SB #20-99

Y.G., on behalf of minor child, B.D.,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, March 22, 1999

For the Petitioner-Appellant, Y.G., pro se

For the Respondent-Respondent, Apruzzese, McDermott, Mastro & Murphy
(Robert J. Merryman, Esq., of Counsel)

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

November 3, 1999

Date of mailing NOV 05 1999

85-99

R.D.F., on behalf of his minor children,

PETITIONER,

V.

BOARD OF EDUCATION OF THE WESTWOOD REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parent challenged Board's residency determination.

ALJ dismissed petition as petitioner failed to respond to the Board's Motion to Dismiss; thus, the Board's allegations of ineligible attendance were deemed admitted. ALJ ordered petitioner's children disenrolled from the District. ALJ ordered petitioner to reimburse the Board for the tuition owed for the periods of the children's ineligible attendance in the District.

Commissioner concurred with the ALJ that petitioner was not domiciled in the District and that his children were not entitled to a free education in the District pursuant to *N.J.S.A.* 18A:38-1a. Petitioner was ordered to pay the tuition owed; he can choose to leave his children in the District until the end of the 1998-99 school year for added tuition cost.

March 23, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3929-98

AGENCY DKT. NO. 83-4/98

ORDER Dismissing the Petition of Appeal with Prejudice

ORDER that Each Count of Respondent's Counterclaim is Admitted

ORDER that the Three Minor Children of Petitioner Shall Be Disenrolled From The Westwood Public Schools

ORDER That Petitioner Shall Reimburse Respondent for Tuition for the Periods Petitioner's Three Minor Children were Ineligible to Attend The Westwood Public Schools

ORDER Denying That Respondent be Reimbursed Costs And attorneys' Fees

R.D.F.,

Petitioner,

v.

WESTWOOD REGIONAL BOARD OF EDUCATION,

Respondent.

R.D.F., *pro se*

Jessica L. Wildstein, Esq., for respondent
(Fogarty & Hara, attorneys)

Record Closed: January 4, 1999 Decided: February 4, 1999

BEFORE: **SEBASTIAN GAETA JR.**, ALJ:

Statement of the Case and Procedural History

By petition of appeal, dated March 24, 1998, petitioner requested that the Commissioner of Education permit his three minor children to remain in the school system administered by respondent Board of Education of the Westwood Regional School District, Bergen County (Board), following the Board disenrolling them from the public schools within the Township of Washington.

On April 15, 1998, the Board filed its Answer and Counterclaim. On April 30, 1998, the Commissioner of Education transmitted the matter as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13 to the Office of Administrative Law, where it was marked filed on May 8, 1998.

Petitioner has not filed an answer to the Board's Counterclaim seeking removal of petitioner's three children from the Westwood Regional school system, payment by petitioner of the tuition for the time the three minor children were ineligible to attend Westwood Regional School District schools and other appropriate relief.

This matter was scheduled for plenary hearing on January 19 and 22, 1999.

On October 9, 1998, at the request of the Board, the Administrative Law Judge scheduled a telephone conference for October 22, 1998. On that day, petitioner called the Office of Administrative Law. He advised he would retain counsel and requested adjournment of that telephone conference, which was granted.

No further communications was received at the Office of Administrative Law from or on behalf of petitioner nor did an attorney-at-law file an appearance on his behalf. On December 10, 1998, the administrative law judge wrote to petitioner, by certified mail, return receipt requested and regular first class mail, requesting that he advise if he would be represented by an attorney or appear *pro se* at the hearing scheduled for

January 19 and 22, 1999. Petitioner was directed to respond no later than December 18, 1998. The mail cover, posted certified mail, return receipt requested, was returned by the United States Postal Service, marked "unclaimed" and indicating notices to the addressee on December 11 and 16, 1998. The mail cover posted regular first class mail was not returned.

Petitioner has not responded to the Administrative Law Judge's December 10, 1998 letter.

On January 11, 1998, petitioner spoke with a secretary at the Office of Administrative Law, requesting an adjournment of the January 19 and 22, 1999 hearing dates. He was instructed to contact counsel for the Board. Counsel for the Board reported that petitioner has not contacted their office.

On December 17, 1998, the Board filed a Motion to Dismiss the Petition of Appeal with Prejudice, to Admit Each Count of the Board's Counterclaim, and to Obtain Reimbursement of Costs and Attorneys' Fees. Petitioner was served with copies of the motion papers at the Garfield and Washington Township address on December 15, 1998.[1] Based on the date of service, petitioner's response to the motion was due on December 28, 1998. *N.J.A.C.* 1:1-12.2(c). Petitioner has not filed a response.

Facts

Petitioner owns two residential properties, one in Garfield, New Jersey, the other in the Township of Washington, Bergen County. At the time he purchased the Washington property, sometime on or before September 1996, he and his family were living in Garfield. It was intended that the family would move to and live at the Washington property.

[1] The Board submitted documentation as proof of service consisting of two (2) letters from Federal Express containing the tracking numbers, delivery addresses, delivery dates, and names and signatures of the recipients.

The Board has a policy which allows the enrollment of non-resident pupils if, in the judgment of the school principal, residency will be established within sixty days of the application of admission. Pursuant to that policy, the three children were enrolled in the Westwood Public Schools.[2]

At the time of admission, the Washington property was uninhabitable and required major renovations.[3] Those renovations have not been completed.

After petitioner's children had been enrolled for over sixty days without establishing domicile in the Township of Washington, the Board disenrolled the children. Upon petitioner filing his appeal, pursuant to *N.J.S.A.* 18A:38-1 the children were not removed from school pending these proceedings. The children are currently enrolled in the Westwood Public Schools.

DISCUSSION

Dismissal of Petitioner's Appeal

A petitioner's failure to prosecute an appeal may result in dismissal of the appeal. *R.J. v. Board of Educ. of the Lower Camden County Reg'l Sch. Dist.*, 97 *N.J.A.R.* 2d (EDU) 155; *N.O. v. Board of Educ. of the Bridgewater-Raritan Sch. Dist.*, 96 *N.J.A.R.* 2d (EDU) 746. In *R.J.*, the Commissioner adopted an administrative law

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[2] Two children were enrolled about September 1, 1996, the third was enrolled December 2, 1996.

[3] In his petition to the Commissioner petitioner states:

My residence has been in Washington Township prior to September, 1996. I began a renovation on my home in 1996, and I lived in the home until the end of 1996. My home was going through such major renovation, that we temporarily lived elsewhere.

My driver's license and registration is in Washington Township, we treat it as our home. The renovation will be complete by May 1, 1998.

At this time the school year, it would be a terrible hardship to remove his child from the school. R.F.D. is doing the work himself, and that is the reason that the renovation is taking the time that it is.

judge's dismissal of the petitioner's appeal for failure to prosecute the appeal. Like the present matter, *R.J.* involved a parent's appeal from a school board decision excluding her child from attendance in the school district. After the appeal was transmitted to the Office of Administrative Law, a telephone conference was arranged, but the petitioner could not be reached. Subsequently, the administrative law judge wrote to the petitioner informing her of the hearing date and requesting information from her. The petitioner did not respond to the administrative law judge's letters nor did she appear on the hearing date. The administrative law judge therefore concluded:

> Inasmuch as R.J. made no effort to contact the judge until the time and date of scheduled hearing despite the fact that she had adequate notice, I FIND that R.J. has been dilatory in prosecuting her appeal and unresponsive to communications from the Department of Education and this judge. Accordingly, I **CONCLUDE** that R.J. has abandoned prosecution of her petition and has failed to show good cause why that failure should be excused.
>
> The petition of appeal is **DISMISSED.** It is so **ORDERED**.
>
> [*R.J., supra*, 97 *N.J.A.R.* 2d at 156.]

Except for the telephone call received by a secretary on January 11, 1999, since October 1998, petitioner has not communicated with the Office of Administrative Law or the Board. Petitioner has failed to respond to correspondence sent by Office of the Administrative Law by the Board. Petitioner has not complied with the Board's discovery requests[4] and has not responded to its motion to dismiss. Such inaction compels the conclusion that petitioner has abandoned prosecution of his appeal. Accordingly, petitioner's appeal shall be dismissed.

---

[4] The Board propounded interrogatories upon petitioner on July 30, 1998. (Certification of Jessica L. Wildstein, Esq. December 14, 1998, at 3 ("Wildstein Cert.")). According to the Board, the requested information related to petitioner's two (2) properties and were not voluminous or complicated. Yet, petitioner has not furnished the Board with the requested information. *Ibid.* The Board asserts that sanctions should be imposed upon petitioner for this discovery violation pursuant to *N.J.A.C.* 1:1-10.5 and *N.J.A.C.* 1:14-14(A). (Motion to Dismiss, at 7.)

Admission of Counterclaim

An answer to a petition must be served upon the petitioner within twenty (20) days of receipt of the petition. *N.J.A.C.* 6:24-1.4(a). Where a party fails to answer a petition, each count is deemed admitted. *N.J.A.C.* 6:24-1.4(e). *See Board of Educ. of the Twp. of Fairfield v. Township Comm. of the Twp. of Fairfield*, 91 *N.J.A.R.* 2d (EDU) 23 (Commissioner restored budget cuts holding that town's failure to answer had the effect of admitting the counts not answered).

Failure to answer a counterclaim is treated the same as failure to answer a petition. The case of *M.D. v. Board of Educ. of the Sch. Dist. of South Orange and Maplewood*, 96 *N.J.A.R.* 2d (EDU) 921 is similar to the present matter. M.D. involved a petition appealing a determination by the school board that a child was ineligible to attend school in the district. The school board filed a counterclaim against the petitioner, but the petitioner failed to file an answer. Citing *N.J.A.C.* 6:24-1.4(e), the administrative law judge deemed each count of the school board's counterclaim admitted. *M.D., supra*, 96 *N.J.A.R.* 2d at 922. Because of the petitioner's failure to answer the counterclaim, failure to appear for a prehearing conference, and failure to respond to a motion filed by the school board, the administrative law judge ordered the petitioner to pay the school board tuition for the child's ineligible attendance. *Id.* at 923. The Commissioner adopted those findings and conclusions and dismissed the petitioner's appeal with prejudice. *Ibid.*

Similarly, in *Board of Educ. of the Pascack Valley Reg'l High Sch. Dist. v. Kwon*, 93 *N.J.A.R.* 2d (EDU) 897, the Commissioner deemed the facts as pled by the school board as true pursuant to *N.J.A.C.* 6:24-1.4(e) because of the respondent parent's failure to file an answer in the matter. Thus, the Commissioner granted the school board's petition for tuition reimbursement and held that the children should be excluded from receiving a free public education in the district. *Kwon, supra*, 93 *N.J.A.R.* 2d at 898.

In the present matter, the Board filed its answer and counterclaim on April 15, 1998 requesting the removal of petitioner's three children from the Westwood Public Schools and tuition reimbursement for the period of their ineligible attendance. Petitioner did not file an answer within the specified period, nor has he filed an answer to date. Accordingly, pursuant to *N.J.A.C.* 6:24-1.4(e), the counts in the Board's Counterclaim are deemed to be admitted.

Disenrollment and Tuition Reimbursement

Having found that petitioner's appeal should be dismissed and that the counts in the Board's Counterclaim shall be admitted, it follows that the children should be disenrolled from the Westwood Public Schools and that the Board is entitled to tuition for the period of the children's ineligible attendance.

A school board may disenroll students who are not properly domiciled within the district. *Thomas v. Board of Educ. of the Passaic County Manchester Reg'l High Sch. Dist.*, 96 *N.J.A.R.* 2d (EDU) 37. Thomas involved a petitioner who admitted in the petition that she and her children were not residents or domiciliaries of the school district. Finding that there were no material facts in dispute, the ALJ concluded that the children were not entitled to a tuition-free education within the respondent's school district and disenrolled them. *Id.* at 38-39.

In the instant matter, petitioner in the petition of appeal claims residence in Washington Township prior to September 1996, but because of the need for renovations the family was living elsewhere.

Under *N.J.S.A.* 18A:38-1, entitlement to a free public school education is determined by where a person is domiciled. In order to establish a domicile there must be physical presence and the concommitant, unqualified intention to remain permanently and indefinitely. *Gosschalk v. Gosschalk*, 48 *N.J. Super.* 566, 573 (App. Div. 1958), *aff'd* 28 *N.J.* 73 (1958).

There are attributes consistent with residency such as the address on record with the Division of Motor Vehicles and that petitioner receives mail at the Washington address, as well as at the Garfield address. Domicile is not the same as residency. One may have many residences, but only one domicile. *Collins v. Yancey*, 55 *N.J. Super.* 514 (Law Div. 1959). However, the circumstances as a whole, including the nature of the children's enrollment in school, indicate that the family's domicile was not in the Township of Washington. The children are not entitled to a tuition-free education within the District and should be disenrolled.

In addition to an order disenrolling petitioner's children, the Board is entitled to tuition reimbursement. Once a determination has been made that a child is not entitled to a free public education within a particular school district, an award of tuition pro-rated to the time of the child's ineligible attendance is authorized by *N.J.S.A.* 18A:38-1b(2). Specifically, this statute provides in pertinent part:

> If in the judgment of the commissioner the evidence does not support the claim of the parent or guardian, the commissioner shall assess the parent or guardian tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced.

In accordance with *N.J.S.A.* 18A:38-1b(2), the Commissioner has adopted decisions by the Office of Administrative Law finding school boards entitled to tuition reimbursement in situations akin to the instant matter.[5] *See A.H. v. Board of Educ. of the Twp. of Egg Harbor,* 97 *N.J.A.R.* 2d (EDU) 281, 183; *Thomas, supra*, 96 *N.J.A.R.* 2d (EDU) at 39, *H.M. and L.M. v. Board of Educ. of the Twp. of Freehold*, 96 *N.J.A.R.* 2d (EDU) 854, 860-861; *S.C. v. Board of Educ. of the Borough of Point Pleasant*, 96 *N.J.A.R.* 2d

[5] In situations where the administrative law judges found the children ineligible to attend schools in the districts, but did not award the school boards tuition reimbursement, the Commissioner modified the decisions to so provide.

(EDU) 680, 684-685; *S.J.S. v. Board of Educ. of the Borough of Woodbury Heights*, 96 *N.J.A.R.* 2d (EDU) 18, 20. Furthermore, the Commissioner's power to seek retroactive tuition for the ineligible attendance of children has been upheld by the Appellate Division in *Board of Educ. of the Borough of Fort Lee v. Kintos*, 96 *N.J.A.R.* 2d (EDU) 1. Accordingly, the Board is entitled to tuition reimbursement from petitioner for the period his children attended the Westwood Public Schools, *i.e.,* September 1, 1996 and December 2, 1996 to present.[6]

Claim for Attorneys' Fees

The Commissioner of Education's broad jurisdiction over education laws pursuant to *N.J.S.A.* 18A:6-9 does not include the authority to award counsel fees. *Balsley v. North Hunterdon Bd. of Educ.*, 117 *N.J.* 434, 442-443 (1990). The *Balsley* Court acknowledged that "the absence of express statutory authority is fatal to the claim for counsel fees." *Id.,* at 443. Thus, the Court held that the Commissioner's broad remedial powers does not include the authority to grant attorneys' fees to a successful complainant in education-discrimination matters. Ibid. This conclusion has been confirmed as to domicile cases. *Board of Educ. of the Twp. of Livingston v. E.J.B.* and *J.H.B., 96 N.J.A.R. 2d (EDU) 536, 537; Board of Educ. of the Pascack Valley Reg'l High Sch. Dist. v. Kwon, supra*, 93 *N.J.A.R.* 2d (EDU) at 898. It has also been held that the Commissioner lacks authority to award legal costs. *Lilenfield v. Board of Educ. of the Borough of Watchung*, 1977 *S.L.D.* 315, 323; *Watsula v. Board of Educ. of the Twp. of Plumsted,* 1977 *S.L.D.* 692, 695. An award of attorneys' fees and costs is, therefore, unavailable.

Orders

It is **ORDERED** that the petition of appeal be and is **DISMISSED WITH PREJUDICE**.

[6] The District seeks $67,438.32 in tuition. This figure is computed from the dates of enrollment through the Commissioner's anticipated decision date of April 30, 1999.

It is **ORDERED** that unless they become eligible for attendance at school in the Westwood Regional School District prior to the Final Decision in this matter, the three minor children of petitioner be disenrolled from the Westwood Public Schools.

It is **ORDERED** that petitioner pay unto the respondent Westwood Regional Board of Education the resident tuition for his three minor children prorated as to the time of their ineligible attendance in the Westwood Regional School District, pursuant to *N.J.S.A.* 18A:38-1b(1).

It is **ORDERED** that the request that respondent be reimbursed for costs and attorneys' fee be and is **DENIED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 4, 1999
DATE

Sebastian Gaeta Jr.
SEBASTIAN GAETA JR., ALJ

Receipt Acknowledged:

2/9/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 10 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

OAL DKT. NO. EDU 3929-98
AGENCY DKT. NO. 83-4/98

R.D.F., on behalf of his minor children, PETITIONER, V. BOARD OF EDUCATION OF THE WESTWOOD REGIONAL SCHOOL DISTRICT, BERGEN COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Although petitioner was granted an extension of time in which to submit exceptions to the initial decision, his submission, which he identified as his "exceptions," consisted only of evidence that had not heretofore been brought to the record, and, as such, could not be considered by the Commissioner. *N.J.A.C.* 1:1-18.4(c). Additionally, there was no indication that petitioner served a copy of his submission upon either the respondent Board or the Administrative Law Judge (ALJ). *N.J.A.C.* 1:1-18.4(a)

Upon careful and independent review, the Commissioner concurs that the within Petition of Appeal is properly dismissed, in that petitioner failed to respond to the Board's Motion to Dismiss, which was served upon him on December 15, 1998.[1] Additionally, the Commissioner concurs that the Board's allegations in its Counterclaim, as filed on

April 15, 1998, are deemed admitted, in that petitioner has failed to respond to such allegations. Therefore, petitioner is deemed not domiciled in the Township of Washington, and his children, therefore, are not entitled to a free education in the Board's District, pursuant to *N.J.S.A.* 18A:38-1a.

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein. Although petitioner's children are *not* entitled to a free education in the Board's District, given the timing of the issuance of this decision within the school year, the Commissioner directs that petitioner's children, C.D.F., R.D.F. and M.D.F., be permitted to complete the 1998-99 school year *on a tuition basis.* That is, if petitioner so chooses, his children may remain in the District until the end of the 1998-99 school year and the Board will, then, increase its tuition calculations accordingly.[2] Alternatively, if petitioner chooses, his children can be disenrolled immediately and the Board will reduce its tuition figures now based on a disenrollment date of April 30, 1999 correspondingly. *In either event*, petitioner is hereby ordered to reimburse the Board for tuition costs for the attendance of his three children in respondent's District.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 23, 1999
Date of Mailing, March 23, 1999

[1] In its Motion to Dismiss, the Board clearly indicated that it was seeking a total of $67,438.32 in tuition, representing tuition for petitioner's three children from the dates of their enrollment, September 1, 1996 and December 1, 1996 through **April 30, 1999**.

[2] The tuition assessed for the three children will be $67,438.32, *plus* tuition for the three children for May and June, 1999.

85-99

EDU #3929-98
C # 85-99
SB # 24-99

R.D.F., on behalf of his minor children,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE WESTWOOD REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION ON MOTION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, March 23, 1999

For the Petitioner-Appellant, R.D.F., pro se

For the Respondent-Respondent, Fogarty & Hara (Jessica L. Wildstein, Esq., of Counsel)

On March 24, 1998 R.D.F. (hereinafter "appellant") filed a petition of appeal with the Commissioner of Education challenging the determination by the Board of Education of the Westwood Regional School District (hereinafter "Board") that his children were not entitled to a free public education in the district under N.J.S.A. 18A:38-1a. The Board filed a counterclaim seeking removal of appellant's children from the district's schools and payment of tuition from the appellant for the period of his children's attendance in the district. Appellant did not file an answer to the Board's counterclaim. On December 17, 1998, the Board filed a motion to dismiss appellant's petition. Appellant did not respond to that motion.

June 7, 1999

On February 4, 1999, an Administrative Law Judge ("ALJ") recommended dismissing the petition, concluding that the appellant had abandoned prosecution of his claim. The ALJ observed that the appellant had not complied with the Board's discovery requests, had not responded to the Board's motion to dismiss the petition and had failed to respond to correspondence sent to him by the Board and the Office of Administrative Law. The ALJ therefore deemed the Board's allegations to be admitted and concluded that appellant was not domiciled in the district and, as a result, that his children were not entitled to a free public education in the district's schools. Accordingly, the ALJ recommended that appellant's children be disenrolled from the district and that appellant be directed to reimburse the Board for tuition for the period of his children's ineligible attendance.

On March 23, 1999, the Commissioner adopted the findings and conclusions of the ALJ and ordered the appellant to reimburse the Board for his children's tuition.

On April 23, 1999, the appellant, acting pro se, filed a photocopy of a notice of appeal with the State Board of Education. By letter dated April 27, 1999, the Director of the State Board Appeals Office notified appellant that he was required to file an original signed notice of appeal and also to provide proof of service of his notice on the Board. Appellant was also advised that a brief in support of his appeal was due on May 13, 1999.

On May 6, 1999, the appellant filed an original notice of appeal and proof of service as requested. He did not, however, file an appeal brief by May 13. By letter dated May 20, 1999, the Director of the State Board Appeals Office notified the appellant of his failure to file a brief and informed him that this matter was being referred

to the Legal Committee of the State Board for consideration of his failure to perfect the appeal.

On May 24, 1999, the Board filed a motion to dismiss the appeal as a result of appellant's failure to file a brief in support of his appeal.

Appellant has still failed to file an appeal brief, nearly eight weeks after the deadline for such filing. Nor has he responded to the Board's motion to dismiss, offered any explanation for his failure to file a brief or requested an extension of time for such filing. As a result, we grant the Board's motion to dismiss the appeal in this matter for failure to perfect. N.J.A.C. 6:2-1.12(a). See Paszamant v. Board of Education of the Borough of Highland Park, decided by the State Board, April 1, 1992, aff'd, Docket #A-4812-91-3 (App. Div. 1993).

July 7, 1999

Date of mailing JUL 09 1999

86-99

BOARD OF EDUCATION OF THE BOROUGH OF PALMYRA, BURLINGTON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
DR. DENNIS HURLEY,	:	DECISION
RESPONDENT.	:	

March 23, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 61-98
AGENCY DKT. NO. 474-12/97

BOARD OF EDUCATION OF THE BOROUGH OF PALMYRA, BURLINGTON COUNTY,
Petitioner,
v.
DR. DENNIS HURLEY,
Respondent.

Frank P. Cavallo, Esq., for petitioner (Parker, McCay & Criscuolo, attorneys)

Louis J. Greco, Esq., for respondent

Record Closed: February 5, 1999 Decided: February 8, 1999

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

This matter was transmitted to the Office of Administrative Law on January 6, 1998, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a stipulation indicating the terms thereof, which is incorporated herein by reference and attachment.

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

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

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

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

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

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

February 8, 1999
DATE

BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

Feb 9, 1999
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 10 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

ml

File No. 01264-0003

Law Offices
PARKER, McCAY & CRISCUOLO, P.A.
Three Greentree Centre, Suite 401
Route 73 & Greentree Road
Marlton, NJ 08053
(609) 596-8900
Attorneys for Petitioner, Board of Education of the Borough of Palmyra School District

	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
BOARD OF EDUCATION OF THE BOROUGH OF PALMYRA SCHOOL DISTRICT, BURLINGTON COUNTY Petitioner, vs. DR. DENNIS HURLEY Respondent/Counter-Petitioner.	AGENCY DKT. NO. 474-12/97 OAL DKT. NO. EDU 61-97S **STIPULATION OF DISMISSAL WITH PREJUDICE OF PETITION OF APPEAL AND COUNTER-PETITION OF APPEAL**

LAW OFFICE
PARKER, McCAY &
CRISCUOLO, P.A.

It is hereby stipulated by and between the parties that the Petition of Appeal filed on behalf of the Petitioner, Borough of Palmyra Board of Education, Burlington County and the Counter-Petition filed on behalf of the Respondent/Counter-Petitioner Dr. Dennis Hurley, are

hereby dismissed with prejudice.

LOUIS J. GRECO, ESQ.

LOUIS J. GRECO, ESQ.
Attorney for Respondent/Counter-Petitioner

PARKER, McCAY & CRISCUOLO, P.A.

FRANK P. CAVALLO, JR., ESQ.
Attorneys for Petitioner

Dated: December 30, 1998

OAL DKT. NO. EDU 61-98
AGENCY DKT. NO. 474-12/97

BOARD OF EDUCATION OF THE BOROUGH OF PALMYRA, BURLINGTON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
DR. DENNIS HURLEY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law incorporating a "Stipulation of Dismissal" have been reviewed. However, in that no settlement terms were included in the document signed by the parties so as to permit the Commissioner's review under *N.J.A.C.* 1:1-19.1, this matter shall, given its nature, instead be considered a withdrawal, pursuant to *N.J.A.C.* 1:1-19.2.

The Commissioner, therefore, approves the withdrawal, and determines that this matter shall be dismissed with prejudice.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 23, 1999
Date of Mailing, March 23, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

87-99

PETER DI MAGGIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

March 23, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10756-96S
AGENCY DKT. NO. 499-10/96

PETER DiMAGGIO,
Appellant,
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,
Respondent.

Michael T. Barrett, Esq., for petitioner (Bergman & Barrett, attorneys)

Thomas W. Sumners, Jr., Esq., for respondent (Sumners, George & Dortch, attorneys)

Record Closed: December 31, 1998 Decided: February 9, 1999

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter was transmitted to the Office of Administrative Law on December 6, 1996, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. On March 18, 1998, the undersigned issued an order granting the motion of the Board of Education of the Mercer County Vocational-Technical School District to be dismissed as a party respondent.

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

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

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

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

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

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

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

Feb. 9, 1999
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

2/11/99
DATE

D. M. Centanaitis/f
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 16 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cc

PETER DIMAGGIO, Petitioner, v. TRENTON BOARD OF EDUCATION, Respondent.	: BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY : : : AGENCY DOCKET NO. 499-10/96 : OAL DOCKET NO. EDU 10756-96S : : : ***SETTLEMENT AGREEMENT*** :

Peter DiMaggio, residing at 16 Hillside Avenue, Trenton, NJ 08618, and the Board of Education of the City of Trenton ("Board"), stipulate and agree that, in consideration of the mutual promises of the parties and in exchange for the consideration more particularly noted below, it is hereby agreed:

1. In return for compliance with the Agreement, Mr. DiMaggio agrees to the dismissal, with prejudice, of the above-captioned litigation. Mr. DiMaggio will continue to retain all tenure and seniority rights to which he is entitled based on all periods of service to the Board and based on terms of this Agreement. The dismissal of this matter shall not be deemed a waiver of tenure or seniority rights which have accrued prior to its filing, or thereafter. Mr. DiMaggio releases and waives any and all claims to back salary and/or back benefits, except as provided in this Agreement.

2. In return for compliance with this Agreement, the Board agrees as follows:

(a) Within 30 calendar days of the approval of this settlement by the Commissioner of Education, the Board will pay Mr. DiMaggio mitigated back salary for the 1996-97 and 1997-98 school years in the gross amount of $79,575.15. Said amount shall be subject to all normal payroll deductions including, but not limited to, retroactive contributions

to the Teacher's Pension and Annuity Fund covering the 1996-97 and 1997-98 school year. Said pension contribution shall be submitted by the Board to the Pension Fund with an explanation designating those contributions as relating to the 1996-97 and 1997-98 school years.

As part of the mitigation used in calculating this back salary, the Board has retained the amount of $7,602.00. This sum is attributable to the amount received by Mr. DiMaggio from the New Jersey Division of Unemployment Insurance during the period November 26, 1996 through August 30, 1998. It is agreed that, upon request by the Division (whether made to Mr. DiMaggio or the Board), the Board shall remit the withheld monies to the Division. The Board shall hold Mr. DiMaggio harmless as to any claim by the Division of Unemployment Insurance for a refund of monies, interest or penalties as to unemployment compensation received by Mr. DiMaggio during the time period specified herein. A notice to the Division confirming the award of back pay and the retention of the funds by the Board shall be sent by Mr. DiMaggio or Michael T. Barrett, Esq. within 30 days of receipt of back salary.

(b) The Board shall credit Mr. DiMaggio's record of accumulated sick leave days with an additional 15 days attributable to the 1997-98 school year. He shall also retain all previously accumulated but unused sick leave days for future use.

(c) For purposes of retirement only and pursuant to Article VII(E) of the collective agreement covering teachers in the district, Mr. DiMaggio will be credited with three (3) additional sick leave days attributable to his unused personal days from the school year. Mr. DiMaggio's sick leave credit for retirement purposes shall also include any previously accrued credit for retirement purposes.

(d) Mr. DiMaggio's seniority shall be credited with one (1) year and seven (7) months

attributable to the 1996-97 and 1997-98 school years. He shall retain all previously accrued seniority and tenure rights.

(e) Mr. DiMaggio shall be reinstated as a full-time teacher within the scope of his educational certificate and endorsement beginning with the 1998-99 school year. His salary shall be calculated based on the collective bargaining agreement for teachers in the Trenton School District based on his previous salary guide placement together with salary guide credit for the 1997-98 school year.

(f) Effective on or before September 1, 1998, Mr. DiMaggio shall be entitled to all of the benefits and emoluments which are normally provided to full-time teachers in the District (including, but not limited to, all forms of health and medical insurance) including all rights specified in the collective agreement, Board policy, past practice, or otherwise. For all purposes, the Board will consider Mr. DiMaggio to have been employed on a full-time basis for the entire 1996-97 and 1997-98 school years in calculating any right, benefit or emolument due to him hereafter from whatever source.

3. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized to sign this Agreement and bind the Board to its terms.

4. The parties recognize that each has been represented by legal counsel of his or its own choosing and that they sign this Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein.

5. This Agreement shall be subject to the laws of the State of New Jersey.

6. All terms of this Agreement are deemed material. This document may not be altered, amended or modified except by an instrument executed in writing by the parties.

However, if it is determined in the future that there has been miscalculation of damages set for in paragraph 2 above, the parties agree to correct any errors regardless of which party gained the benefit(s) thereof.

7. This Agreement is subject to the approval of the Administrative Law Judge and the Commissioner of Education and shall be of no force or effect unless such approval is received. In the event that such approval is not given, the parties shall be returned to the status quo existing prior to this Agreement.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals on the dates specified.

FOR PETITIONER:

Peter DiMaggio

WITNESS:

Michael T. Barrett, Esq.

Dated: 10.4.98

FOR THE RESPONDENT,
TRENTON BOARD OF EDUCATION:

Charles R. Milewski, Board Secretary

Abdul-Malik Ali, Board President

WITNESS:

Thomas W. Sumners, Jr., Esq.

Dated: November 23, 1998

OAL DKT. NO. EDU 10756-96
AGENCY DKT. NO. 499-10/96

PETER DI MAGGIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

March 23, 1999
Date of Mailing, March 23, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

88-99

BOARD OF EDUCATION OF THE BOROUGH OF HI-NELLA, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF COLLINGSWOOD, CAMDEN COUNTY AND BOARD OF EDUCATION OF THE BOROUGH OF OAKLYN, CAMDEN COUNTY,	:	DECISION
RESPONDENTS.	:	
	:	

March 23, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO.EDU 4178-98
AGENCY DKT. NO. 93-4/98

BOARD OF EDUCATION OF THE BOROUGH OF HI-NELLA, CAMDEN COUNTY,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF COLLINGSWOOD, CAMDEN COUNTY and BOARD OF EDUCATION OF THE BOROUGH OF OAKLYN, CAMDEN COUNTY,
Respondent.

James L. Muller, Esq., for petitioner

Alan R. Schmoll, Esq., for respondent (Capehart & Scatchard, attorneys)

John D. Wade, Esq., for respondent

Record Closed: February 5, 1999 Decided: February 10, 1999

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

This matter was transmitted to the Office of Administrative Law on May 5, 1998, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

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

10 FEBRUARY 1999
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

2/17/99
DATE

(NAME OF AGENCY)

Mailed to Parties:

FEB 18 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

1999 FEB -5 A 11:12

CAPEHART & SCATCHARD, P.A.
A Professional Corporation
Laurel Corporate Center, Suite 300
8000 Midlantic Drive - C.S. 5016
Mount Laurel, N.J. 08054
(609) 234-6800
Attorneys for Respondent Collingswood Board of Education

THE BOARD OF EDUCATION OF THE BOROUGH OF HI-NELLA, Petitioner, vs. THE BOARD OF EDUCATION OF THE BOROUGH OF COLLINGSWOOD, and THE BOARD OF EDUCATION OF THE BOROUGH OF OAKLYN, Respondents.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY DOCKET NO.: 934-98 CIVIL ACTION **STIPULATION OF SETTLEMENT**

This action having been commenced before the Commissioner of Education of the State of New Jersey by the Petitioner, the Board of Education of the Borough of Hi-Nella, against the Respondents, the Board of Education of the Borough of Oaklyn and the Board of Education of the

Borough of Collingswood, seeking to sever certain sending-receiving relationships with the Respondents;

And it appearing that the parties have amicably resolved the matter in consideration of the following terms and conditions;

IT IS HEREBY STIPULATED AND AGREED AS FOLLOWS:

As to Respondent Oaklyn:

1. The current sending-receiving contract between the Petitioner and Respondent Oaklyn shall be extended for a period of 10 years commencing on July 1, 1999, whereby Hi-Nella students shall continue to attend the Oaklyn School for Kindergarten through Grade 8 inclusive;

2. Petitioner's students who are entering Grade 9 in September 1999 shall no longer attend the Oaklyn Grade 9 but shall attend Sterling High School, it being agreed hereby that Grade 9 is no longer covered by the sending-receiving relationship;

3. The sending-receiving contract which commences on July 1, 1999, shall contain language providing that the contract cannot be terminated by either party prior to its expiration on June 30, 2009. It shall further provide that in the event that either party elects to terminate the contract as of June 30, 2009, written notice of termination shall be given by the terminating party to the other no later than June 30, 2007.

As to Respondent Collingswood:

1.The current sending-receiving contract between the Petitioner and Respondent Collingswood shall terminate on June 30, 1999;

2. The Petitioner shall pay to Respondent Collingswood tuition payments for the 1998-99 school year in accordance with the 1998-99 tuition payment schedule heretofore established by the parties, subject to adjustments, if any, which may be required pursuant to NJSA 18A:38-19 and NJAC 6:20-3.1;

3. Any of the Petitioner's students enrolled in Collingswood High School for the 1998-99 school year shall have the option to continue to attend beyond the 1998-99 school year for the balance of his/her high school career. Each such student who elects to continue attending Collingswood High School shall be required to submit his/her decision to do so in writing to the Superintendent of Schools no later than February 15, 1999. If a student fails to so submit, it shall be conclusively presumed that the student will no longer attend Collingswood High School and the student's records shall be forwarded to Sterling High School for the 1999-2000 school year;

4. Upon a student electing to continue to attend Collingswood High School under the terms of Paragraph 3 above, the Petitioner shall continue to pay tuition to Respondent Collingswood on behalf of that student for the balance of that student's high school career in accordance

with the statutory and regulatory provisions referred to in Paragraph 2 above.

5. Respondent Collingswood acknowledges that Petitioner's students who graduate from Respondent Oaklyn's Grade 9 at the end of the 1998-99 school year shall no longer attend Collingswood High School.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals.

James L. Muller, P.A.
Attorney for Petitioner
Board of Education of the
Borough of Hi-Nella

By: _____
James L. Muller, Esquire
Date:

John D. Wade, P.C.
Atorney for Respondent
Board of Education of the
Borough of Oaklyn

By: _____
John D. Wade, Esquire
Date:

Capehart & Scatchard, P.A.
Attorney for Respondent
Board of Education of the
Borough of Collingswood

By: _____
Alan R. Schmoll, Esquire
Date:

g:ars\muller3

OAL DKT. NO. EDU 4178-98
AGENCY DKT. NO. 93-4/98

BOARD OF EDUCATION OF THE BOROUGH OF HI-NELLA, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF COLLINGSWOOD, CAMDEN COUNTY AND BOARD OF EDUCATION OF THE BOROUGH OF OAKLYN, CAMDEN COUNTY,	:	DECISION
RESPONDENTS.	:	

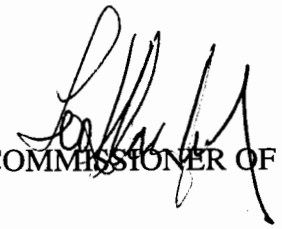
The record of this matter and the initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

In his review of the parties' settlement agreement, wherein it is agreed that petitioner's sending/receiving agreement with Oaklyn to receive its 9th grade students and its agreement with Collingswood to receive its 10th, 11th, and 12th grade students be terminated, the Commissioner has fully considered the feasibility study submitted by petitioner, pursuant to *N.J.S.A.* 18A:38-13. As said study has established to the Commissioner's satisfaction that the student withdrawals as a consequence of the within agreement would cause no substantial negative educational, financial or racial composition impact on any of the Districts involved, he approves the settlement terms and adopts the settlement as the final decision in this matter.[1]

March 23, 1999
Date of Mailing, March 23, 1999

[1]Notwithstanding the Commissioner's acceptance of this agreement, he notes that Term 3 as to respondent Oaklyn envisions the possibility that the petitioner and/or Oaklyn may terminate their surviving sending/receiving agreement, calling for petitioner to send its Kindergarten through Grade 8 students to Oaklyn, upon the agreement's expiration on June 30, 2009. The Commissioner is compelled to clarify that this approval of the within settlement does not obviate the obligation of the parties to comply with *N.J.S.A.* 18A:38-13 if they contemplate termination of their sending/receiving relationship pursuant to this provision.

This matter is hereby dismissed, subject to compliance with the terms of the parties' settlement.[2]



COMMISSIONER OF EDUCATION

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

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J.O.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE STERLING HIGH SCHOOL DISTRICT, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning high school student contended the Board acted arbitrarily, capriciously and unreasonably when it suspended him for the remainder of the 1997-98 school year with conditions for readmission in September 1998 or thereafter for planning and/or arranging a retaliatory assault and battery on student J.C. Petitioner contended that the Board did not hold a proper hearing within 21 days of his suspension, imposed penalties on him greater than those imposed on others for similar violations and treated him differently based on race. Board moved for dismissal alleging the petition was untimely filed and petition was moot because petitioner withdrew as a student and enrolled in a private school. ALJ noted petition was not moot, as the suspension remained a part of petitioner's permanent school records.

ALJ concluded petitioner's claims were time-barred by *N.J.A.C.* 6:24-1.2(c). Moreover, the ALJ determined that assault on another student is a very serious matter calling for expulsion and that nothing in the evidence offered by petitioner supported an inference that the Board acted unreasonably in finding petitioner responsible for the attack on J.C. or in disciplining him for his actions. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2794-98

AGENCY DKT. NO. 66-3/98

J. O.,

Petitioner,

v.

BOARD OF EDUCATION OF THE STERLING HIGH SCHOOL DISTRICT, CAMDEN COUNTY,

Respondent.

Jacob B. Sless, Esq., for petitioner (Abramson & Denenberg, attorneys)

William D. Hogan, Esq., for respondent (Davis, Reberkenny & Abramowitz, attorneys)

Record Closed: November 16, 1998 Decided: February 16, 1999*

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter commenced on March 16, 1998, when J.O. (hereinafter petitioner) filed a petition of appeal with the Commissioner of Education contending that the Board of Education of

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* An extension of time for issuing the initial decision was requested and granted pursuant to N.J.S.A. 52:14B-10(c).

the Sterling High School District (hereinafter respondent) acted arbitrarily, capriciously and unreasonably in that it did not hold a proper hearing within 21 days of his suspension from school, imposed penalties on him greater than those imposed on others for similar violations and treated him differently based on his race/Black. An answer on behalf of respondent was filed on March 25, 1998 and on April 8, 1998, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to -13.

A prehearing conference was conducted on July 1, 1998 at which time the following were identified as issues for determination at hearing:

1. Did respondent violate petitioner's due process rights in connection with a disciplinary action imposed in December 1997?

2. Was respondent's December 1997 resolution in violation of petitioner's civil rights or otherwise arbitrary, capricious and unreasonable?

3. If the answer to question number one and/or question number two above is yes, what are the appropriate remedies?

4. Is the petition barred by the regulatory statute of limitations in N.J.A.C. 6:24-1.2(c)?

5. Should the petition be dismissed as moot?

A hearing was scheduled for November 16 & 17, 1998, at the Trenton office of the Office of Administrative Law and commenced as scheduled. At the close of petitioner's case, respondent moved to dismiss the petition: 1) as untimely brought pursuant to N.J.A.C. 6:24-1.2(c), 2) as moot because petitioner, after being advised of his disciplinary suspension, withdrew as a student from respondent's district and enrolled in a private school, and 3) pursuant to R. 4:37-2(b) for failure to offer any evidence from which a reasonable fact finder could rule in petitioner's favor. Respondent also moved to dismiss petitioner's allegations of due process violations, and in response petitioner withdrew those allegations. Although the undersigned determined that the

petition was not moot since the suspension remained a part of petitioner's permanent school records, the motion was granted on other grounds and the hearing therefore concluded.

MOTION TO DISMISS

Ninety-day Limitations Period of N.J.A.C. 6:24-1.2(c)

The State Board of Education has established a time limitation for instituting actions before the Commissioner of Education for resolution of disputes under the school laws. N.J.A.C. 6:24-1.2(c) requires a petitioner to "file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing." Although the regulation does not address what constitutes adequate notice, that concept was addressed at length by our Supreme Court in Kaprow v. Board of Educ. of Berkeley Tp., 131 N.J. 572, 587 (1993):

> "Adequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate. See Burns v. West Am. Corp., 137 N.J. Super. 442, 446, 349 A.2d 142 (Dist. Ct. 1975). Moreover, adequate notice under the regulation must be sufficient to further the purpose of the ninety-day limitations period. See Apex Roofing Supply Co. v. Howell, 59 N.J. Super. 462, 467, 158 A.2d 49 (App. Div. 1960). A limitations period has two purposes. The first is to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims. Ochs v. Federal Ins. Co., 90 N.J. 108, 112, 447 A.2d 163 (1982). The second purpose is "'to penalize dilatoriness and serve as a measure of repose'" (quoting Farrell v. Votator Div., 62 N.J. 111, 115, 299 A.2d 394 (1973)).
>
> > When a plaintiff knows or has reason to know that he has a cause of action against an identifiable defendant and voluntarily sleeps on his rights so long as to permit the customary period of limitations to expire, the pertinent considerations of individual justice as well as the broader

considerations of repose, coincide to bar his action. [Farrel, supra, 62 N.J. at 115, 299 A.2d 394.]

In the within matter petitioner had a hearing before respondent Board of Education on December 11, 1997. At the conclusion of the hearing and after deliberation in executive session, the following resolution was adopted and read in the presence of petitioner, his attorney and his parent.

RESOLVED, that student J.O., having been charged with threatening a student, assaulting a student and theft of student property on Wednesday, November 19, 1997, is hereby found to be guilty of planning and/or arranging a retaliatory assault and battery on student J.C. in accordance with Findings of Fact made by the Board, after a hearing conducted on December 11, 1997 and incorporated herein by reference.

BE IT FURTHER RESOLVED, that the charges or elements thereof with respect to which student J.O. is found guilty is listed as follows:

A. Planning and/or arranging a retaliatory assault and battery on student J.C. on November 19, 1997.

BE IT FURTHER RESOLVED, that the Board, having found J.O. guilty of the charges set forth in the preceding section, hereby suspends J.O. from the regular educational program, under the following terms and conditions:

(a) Such suspension shall be for a period no less than the entire remainder of the 1997-98 school year;

(b) Such suspension shall continue for the 1998-99 school year unless the Board determines to readmit J.O. to the regular educational program for September 1998 (or on any date thereafter), after a Youth Study Team evaluation report and a psychiatric evaluation report, as recommended by the Administration, either with the consent of the parent/guardian or, if the parent/guardian declines to consent, by order of the Commissioner of Education; and

(c) Such suspension shall apply to both the regular educational program and all extra-curricular activities and school functions.

(d) Any readmission determination by the Board is conditioned on the following minimum undertakings by J.O.:

(i) his successful completion of summer school after conclusion of the 1997-98 school year; and

(ii) his agreeing to a behavior contract drafted by the Administration.

(e) During his period of suspension, J.O. shall be provided home instruction by the Administration.

Thereafter, written findings were prepared and attached to the same resolution which was then formally readopted at the regular board meeting on December 18, 1997. At the regular board meeting on December 18, 1997, only the board's decision with regard to the suspension was read and not the findings of fact. By letter dated December 19, 1997, the Board of Education's findings and the board approved resolution were transmitted to petitioner's attorney with a copy to petitioner's father. The written resolution was identical to the one read into the record of the special meeting on December 11, 1997. The attached "findings" provided:

WHEREAS, Student J.O. aged 18 years and a junior at Sterling High School, was suspended by the high school Vice Principal, Mrs. Linda Rosbert ("Rosbert") on November 20, 1997, on a charge of threatening a student and assaulting a student and subsequently amended by the school Superintendent, Mr. Gary Kasprack ("Kasprack"), on December 8, 1997 to include theft of student property; and

WHEREAS, the Board has conducted a hearing on the charges on December 11, 1997, after due notice to the student and his parent/guardian;

NOW, THEREFORE, the Board makes the following findings from the evidence and testimony presented before it;

1. O. appeared in the company of his father, Mr. James Ellerbee ("Ellerbee"), and his attorney, Ms. Michelle

Hammell ("Hammell") at the hearing before the Board on December 11, 1997 and, on the advice of his counsel, made no statements.

2. Testimony from J. C. the victim, H. K., J. T., and G.T. was somewhat contradictory.

3. J.C. testified that a girl (N. B.) attacked her, knocked her down and beat on her at Riccardi's Garage after school on November 19, 1997. Also, J.C. testified that J. O. grabbed her and took her necklace and when leaving said "You're going to get shot."

4. H.K. testified that J.C. was jumped from behind by N.C. H.K. testified that a man from Riccardi's Garage stopped the fight at one point but the fight started again. She testified that J. O. held J.C. at one point while N.B. continued to beat on J.C. Also, H.K. stated that J. O. picked up J.C.'s chain and money and refused to return it.

5. Both J. T. and G. T. testified that N.B. and J.C. were arguing in the lot of Riccardi's Garage when they drove up and that J.C. took the first swing. Also, they both testified that the man from the garage did not break up the fight but J. O. did. After the fight ended, they, including N.B., got in J. O.'s car and drove away.

6. Additional testimony was submitted by copies of the police report and written statements given by witnesses. A. A, Ken Ryker, J. C. and H.K. Ryker's written statement stated that a female jumped out of the car. A.A.'s written statement contradicted the testimony of J. T. and G. T. by indicating that all occupants of J. O.'s automobile knew that the attack was about to occur.

7. Rosbert testified that she went to Riccardi's Garage and brought J. C. to the nurse's office on November 19, 1997 and also reviewed/summarized J. O.'s prior disciplinary record.

8. Mr. William Hiltner ("Hiltner") and Mr. Mark Napoleon ("Napoleon") testified that J. O. is very coachable, respectful and if he was involved in this, it is out of character.

9. J. O. and his father were notified of the student disciplinary charges against him filed by the Administration and the witnesses who were prepared to give testimony with respect to the incident in question.

10. The Hi-Nella Police have charged J. O. with the following offenses: Aggravated Assault, Robbery and Terroristic Threats.

11. J. O. has been referred to the Youth Study Team ("YST") by the Administration for a full team evaluation and a psychiatric evaluation.

12. The Board has also reviewed the academic and disciplinary records of O.

13. Upon completion of the full team evaluation and psychiatric evaluation the YST will make a report and recommendation to the Board of Education regarding O.'s possible readmission in September 1998.

14. If Ellerbee declines to consent to a full YST evaluation and psychiatric evaluation, the Administration will petition the Commissioner of Education for emergent relief to order a full YST evaluation and psychiatric evaluation.

CONCLUSIONS

(A) The Board is unable to reach a conclusion, based on conflicting testimony from credible witnesses, as to whether J. O. physically participated in the assault and battery of J. C. and whether J. O. took J.C.'s necklace and money.

(B) The Board concludes, based on a preponderance of credible evidence, that J. O. planned the assault and battery on J.C. as a form of retaliation and utilized N.B. as the instrument of that retaliation by arranging for her to physically assault and batter J.C.

Based upon the foregoing, I **CONCLUDE** that "the final order, ruling or other action" by the local board occurred on December 11, 1997, when the board found petitioner guilty of

planning and/or arranging a retaliatory assault and battery on student J.C. and advised petitioner in the presence of his parent and his attorney of that conclusion and its consequences, i.e., a suspension for the remainder of the 1997-98 school year with conditions for readmission in September 1998 or thereafter. At that point petitioner had sufficient knowledge of the board's determination to commence the running of the regulatory period of limitations. Accordingly, the last day for petitioner to file a timely petition challenging respondent's actions of December 11, 1997, was March 11, 1998. The petition commencing the within action was not filed until March 16, 1998 and I therefore **CONCLUDE** that his claims are time-barred by N.J.A.C. 6:24-1.2(c). Because respondent did not move to dismiss the petition of appeal prior to commencement of the hearing, petitioner presented his entire case at the hearing. For the additional reasons set forth hereinafter, the petition of appeal is **DISMISSED WITH PREJUDICE.**

Involuntary Dismissal Pursuant to R. 4:37-2(b)

The classic statement of the test for determining a motion for dismissal at the end of an opponent's case is articulated in Dolson v. Anastasia, 55 N.J. 2,5-6 (1969):

> In the case of motions for involuntary dismissal, the test is, as set forth in R. 4:37-2(b) and equally applicable to motions for judgment, whether "the evidence, together with the legitimate inferences therefrom, could sustain a judgment in ****favor" of the party opposing the motion, i.e., if, accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied. . . . The point is that the judicial function here is quite a mechanical one. The trial court is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion. (Citations omitted).

The Rules Governing the Courts of the State of New Jersey, R. 4:37-2(b), provides:

> (b) At Trial - Generally. After having completed the presentation of the evidence on all matters other than the

> matter of damages (if that is an issue), the plaintiff shall so announce to the court, and thereupon the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal of the action or of any claim on the ground that upon the facts and upon the law the plaintiff has shown no right to relief. Whether the action is tried with or without a jury, such motion shall be denied if the evidence, together with the legitimate inferences therefrom, could sustain a judgment in plaintiff's favor.

Not all rules and legal concepts utilized in judicial tribunals are applicable in "quasi-judicial," administrative adjudications. See Hackensack v. Winner, 82 N.J. 1 (1980). Although there is no specific rule in the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, which addresses motions at the end of a petitioner's case, N.J.A.C. 1:1-1.3(a) provides:

> This chapter shall be construed to achieve just results, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. In the absence of rule, a judge may proceed in accordance with the New Jersey Court Rules, provided the rules are compatible with these purposes. Court rules regarding third party practice and class action designations may not be applied unless such procedures are specifically stuatorily authorized in administrative proceedings.

In addition, motions for dismissal and judgment have been discussed by Judge Lefelt in his text on administrative law, in pertinent part as follows:

> The two most frequent motions made at administrative hearings are motions for judgment of involuntary dismissal at the end of petitioner's case and motion for judgment at the close of all the evidence. The technical, common law patterns of going forward, making the prima facie case, the shifting of the burden and resting a case are not binding on ALJs. If a judge requires the party without the burden of proof to proceed first, no motion for judgment of involuntary dismissal can be made. If the party with the burden proceeds first, the motion can be made. The test is identical to that applied in the judiciary. The judge considers whether all the evidence together with the legitimate inferences therefrom could sustain a judgment in favor of the party opposing the motion. The

> judge is not concerned with weight, worth, nature or extent of the evidence. The judge must accept all the evidence supporting the party defending against the motion and accord that party the benefit of all inferences which can reasonably and legitimately be deduced therefrom. . . . 37 N.J. Pract. (Lefelt) § 195

Therefore, the legal standard I now apply to the evidence presented thus far is the one articulated in Dolson v. Anastasia, supra, and reiterated in Judge Lefelt's text.*

Petitioner relied upon the joint exhibits which are listed at the end of this initial decision and the testimony of G.T., one of the witnesses who testified on his behalf at the December 11, 1997 board hearing. J.T., the other witness who had testified for petitioner at the board hearing, has moved out of State and was unavailable to testify at the within hearing. No transcript of the board hearing is available because on December 11, 1997 the tape recorder was not turned on.

G.T. testified that on November 19, 1997, he walked with his brother J.T. to petitioner's car, a white Jetta, parked in the school parking lot in anticipation of meeting petitioner for a ride home. Although he first testified that he believed petitioner and another student who was also getting a ride home, A.A., were already in the car, later in his testimony he indicated that he had observed petitioner and A.A. walking across the parking lot toward the car where he and his brother J.T. were waiting. He denied that there was any conversation in the car after the four students had entered about going to watch a fight between petitioner's then girlfriend N.B. and another student H.K., a Caucasian female. G.T. testified that he was surprised when petitioner turned the vehicle in the opposite direction from home and drove directly to Riccardi's Garage. Although G.T. denied any prior knowledge that there would be a fight between the two females, when he was asked concerning petitioner's foreknowledge, he answered, "Evidently he had to know" because he drove directly there rather than turning in the usual direction to drive home. The fight started within seconds of their arrival at Riccardi's Garage, G.T. testified. G. T. further testified that N.B., petitioner's girlfriend, was not a student at Sterling High School and that she

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* This is also now the standard for determining motions for summary judgment, recently adopted in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520 (1995).

lived in Blackwood, New Jersey, which the witness thought was ten or fifteen minutes away from the school and the garage where the fight took place. He further testified that he had no idea how N.B. arrived at Riccardi's Garage, that she had not arrived with the four students in the white Jetta, although at the conclusion of the fight she did leave with them, and petitioner gave her a ride home. G.T.'s remaining testimony concerning what happened at the garage was entirely consistent with his testimony as reported in the board's findings. He said that he, petitioner and the other two students who had arrived with them in the car simply stood and watched the fight between the two females until the owner of the garage came out and yelled at them to break it up, to take it elsewhere or something to that extent. Because the board did not make any findings concerning petitioner's actual participation in the assault or concerning whether he took J.C.'s necklace and money, G.T.'s testimony in that regard is not relevant to a determination herein.

Although A.A., the third passenger in petitioner's car on November 19, 1997, did not testify at the board hearing or herein, he provided a written statement on December 4, 1997, which was considered by the board in making its determination. That statement was entered as exhibit J-8 in evidence and provides:

> I don't know exactly how this incident started, but I was told about certain events before the girl (I don't know her name) was allegedly attacked. J. O. told me that she was provoking him constantly in his phys. ed. class and using obscene language. At that he also told me that he tried to tell her to leave him alone as nice as he could because he was in front of teachers. Eventually she must have really annoyed him because he was very bothered. J. told me that she was also in some of his other classes and that she was still provoking him. He said the teachers weren't doing anything about it. Now I don't know what happened before the two girls fought but I know that there was a brawl between the girl from school and another girl. J., G. and J.T., and I rode over to the parking lot next to the school to see these girls fight. The fight was quick and towards the end when I thought the fight was over (the fight was only between the two girls NO ONE else "Jumped in") the girl from the other school was walking away and the girl from Sterling rushed her from behind, than J. O. pulled her off of the other girl. He didn't hit her or anything; he just grabbed her off of the girl and

> let her go. Then the other girl hit the girl from Sterling and "the fight" was over. The end.

The fact that there was some sort of dispute or disagreement between petitioner and J.C. prior to November 19, 1997, is also confirmed in J-1 in evidence, the memorandum from L. Rosbert, Sterling High School Vice-Principal, to Superintendent Kasprack, dated December 1, 1997, which provided:

> L. Heuschkel submitted a request for a peer mediation between J.O. and J.C. on Monday, November 17th, because there had been words exchanged between the two students during gym class. A faculty advisor was assigned to arrange the mediation for Tuesday, the 18th. On Tuesday both J. and J. were on the field trip to Fort Dix - one designed for students in making good decisions; therefore, the mediation never took place. According to the faculty chaperones there were no incidences on the trip between the two students.
>
> After school on Wednesday November 19th Reno Domenico called me to go with him that there was a report of a fight next door. When we arrived at the auto shop, we found J. with a few friends. She was extremely bruised on the face and also had several lacerations on her neck. We brought her back to school, contacted the nurse for assistance, and called the police. The police arrived to take statements from J. and H.K. Two employees from the auto station also arrived and gave statements.
>
> The information we received from J. and H. stated that it was J.'s girlfriend that did most of the assault on J. The girlfriend attends Highland High School and arrived in J.'s car. The girl got out of the car to attack J. J. also got out of the car and was accused of pushing J. and then taking the money and jewelry that fell from J. during the fight. (J-1 in evidence)

Petitioner himself did not testify at the board hearing on December 11, 1997, but rather upon the advice of counsel, claimed his Fifth Amendment privilege against self-incrimination; criminal charges stemming from the November 19, 1997 incident were then, and still are, pending. Although petitioner was willing to testify concerning the merits of the charges at the hearing in

the within matter on November 16, 1998, because he had declined to offer the Board of Education his testimony on December 11, 1997 (and because had had declined to provide answers to interrogatories in the within matter detailing his own version of the events) the undersigned precluded his testimony on the merits herein with respect to the issue of his culpability.* Petitioner did testify herein concerning the appropriateness of the sanction imposed by respondent.

Where an issue is one involving the exercise of a local board's discretion, the scope of the Commissioner's review is "not to substitute his judgment for that of those who made the evaluation, but to determine whether they had a reasonable basis for their conclusions." Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1960). Actions of local boards of education which lie within the area of their discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives. Quinlan v. Board of Ed. of North Bergen, 73 N.J. Super. 40 (App. Div. 1962); Thomas v. Morris Township Board of Education, 89 N.J. Super. 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966); K.L. Matawan/Aberdeen High School Dist., 91 N.J.A.R. 2d. (EDU) 74; M.G. v. Monmouth Regional High School, 91 N.J.A.R. 2d. (EDU) 38.

As noted in the prehearing order, the burden of persuasion herein is upon petitioner to establish the arbitrary, capricious and unreasonable nature of respondent's action. To defeat a motion for dismissal at the end of petitioners' case, petitioner must establish a prima facie case by presenting sufficient proof from which the liability of respondent can be logically and reasonably inferred. Even when viewed in the light most favorable to petitioner, the competent evidential materials presented are insufficient to permit a rational fact finder to resolve this dispute in favor

* There is no indication that the board drew an adverse inference from petitioner's failure to testify on his own behalf at his hearing on December 11, 1997, although such an inference is clearly permissible when the defendant/respondent in a civil or administrative action declines to offer explanation. State Department of Law and Public Safety v. Merlino, 216 N.J. Super. 579, 587-588 (App. Div. 1987), affirmed 109 N.J. 134 (1988); Wild v. Roman, 91 N.J. Super. 410 (App. Div. 1966). Because petitioner was willing to testify on November 16, 1998 concerning his culpability, no such adverse inference was warranted in the within matter.

of petitioner. There was absolutely nothing in the testimony of G.T. which could lead a reasonable person to conclude that the board's finding that petitioner had enlisted the assistance of his girlfriend N.B. to attack student J.C., was irrational or that it was based upon the fact that petitioner and the witnesses on his behalf were Black and the witnesses who testified against petitioner were Caucasian. The board's determination of petitioner's culpability is supported by the undisputed facts that there was some sort of ongoing dispute between petitioner and J.C. prior to November 19, 1997, which had been the planned subject of peer mediation, but had not actually taken place on November 18, 1999, because of the unavailability of both students who were on a field trip. The existence of a underlying dispute in conjunction with the undisputed fact that petitioner drove from the school parking lot in the opposite direction from home directly to Riccardi's Garage, where a physical altercation between his girlfriend, N.B., a student at a different high school, and J.C. immediately ensued and which petitioner took no action to stop until the owner of the garage came out to intervene, all provide reasonable support for respondent's conclusion. Absolutely none of the evidence offered by petitioner in the within matter in any way contradicts the foregoing or provides support for an inference that any or all of the board members voted the way they did because of racial bias rather than based upon the facts before them. The mere fact that the two witnesses who testified against petitioner at the board hearing, J.C. and H.K., are Caucasian and the witnesses who testified on petitioner's behalf, J.T. and G.T., are Black does not give rise to any inference of racial discrimination by the board. In fact, as noted above, nothing offered by G.T. at the hearing herein was the least bit contradictory of the board's conclusion that J.O. had planned the attack on J.C. to retaliate for her earlier behavior toward him. The board specifically declined to make any findings with respect to the conflicting testimony it heard from the eye witnesses.

With respect to his allegations that respondent imposed penalties upon him greater than those imposed on others for similar violations and treated him differently based upon his race, petitioner offered the disciplinary guidelines published in the school handbook, P-3 in evidence, and evidence of three other disciplinary actions:

J.W., a Caucasian student, a football player charged by a parent with assault on another football player at a game. This was handled by the coach, with no board hearing, and the parent ultimately withdrew the charges;

S.C., a Caucasian student, who received a 10-day suspension from the administration on charges totally unrelated to assault on another student or fighting or anything similar; and

another Black student, unnamed, who was expelled after a board hearing on charges of assault.

As respondent pointed out there are 870 students enrolled at Sterling High School and simply identifying two Black students disciplined for assault and two Caucasian students who received lesser discipline for other offenses does not create a reasonable inference of racial discrimination. Furthermore, a punch in the heat of the moment at a football game is far different from a planned retaliatory attack. Nor does it make any difference that petitioner may not have physically participated in the attack himself; those who engage others to do their unlawful bidding are at least equally as guilty as the actual perpetrator. In addition, respondent did not expel petitioner. His suspension (with home instruction) was for the balance of the school year and his return to class was conditioned upon submitting to a psychiatric evaluation, attending summer school and executing a behavior contract. Petitioner testified that he declined to abide by the conditions for reinstatement and instead enrolled in private school in January 1998, primarily because he wished to play basketball. He felt his suspension was unduly harsh because it deprived him not only of the opportunity to attend class but also because it prevented him from being Captain of Sterling's basketball team.

Whether respondent considered the effect of the long-term suspension upon petitioner's basketball career is not apparent from the record, but it is also irrelevant to a determination in this matter. If petitioner's point in offering this testimony was to suggest that when star basketball players are found guilty of disciplinary infractions they ought to receive some special

consideration from boards of education who are responsible for maintaining discipline and safety, then he is grossly mistaken. If anything, student leaders should be held to even higher standards of behavior than others, and deviation from those standards must be met with prompt, appropriate discipline severe enough to impress upon both the perpetrator and others that all students are required to conduct themselves in a responsible and civilized fashion so that the business of public schools, teaching and learning, may occur unimpeded. Assault on another student is a very serious matter. It is specifically identified in the statute as justification for expulsion from school. N.J.S.A. 18A:37-2(d). Absolutely nothing in the evidence offered by petitioner in this matter supports an inference that the board acted unreasonably in finding petitioner responsible for the November 19, 1997 attack on J.C. or in disciplining him for his actions. For all of the foregoing reasons, respondent's motion at the end of petitioner's case is hereby **GRANTED,** and the within matter is **DISMISSED WITH PREJUDICE.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P. O. Box 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Feb 16, 1999
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

2/16/99
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 18 1999
DATE

Barbara A. Kennedy
OFFICE OF ADMINISTRATIVE LAW

cc

OAL DKT. NO. EDU 2794-98
AGENCY DKT. NO. 66-3/98

J.O.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE STERLING HIGH SCHOOL DISTRICT, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions.

Upon careful and independent review, the Commissioner determines to affirm the findings and conclusions of the ALJ. Accordingly, the initial decision is adopted for the reasons expressed therein. The within Petition of Appeal is dismissed.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 23, 1999
Date of Mailing, March 23, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

90-99

AUGUSTINE SPAGNOLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY AND MERCER COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENTS.	:	

March 23,1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

PARTIAL INITIAL
DECISION SETTLEMENT
OAL DKT. NO. EDU 6748-97
AGENCY DKT. NO. 256-7/97

JAMES PUPALAIKIS, AUGUSTINE SPAGNOLA, and **EDWARD S. SCHMIDT,**
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, and **BOARD OF EDUCATION OF THE MERCER COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, MERCER COUNTY,**
Respondents.

Julia S. Dasaro, Esq., for petitioner **Spagnola** (Chamlin, Rosen, Uliano & Witherington, attorneys)

Thomas W. Sumners, Jr., Esq., for respondents (Sumners, George & Dortch, attorneys)

Record Closed: December 31, 1998 Decided: February 11, 1999

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter was transmitted to the Office of Administrative Law on August 21, 1997, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. On March 18, 1998, the undersigned issued an order granting the motion of the Board of

Education of the Mercer County Vocational-Technical School District to be dismissed as a party respondent.

Petitioner Spagnolo* and the Board of Education of the City of Trenton have agreed to a settlement and have prepared a written agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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* Separate partial initial decisions will be issued for the other two petitioners when they sign settlement agreements or their issues are otherwise resolved.

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

Feb 11, 1999
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

2/17/99
DATE

D. M. Antanaitis/jf
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 18 1999
DATE

Barbara A Harnad
OFFICE OF ADMINISTRATIVE LAW

cc

AUGUSTINE SPAGNOLA Petitioner, v. TRENTON BOARD OF EDUCATION, Respondent.	: BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY : : 1998 DEC 31 A 10: 25 : AGENCY DKT NO. 256-7/97 : OAL DOCKET NO. EDU6748-97 : : : ***SETTLEMENT AGREEMENT*** :

Augustine Spagnola, residing at ~~337~~ 377 Essex Drive, Brick, New Jersey, 08723, and the Board of Education of the City of Trenton ("Board"), stipulate and agree that, in consideration of the mutual promises of the parties and in exchange for the consideration more particularly noted below, it is hereby agreed:

1. In return for compliance with the Agreement, Mr. Spagnola agrees to the dismissal, with prejudice, of the above-captioned litigation. Mr. Spagnola will continue to retain all tenure and seniority rights to which he is entitled based on all periods of service to the Board and based on terms of this Agreement. The dismissal of this matter shall not be deemed a waiver of tenure or seniority rights which have accrued prior to its filing, or thereafter. Mr. Spagnola releases and waives any and all claims to back salary and/or back benefits, except as provided in this Agreement.

2. In return for compliance with this Agreement, the Board agrees as follows:

(a) Within 30 calendar days of the approval of this settlement by the Commissioner of Education, the Board will pay Mr. Spagnola mitigated back salary for the 1997-98 school year in the gross amount of $34,662.70. Said amount shall be subject to all normal payroll deductions including, but not limited to, retroactive contributions to the Teacher's Pension and Annuity Fund covering the 1997-98 school year. Said pension contribution shall be submitted by the Board to the Pension Fund with an explanation designating those

contributions as relating to the 1997-98 school years.

As part of the mitigation used in calculating this back salary, the Board has retained th amount of $8,976.00. This sum is attributable to the amount received by Mr. Spagnola from the New Jersey Division of Unemployment Insurance during the periods July 1, 1997 through August 30, 1998. It is agreed that, upon request by the Division (whether made to Mr. Spagnola or the Board), the Board shall remit the withheld monies to the Division. The Board shall hold Mr. Spagnola harmless as to any claim by the Division of Unemployment Insurance for a refund of monies, interest or penalties as to unemployment compensation received by Mr. Spagnola during the time period specified herein. A notice to the Division confirming the award of back pay and the retention of the funds by the Board shall be sent by Mr. Spagnola or Rachel S. Flanagan, Esq. within 30 days of receipt of back salary.

(b) Within 30 days of the approval of this settlement by the Commissioner of Education, the Board will pay Mr. Spagnola the sum of $4,317.76, representing the cost c replacement health insurance incurred by Mr. Spagnola during the 1997-98 school year. This amount does not constitute back salary and shall be paid in a lump sum without any deductions of any type. Mr. Spagnola shall be solely responsible for payment of state and/or federal income taxes due on this amount, if any.

(c) The Board shall credit Mr. Spagnola's record of accumulated sick leave days with an additional 15 days attributable to the 1997-98 school year. He shall also retain all previously accumulated but unused sick leave days for future use.

(d) For purposes of retirement only and pursuant to Article VII(E) of the collective agreement covering teachers in the district, Mr. Spagnola will be credited with three (3) additional sick leave days attributable to his unused personal days from the 1997-98 school year. Mr. Spagnola's sick leave credit for retirement purposes shall also include any previous

accrued credit for retirement purposes.

(e) Mr. Spagnola's seniority shall be credited with one (1) additional year attributable to the 1997-98 school year. He shall retain all previously accrued seniority and tenure rights.

(f) Mr. Spagnola was reinstated as a full-time teacher within the scope of his educational certificate and endorsement beginning with the 1998-99 school year. His salary shall be calculated based on the collective bargaining agreement for teachers in the Trenton School District based on his previous salary guide placement together with salary guide credit for the 1997-98 school year.

(g) Effective on or before September 1, 1998, Mr. Spagnola shall be entitled to all of the benefits and emoluments which are normally provided to full-time teachers in the District (including, but not limited to, all forms of health and medical insurance) including all rights specified in the collective agreement, Board policy, past practice, or otherwise. For all purposes, the Board will consider Mr. Spagnola to have been employed on a full-time basis for the 1997-98 school years in calculating any right, benefit or emolument due to him hereafter from whatever source.

3. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized to sign this Agreement and bind the Board to its terms.

4. The parties recognize that each has been represented by legal counsel of his or its own choosing and that they sign this Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein.

5. This Agreement shall be subject to the laws of the State of New Jersey.

6. All terms of this Agreement are deemed material. This document may not be altered, amended or modified except by an instrument executed in writing by the parties. However, if it is determined in the future that there has been miscalculation of damages set forth

in paragraph 2 above, the parties agree to correct any errors regardless of which party gained the benefit(s) thereof.

7. This Agreement is subject to the approval of the Administrative Law Judge and the Commissioner of Education and shall be of no force or effect unless such approval is received. In the event that such approval is not given, the parties shall be returned to the status quo existing prior to this Agreement.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals on the dates specified.

FOR PETITIONER:

Augustine Spagnola

WITNESS:

Julia ~~Tesauro~~ DASARO, Esq.

Dated: 12-29-98

FOR THE RESPONDENT,
TRENTON BOARD OF EDUCATION:

Charles R. Milewski, Board Secretary

Abdul-Malik Ali, Board President

WITNESS:

Thomas W. Sumners, Jr., Esq.

Dated: November 23, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
P. O. Box 049
Trenton, New Jersey 08625-0049
(609) 588-6633

M. Kathleen Duncan
Administrative Law Judge

March 18, 1998

TO ALL COUNSEL: See Attached Service List

LETTER ORDER

RE: VO-TECH LAY OFF CASES
OAL DKT. NOS. EDU 10333-96, 10756-96, 954-97,
6748-97 and 10057-97

Dear Counsel:

This will confirm, pursuant to my rulings from the bench this morning, that petitioners' motion to take depositions is **DENIED** and the motion for summary decision dismissing respondent Mercer County Vocational Technical School district as a party is **GRANTED**, although the portion of the latter motion which seeks counsel fees and costs is **DENIED.** With respect to the Vo-Tech motion, an opinion on the merits for review by the Commissioner will be issued on May 4, 1998 if this case is not settled by then or if any party so requests (even if all the other issues are settled).

This will also confirm that Mr. Sumners will have a written proposal concerning positions to which petitioners may be entitled on my desk (and the desks of all other counsel herein) no later than 5 p.m. on March 30, 1998. Finally, the April 20, 1998 hearing date has been converted to another supplemental prehearing conference to take place at 10:30 a.m. at Mercerville OAL. Hearing dates for April 21 and 22, 1998 have been adjourned. At the moment, April 27, 28, 29, 1998 remain scheduled for hearing. Please mark your calendars accordingly.

This order may be reviewed by the **COMMISSIONER OF EDUCATION** either upon interlocutory review, pursuant to N.J.A.C. 1:1-14.10, or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

March 18, 1998
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

cc

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

PREHEARING ORDER

CONSOLIDATED CASES

JOHN SCOTT and **CHARLES YARNALL,**
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, and **BOARD OF EDUCATION OF THE MERCER COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, MERCER COUNTY,**
Respondents.

OAL DKT. NO. EDU 10333-96
AGENCY DKT. NO. 480-10/96

PETER DIMAGGIO,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, and **BOARD OF EDUCATION OF THE MERCER COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, MERCER COUNTY,**
Respondents.

OAL DKT. NO. EDU 10756-96
AGENCY DKT. NO. 499-10/96

CHARLES YARNALL,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,

Respondent.

OAL DKT. NO. EDU 954-97
AGENCY DKT. NO. 33-1/97

JAMES PUPALAIKIS, AUGUSTINE SPAGNOLA, and **EDWARD S. SCHMIDT,**

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, and **BOARD OF EDUCATION OF THE MERCER COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, MERCER COUNTY,**

Respondents.

OAL DKT. NO. EDU 6748-97
AGENCY DKT. NO. 256-7/97

CHERYL MALACH,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, and **BOARD OF EDUCATION OF THE MERCER COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, MERCER COUNTY,**

Respondents.

OAL DKT. NO. EDU 10057-97
AGENCY DKT. NO. 391-10/97

APPEARANCES PURSUANT TO ATTACHED SERVICE LIST.

After notice, a prehearing conference was held in the above-entitled matter on January 7, 1998, and the following procedures were settled:

1. NATURE OF PROCEEDINGS AND ISSUES TO BE RESOLVED:

Petitioners seek an order from the Commissioner of Education that the Board of Education of the City of Trenton and the Board of Education of the Mercer County Vocation Technical School District violated their tenure/seniority rights by retaining or employing other non-tenured teaching staff members or teaching staff members with less seniority.

Issues for determination at hearing will be:

1. Did respondent Trenton Board of Education violate the tenure rights of any petitioner by retaining or employing any non-tenured teaching staff member in a position for which petitioner holds an appropriate Instructional Certificate/endorsement?

2. Did respondent Trenton Board of Education violate the seniority rights of any petitioner by retaining or employing a teaching staff member with less seniority in a relevant category?

3. If the answer to questions number one and/or two above is yes, what are the appropriate remedies?

4. Did respondent Trenton Board of Education enter into an agreement with respondent Mercer County Vocational-Technical School District constituting a sending-receiving relationship pursuant to N.J.S.A. 18A:28-6.1?

5. If the answer to the previous question is yes, did respondent Mercer County Vocation-Technical School District violate petitioners' tenure and/or seniority rights by failing to offer him/her a position?

6. Does any petitioner have tenure/seniority rights to a position in the Mercer County Vocational-Technical School District pursuant to N.J.S.A. 18A:28-16 or N.J.S.A. 18A:54-11.3?

7. If the answer to questions number four, five and six, or any of them, is yes, what are the appropriate remedies?

2. PARTIES AND THEIR DESIGNATED ATTORNEYS OR REPRESENTATIVES:

SEE ATTACHED SERVICE LIST.

3. SPECIAL LEGAL REQUIREMENTS AS TO NOTICE OF HEARING:

Not applicable.

4. SCHEDULE OF HEARING DATES, TIME AND PLACE:

April 20, 21, 22, 27, 28 and 29, 1998, 9 a.m., Trenton office of the Office of Administrative Law, 9 Quakerbridge Plaza, Mercerville, New Jersey.

All adjournment requests must be in writing.

No adjournments will be granted except in strict accordance with the requirements of N.J.A.C. 1:1-9.6.

5. STIPULATIONS:

To be placed upon the record prior to commencement of testimony.

6. SETTLEMENT:

The parties will continue to discuss settlement possibilities and will advise the undersigned if a settlement conference is desired prior to the scheduled hearing dates.

7. AMENDMENTS TO PLEADINGS:

Amended Answers have been filed.

8. DISCOVERY AND DATE FOR COMPLETION:

Responses have been provided to initial discovery requests. Any discovery motion should be filed as quickly as possible, but in no event later than February 25, 1998.

9. ORDER OF PROOFS:

Petitioners bear the burden of moving forward with the evidence and the burden of proof. Testimony will be in same order as captions listed above. Respondent's witnesses to testify following petitioners'.

10. EXHIBITS MARKED FOR IDENTIFICATION:

Parties will confer prior to the hearing date for the purpose of marking exhibits by consent.

11. EXHIBITS MARKED IN EVIDENCE:

To be marked at time of hearing. Please be sure to bring an original and two copies of each exhibit you intend to offer as evidence.

12. ESTIMATED NUMBER OF FACT AND EXPERT WITNESSES:

No limitation.

13. MOTIONS:

Respondent Mercer County Vocational-Technical School District will file a motion for summary decision on or before February 4, 1998. Responses to be filed no later than February 25, 1998. Oral argument on the motion will be conducted on March 18, 1998, 10 a.m., Trenton office of the Office of Administrative Law.

14. OTHER SPECIAL MATTERS:

These cases are hereby **CONSOLIDATED** for disposition with the consent of all parties.

Teaching staff members employed by the Trenton Board of Education whose positions could be affected by the outcome in the within matters will be given written notice of their opportunity to intervene in these proceedings by the undersigned. The attached notice will be sent to each person identified by counsel for the Trenton Board of Education. Names and addresses of persons to be notified will be supplied to the undersigned by Mr. Sumners on or before January 15, 1998.

Do not fax anything to the judge without specific prior permission.

This order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** either upon interlocutory review, pursuant to N.J.A.C. 1:1-14.10, or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

Jan. 8, 1998
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

cc

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
P. O. Box 049
Trenton, New Jersey 08625-0049
(609) 588-6633

M. Kathleen Duncan
Administrative Law Judge

RE: OAL DKT. NOS. EDU 10333-96, 10756-96, 954-97, 6748-97 and 10057-97

Dear Teaching Staff Member:

The parties in the above-captioned cases have identified your position with the Trenton Board of Education as one which may be affected by the Commissioner's decision in these matters. Each of the petitions seeks an order determining that the Trenton Board of Education and the Mercer County Vocational-Technical School District have violated petitioners' tenure and seniority rights by permitting non-tenured individuals or teaching staff members with less seniority to remain employed in positions for which petitioners hold an appropriate instructional certificate/endorsement.

Accordingly, I am hereby notifying you of the opportunity to intervene in these proceedings by advising me in writing of your desire to do so no later than 5 p.m. on February 2, 1998. If I do not hear from you by that time, I will conclude that you do not wish to participate in these proceedings.

Very truly yours,

M. KATHLEEN DUNCAN
Administrative Law Judge

MKD:cc
c: **SEE ATTACHED SERVICE LIST**

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
P. O. Box 049
Trenton, New Jersey 08625-0049
(609) 588-6633

M. Kathleen Duncan
Administrative Law Judge

August 4, 1998

TO ALL COUNSEL: SEE ATTACHED SERVICE LIST

RE: OAL DKT. NOS. EDU 10333-96, 10756-96, 954-97, 6748-97 and 10057-97

Enclosed please find a copy of the Supplemental Prehearing Order Severing the above-captioned cases.

Very truly yours,

M. Kathleen Duncan

M. KATHLEEN DUNCAN
Administrative Law Judge

MKD:cc

3m

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

SUPPLEMENTAL PREHEARING ORDER

CONSOLIDATED CASES

JOHN SCOTT and **CHARLES YARNALL,**
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, and **BOARD OF EDUCATION OF THE MERCER COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, MERCER COUNTY,**
Respondents.

OAL DKT. NO. EDU 10333-96
AGENCY DKT. NO. 480-10/96

PETER DIMAGGIO,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, and **BOARD OF EDUCATION OF THE MERCER COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, MERCER COUNTY,**
Respondents.

OAL DKT. NO. EDU 10756-96
AGENCY DKT. NO. 499-10/96

New Jersey is an Equal Opportunity Employer

CHARLES YARNALL,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,

Respondent.

OAL DKT. NO. EDU 954-97
AGENCY DKT. NO. 33-1/97

JAMES PUPALAIKIS, AUGUSTINE SPAGNOLA, and **EDWARD S. SCHMIDT,**

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, and **BOARD OF EDUCATION OF THE MERCER COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, MERCER COUNTY,**

Respondents.

OAL DKT. NO. EDU 6748-97
AGENCY DKT. NO. 256-7/97

CHERYL MALACH,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, and **BOARD OF EDUCATION OF THE MERCER COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, MERCER COUNTY,**

Respondents.

OAL DKT. NO. EDU 10057-97
AGENCY DKT. NO. 391-10/97

APPEARANCES:

Michael T. Barrett, Esq., for Peter DiMaggio (Bergman & Barrett, attorneys)

Rachel S. Flanagan, Esq., for Augustine Spagnola (Chamlin, Rosen & Uliano, attorneys)

Thomas W. Sumners, Jr., Esq., for Trenton Board of Education

Louis P. Bucceri, Esq., for Edward Schmidt and Cheryl Malach (Bucceri & Pincus, attorneys)

Michael S. Ridgway, Esq., for Charles Yarnall & James Pupalaikis (Ridgway & Stayton, attorneys)

Merick Limsky, Esq., for all intervenors (Balk, Oxfeld, Mandell & Cohen, attorneys)

A supplemental prehearing conference was held in the above-captioned matter on July 31, 1998, at which time the following additional determinations were made:

SEVERANCE:

These matters which were consolidated for disposition with the consent of all parties are hereby **ORDERED** severed for individual disposition.

SETTLEMENT:

Most of the issues now having been amicably resolved between the parties, there is no current need for trial dates to be scheduled. The parties in each case will prepare and submit either a signed Stipulation of Settlement or a letter of withdrawal from the individual petitioner or petitioners. If it becomes clear that the issue of compensatory/consequential damages cannot be

resolved in any of the cases, the parties in that case will agree upon a schedule for submission of summary decision papers and will forward to the undersigned a confirming letter.

This order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** either upon interlocutory review, pursuant to N.J.A.C. 1:1-14.10, or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

Aug. 4, 1998
DATE

M. KATHLEEN DUNCAN, ALJ

cc

TRENTON BOE LAY OFF CASES
SERVICE LIST

Attorney	Client	Docket No.
Michael Barrett, Esquire Bergman & Barrett P. O. Box 1273 Princeton, New Jersey 08542 (609) 921-1502	Peter DiMaggio	EDU 10756-96
Dennis DeSantis, Esquire Destribats, Campbell, DeSantis Magee & O'Donnell 247 White Horse Avenue Trenton, New Jersey 08610-2699 (609) 585-2443	Mercer County Vocational Technical School District	EDU 10333-96, 10756-96, 6748-97, 10057-97
Arnold W. Mellk, Esquire Wills, O'Neill & Mellk 10 Nassau Street-Box 614 Princeton, New Jersey 08542 (609) 924-0700	John Scott	EDU 10333-96
Julia S. Dasaro, Esquire Chamlin, Rosen, Uliano & Witherington 268 Norwood Avenue West Long Branch, New Jersey 07764 (908) 229-3200	Augustine Spagnola	EDU 6748-97
Louis Bucceri, Esquire Bucceri & Pincus 1200 Route 46 Clifton, New Jersey 07013 (973) 773-5665	Edward Schmidt Cheryl Malach	EDU 6748-97 EDU 10057-97
Thomas W. Sumners, Jr., Esquire Sumners, George & Dortch 209 East Front Street Trenton, New Jersey 08604 (609) 393-6604	Trenton Board of Education	All
Herbert J. Stayton, Esquire Ridgway & Stayton 2 Eves Drive Marlton, New Jersey 08053 (609) 983-8133	Charles Yarnall James Pupalaikis	EDU 954-97, EDU 10333-96

Sanford R. Oxfeld, Esquire Balk, Oxfeld, Mandell & Cohen 50 Commerce Street Newark, New Jersey 07102-4003 (973) 623-0353	For all intervenors	All

OAL DKT. NO. EDU 6748-97
AGENCY DKT. NO. 256-7/97

AUGUSTINE SPAGNOLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY AND MERCER COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENTS.	:	

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

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

COMMISSIONER OF EDUCATION

March 23, 1999
Date of Mailing, March 23,1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

94-99

L.S., on behalf of minor children, E.S. and E.S. PETITIONER, V. BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

March 26, 1999

OAL DKT. NO. EDU 9584-98
AGENCY DKT. NO. 414-9/98

L.S., on behalf of minor children, E.S. and E.S.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

Douglas B. Groll

ASSISTANT COMMISSIONER OF EDUCATION

March 26, 1999
Date of Mailing, March 26, 1999

95-99

DONNA SMITH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SUSSEX COUNTY VOCATIONAL-TECHNICAL HIGH SCHOOL DISTRICT, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

March 26, 1999

OAL DKT. NO. EDU 7960-97
AGENCY DKT. NO. 228-6/97

DONNA SMITH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SUSSEX COUNTY VOCATIONAL-TECHNICAL HIGH SCHOOL DISTRICT, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

March 26, 1999
Date of Mailing, March 26, 1999

96-99

JACQUELINE FIDURSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

March 26, 1999

OAL DKT. NO. EDU 11246-97
AGENCY DKT. NO. 389-10/97

JACQUELINE FIDURSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

March 26, 1999
Date of Mailing, March 26, 1999

97-99

LAURA KNAUSE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UPPER FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

March 26, 1999

OAL DKT. NO. EDU 8658-98
AGENCY DKT. NO. 404-9/98

LAURA KNAUSE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UPPER FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

March 26, 1999
Date of Mailing, March 26, 1999

98-99

ALEXANDER J. DREWNIANY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE ESSEX COUNTY VOCATIONAL SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

March 26, 1999

OAL DKT. NO. EDU 9599-97
AGENCY DKT. NO. 288-8/97

ALEXANDER J. DREWNIANY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE ESSEX COUNTY VOCATIONAL SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

March 26, 1999
Mailing Date, March 26, 1999

TEANECK COMMUNITY CHARTER SCHOOL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF TEANECK, BERGEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

SYNOPSIS

Petitioning Charter School sought order from the Commissioner requiring the Board to provide petitioner with 90% of the local levy per student, as well as transportation or aid in lieu of transportation, effective from the commencement of the Charter School as required by statute and its implementing regulations. Petitioner also sought pre-judgment interest.

Commissioner determined that the statutory and regulatory framework for charter schools does indeed impose on districts the dual requirement to pay directly to the charter school within their districts the specific level of funding for resident charter school students as determined by *N.J.S.A.* 18A:36A-12 *and* to provide transportation to those students in such a way that the district bears the cost of transportation, not the charter school. Commissioner granted summary decision to petitioner insofar as he directs the Board to pay promptly to petitioner the difference between the amounts it already paid and those amounts owing and due petitioner pursuant to *N.J.S.A.* 18A:36A-12. Commissioner ordered the issue of pre-judgment interest transmitted to OAL for a plenary hearing which is to be strictly limited to petitioner's allegation that the Board acted in bad faith and/or deliberate violation of law, unless petitioner withdraws its claim within ten days of receipt of this decision on motion.

AGENCY DKT. NO. 8-1/99

TEANECK COMMUNITY CHARTER SCHOOL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF TEANECK, BERGEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

For Petitioner: Lois H. Goodman, Esq. (Carpenter, Bennett & Morrissey)

For Respondent: Sidney A. Sayovitz, Esq. (Schenck, Price, Smith & King)

PROCEDURAL HISTORY

This matter was opened before the Commissioner of Education by way of the filing of a Petition of Appeal on January 11, 1999 by the Teaneck Community Charter School (petitioner) seeking an order from the Commissioner requiring the Board of Education of Teaneck (respondent) to provide petitioner with 90% of the local levy per student, as well as transportation or aid in lieu of transportation, effective from the commencement of the Charter School as required by statute and its implementing regulations. On January 29, 1999, petitioner submitted by fax transmission a Motion for Summary Judgment and Letter-Memorandum in support thereof. In addition to the aforesaid relief sought of the Commissioner, petitioner's Motion for Summary Judgment requested pre-judgment interest. This was followed by the filing of an Amended Petition of Appeal on February 4, 1999, the sole amendment of which was the request for pre-judgment interest.

On February 1, 1999, respondent filed its answer to the petition requesting dismissal of the petition, averring that the regulations adopted by the Department of Education at

N.J.A.C. 6A:11, subchapter 4 are in conflict with the Charter School Program (Act), *N.J.S.A.* 18A:36A-1 *et seq.* and the New Jersey Constitution. On February 1, the Director of the Bureau of Controversies and Disputes sent the parties a letter indicating that the Commissioner would decide the Motion for Summary Judgment pursuant to the authority granted him by *N.J.A.C.* 6:24-1.13. Respondent was provided ten (10) days from receipt of the letter to submit a reply brief or letter-memorandum in response to the Motion for Summary Judgment. Respondent's reply was filed on February 16, 1999. Petitioner was accorded five (5) days from receipt of respondent's reply brief or letter-memorandum to file a response thereto. Petitioner's response was received on February 23, 1999; whereupon, the record relative to the Motion for Summary Judgment closed.

BACKGROUND

In September 1998, the Teaneck Community Charter School commenced operations pursuant to a charter granted in accordance with *N.J.S.A.* 18A:36A-1 *et seq.* Pursuant to *N.J.S.A.* 18A:36A-12, respondent, as the district of residence of the Charter School, was required to pay petitioner 90% of the local levy budget per pupil for each child residing in the district who attends the Charter School. In accordance with *N.J.S.A.* 18A:36A-13 and *N.J.A.C.* 6A:11-4.1 and 4.2, respondent must provide transportation, or aid in lieu of transportation, to petitioner's students who reside in Teaneck, on the same terms as respondent provided such transportation to the students attending its District's schools.

On October 14, 1998, respondent adopted a Resolution which reads as follows:

> WHEREAS, the Board of Education has been directed to provide transportation to students of the Teaneck Community Charter School; and
>
> WHEREAS, the Board of Education has reviewed the Charter School Program Act of 1995 and understands that the Act limits the payments to be made by the Board of Education to 90% of the local levy budget per pupil; and

> WHEREAS, the Board of Education has determined that the additional costs of transportation will result in payments by the Board of Education in excess of the 90% cap; now, therefore be it
>
> RESOLVED, that the School Business Administrator is directed to subtract the costs of transporting the Charter School pupils from the payments to be made to the Charter School by the Board of Education, pursuant to *N.J.S.A.* 18A:36A-12. (Petition, Exhibit A)

Upon adoption of the Resolution, respondent commenced to deduct the costs of providing transportation to students residing within the District who attended the Charter School. For the months of November and December 1998, respondent deducted the amount of $10,286 from the funds it transmitted to petitioner.

PETITIONER'S POSITION

Petitioner avers, *inter alia,* that respondent's decision to deduct transportation costs from the required 90% of the local levy payment is without basis in statute or regulations, and, thus, constitutes a clear violation of respondent's obligations. *N.J.S.A.* 18A:36A-12 provides in pertinent part that

> [t]he school district of residence shall pay directly to the charter school for each student enrolled in the charter school who resides in the district a presumptive amount equal to 90% of the local levy budget per pupil for the specific grade level in the district. At the discretion of the commissioner and at the time the charter is granted, the commissioner may require the school district of residence to pay directly to the charter school for each student enrolled in the charter school an amount equal to less than 90%, or an amount which shall not exceed 100% of the local levy budget per pupil for the specific grade level in the district of residence.***

Petitioner further maintains that the local board of education also bears responsibility for the provision of transportation services to students within the District as set forth in *N.J.S.A.* 18A:36A-13 which reads

> [t]he students who reside in the school district in which the charter school is located shall be provided transportation to the charter

> school on the same terms and conditions as transportation is provided to students attending the schools of the district.***

Petitioner also avers that the State Board of Education regulations for charter schools provide further guidance as to the financial obligations of a local board of education, specifically citing the following provisions of *N.J.A.C.* 6A:11-4.1 in support of this contention.

> (a) A district board of education shall have the following responsibilities for transportation:
>
> 1. Transportation or aid in lieu of transportation shall be provided pursuant to *N.J.S.A.* 18A:39-1 et seq. to students in kindergarten through grade eight who live more than two miles and to students in grades nine through 12 who live more than two and one-half miles from the charter school that they attend.***
>
> 2. The transportation of students to and from a charter school shall be the responsibility of the district board of education of the school district in which each student resides.

Thus, petitioner argues, respondent is responsible for providing to it the requisite 90% of the local levy budget per pupil. Additionally, respondent is responsible for providing the students of the District with transportation or aid in lieu of transportation. Petitioner further avers that nowhere in the Act is there any indication that the 90% requirement was intended to cap all payments by a local board. Of this, petitioner states

> ***By contrast, the requirement that the board provide *either* transportation or aid in lieu of transportation makes clear that the intent was to create an obligation in addition to that posed by the 90% requirement. By deducting the costs of transportation from the amount paid to the Charter School each month, the Board has violated its clear statutory obligations. (emphasis in text) (Petitioner's Brief at p. 3)

Petitioner further contends that respondent's position is belied by the comments published in the *New Jersey Register (N.J.R.)* following publication of the proposed charter school rules, in particular, the first comment under the transportation heading which clearly indicates that school districts are allowed to retain 10% of the local levy budget per pupil to cover its costs for administering the program, including transportation (29 *N.J.R 3493,* August 4, 1997, Subchapter 4)

Given the above, petitioner argues that respondent should be made to reimburse the charter school for any and all amounts improperly deducted from the requisite 90% payment, as well as interest on that amount, in accordance with *N.J.A.C.* 6:24-1.16, since respondent's refusal to make full payments clearly required by law was either in bad faith or in deliberate violation of law.

RESPONDENT'S POSITION

Respondent rejects petitioner's position that the Act, *N.J.S.A.* 18A:36A-1, should be interpreted as to require a district board of education to pay 90% of the local levy budget *and* to pay for transportation costs for each pupil, arguing that such an interpretation is inconsistent with the plain meaning of the Act and with the intention of the Legislature. Citing 29 *N.J.R.* 3494, Subchapter 7, response to Comment 1, respondent argues that it is clear the Legislature and the Department of Education (DOE) used a funding formula based on a per pupil method because it was regarded as the fairest method of determining school costs. Respondent further maintains that the per pupil methodology is related to and reflective of costs and given the provisions of *N.J.S.A.* 18A:36A-12 recited above and DOE regulatory comments, it is apparent that the Legislature and DOE wanted to limit a charter school to 90% of the per pupil formula and expected them to live within that cap. Moreover, respondent emphasizes that the Commissioner was given the authority to provide additional funding not to exceed 100% of the local levy budget per pupil, but at no point in the Act or in the regulations is there any indication that the charter school was to receive more than the 90% level, except when the Commissioner affirmatively chose to provide additional funding not to exceed 100%.

Respondent next argues that petitioner's position would subvert the clear intent of *N.J.S.A.* 18A:36A-12 because petitioner would have the Teaneck Board pay more than 100% of the per pupil funding formula, *i.e.*, the 90% level *and* the costs of transportation, even though the Commissioner has neither authorized nor been requested to authorize a higher level. Respondent further avers that, contrary to petitioner's assertion, it does provide transportation to the Charter

School students on the same terms and conditions as provided to Teaneck public school students. Respondent contends, *inter alia,* that

> *N.J.S.A.* 18A:36A-13 is not a funding section as no reference is made therein to "payments" or "funding levels." Rather, this section requires that a local board of education provide transportation to charter school pupils, an activity not in dispute. Had the Legislature intended *N.J.S.A.* 18A:36A-13 to be a funding section, it could have provided that school districts shall pay to the Charter School the costs of transportation, utilizing language similar to that used in the previous section, *N.J.S.A.* 18A:36A-12. In fact, the only section in the Act dealing with funding is *N.J.S.A.* 18A:36A-12, which caps funding levels at 90%, except when authorized by the Commissioner***. The position advocated by [petitioner] plainly ignores the funding cap of *N.J.S.A.* 18A:36A-12.*** (Respondent's Reply Brief at p. 4)

Respondent believes it noteworthy that if the Commissioner were to approve a 100% funding level, petitioner's position would result in 100% of the pupil level plus transportation costs. Of this, respondent states "[i]t is respectfully submitted that *N.J.S.A.* 18A:36A-13 simply indicates that providing transportation is the responsibility of the local district but does not indicate that the costs of transportation shall be provided above the 90 –100% level." (*Id.* at pp. 4-5) Respondent also avers that the charter school regulations do not require additional funding but merely indicates that the transportation of students to and from a charter school shall be the responsibility of the school district in which the student resides, a responsibility it recognizes and accepts. See *N.J.A.C.* 6A:11-4.1(a)(2).

Additionally, respondent argues that petitioner is seeking funding for transportation two times because, it argues, the local levy budget per pupil, as set forth in *N.J.S.A.* 18A:36A-12, already includes the cost of transportation. Consequently, respondent contends that funding the Teaneck Charter School at the 90% level already pays for 90% of the costs of transportation and by requesting it to pay an additional transportation cost, petitioner seeks to be paid twice. Of this, respondent states that neither the Act, nor the regulations and the DOE's regulatory comments

indicate that charter school funding requires payment to the Charter School twice for transportation costs, and to argue otherwise simply makes no sense.

Respondent disagrees with petitioner's arguments relative to the DOE regulatory comments on transportation previously recited above, emphasizing that the DOE noted only that the 10% difference in per pupil formula provides districts with funds to cover *administrative* costs, not the cost of *transportation.*

Lastly, respondent objects to and vigorously denies the allegation in the Amended Petition of Appeal that the Teaneck Board acted in bad faith and/or in deliberate violation of the applicable statute and rules and is, thus, entitled to pre-judgment interest. With respect to this, respondent argues, *inter alia,* that it was inappropriate for a motion for summary judgment to be filed before a party has had an opportunity to submit its responsive pleading. Moreover, according to respondent, such an allegation constitutes a disputed fact, which has not been proven either in the form of an affidavit or through testimony; therefore, it cannot be decided via summary judgment but must be the subject to a full evidentiary hearing.

In response to the above, petitioner contends that it is respondent who is misinterpreting the statute, arguing, *inter alia,* that respondent is reading the term "provide" too narrowly and that it is clear from reading *N.J.S.A.* 18A:36A-13 that "provide" means to pay for such transportation. Moreover, petitioner avers that, contrary to respondent's arguments otherwise, the Teaneck Board is not providing the charter school students with transportation on the same terms and conditions as the District's students because those students are not required to pay their own costs of transportation to school. Thus, argues petitioner, respondent must bear the costs of transportation of the charter school students, if transportation for charter school students is to be on the same terms and conditions as other students in the District. Finally, petitioner maintains that there are no issues of fact with respect to respondent's actions or motives in this matter that need to be determined before awarding it pre-judgment interest.

COMMISSIONER'S DETERMINATION

Initially, the Commissioner will address the issue of whether this matter is ripe for summary judgment. Upon review of the parties' submissions, it is apparent that the only genuine issue of material fact in dispute in this matter relates to the allegation that respondent acted in bad faith and/or in deliberate violation of the law. Consequently, the Commissioner determines that deciding that issue on a summary judgment basis is not appropriate. Accordingly, the Commissioner's decision on motion herein will not address the pre-judgment interest issue raised in petitioner's Motion for Summary Judgment and subsequently added to the Amended Petition of Appeal.

The substantive issue presented in the instant motion is whether or not the statutes for the creation of charter schools enacted by the New Jersey Legislature and the regulations developed by the DOE to implement those statutes require a local district board of education to pay funds directly to a charter school at the levels as set forth in *N.J.S.A.* 18A:36A-12 *and* to provide transportation to the charter school students who reside in the district in such a way that the district bears the cost of the transportation *over and above* the level of funding required by *N.J.S.A.* 18A:36A-12. Upon a thorough review of the position of the parties and relevant statutory and regulatory provisions, the Commissioner is in full agreement with petitioner that the statutory and regulatory framework for charter schools does indeed impose on districts the dual requirement to pay directly to the charter school within their districts the specific level of funding for resident charter school students as determined by *N.J.S.A.* 18A:36A-12 *and* to provide transportation to those students in such a way that the district bears the cost of transportation, not the charter school. The Commissioner reaches this determination for the reasons set forth below.

Contrary to respondent's arguments that the statutory and regulatory framework for charter school payment permits the deduction of the cost of transportation from monies it must pay

a charter school because the **maximum amount** to be paid by a district is capped at 90% of the local levy budget per pupil for the specific grade level, unless the Commissioner approves otherwise, the Commissioner concludes that *N.J.S.A.* 18A:36A-12 establishes the mechanism by which the *basic operational costs* of a charter school are to be funded, *i.e.*, through the **direct** payment of revenues by the school district of residence to the charter school at the presumptive 90% rate as discussed *ante,* unless the Commissioner, at the time the charter is granted, sets a different rate which may be lower than 90% but not higher than 100%. *N.J.S.A.* 18A:36A-12 also delineates the other **direct** payment responsibilities of school district to a charter school to support the charter school's *basic operational costs, i.e.*, the payment of any categorical and federal aid attributable to resident students, providing the students are receiving the appropriate categorical services.

Furthermore, pursuant to *N.J.S.A.* 18A:36A-13, the Legislature imposed the responsibility for transportation of charter school students on the school district of residence, not on the charter school, and, as set forth in the Legislative Fiscal Estimate to Senate Bill, No. 1796 dated September 14, 1995 which established charter schools in New Jersey, the Legislature determined that "***the district would be eligible for State aid for that transportation." Upon thorough consideration of the legislative provisions for the funding of charter schools, the Commissioner concludes that transportation is *not* a basic operational function of the charter school subject to funding through the revenue provisions of *N.J.S.A.* 18A:36A-12. This being so, the Commissioner finds and determines that the financial obligation for transportation set forth in *N.J.S.A.* 18A:36A-13 is an **additional** financial obligation on school districts, separate and apart from that imposed by *N.J.S.A.* 18A:36A-12, for which the district receives State aid. The Commissioner further concludes that, contrary to respondent's arguments, there is no statutory or legislative authority to deduct the cost of transporting students from the per pupil payment which school districts are mandated to pay directly to charter schools as operational revenue.

Lastly, the Commissioner concludes that respondent's argument contending that petitioner's position is tantamount to double-dipping, because the local levy budget per pupil referenced in *N.J.S.A.* 18A:36A-12 includes transportation costs, is misplaced. When the Charter School Program Act of 1995, *N.J.S.A.* 18A:36A-1 *et seq.,* was enacted by the Legislature, the financing for public education was controlled by the Quality Education Act of 1990 (QEA), *N.J.S.A.* 18A:7D-1 *et seq.* Hence, the per pupil funding mechanism devised for the Act by the Legislature at that time was based on the local levy budget provision of QEA. *N.J.S.A.* 18A:7D-3 defined local levy budget as "the sum of the foundation aid and transition aid received by a school district and the district's local levy for the general fund." With the enactment of *L.*1993, *c.* 83, the Legislature approved one tax levy for a general fund budget for school districts instead of separate tax levies for current expenses and capital outlays as had previously existed. While the *general fund budget* included pupil transportation costs, the cost for transportation was not part of a district's *local levy* for the general fund because the statutory scheme for transportation aid envisioned full support for providing required pupil transportation. *N.J.S.A.* 18A: 7D-19.

As correctly noted by the parties, *N.J.S.A.* 18A:36A-12 and *N.J.A.C.* 6A:11-1 2 cap the presumptive amount to be paid directly to a charter school located in a district at 90% of the local levy per pupil for the specific grade level, unless the Commissioner approves another percentage which may be less than 90% but no greater than 100% of the per pupil levy. However, CEIFA does not include the terminology "local levy budget" as contained in the Charter School Act of 1995, *N.J.S.A.* 18A:36A-12 and *N.J.S.A.* 18A:7D-1 *et seq.* (QEA), the school finance act which preceded CEIFA.[1] Therefore, it is necessary to examine the specific definitions relevant to the controverted matter herein as they are currently set forth in *N.J.A.C.* 6A:11-1.2.

[1] As noted by the DOE in 29 *N.J.R.* 3495, Subchapter 7, response to Comment 3, "*N.J.S.A.* 18A:36A-1 et seq. was enacted prior to the new funding laws with the 'local levy per pupil for the specific grade level' having no meaning under *N.J.S.A.* 18A:7F-1 et seq. [the Comprehensive Education Improvement and Financing Act of 1996 or CEIFA].***'"

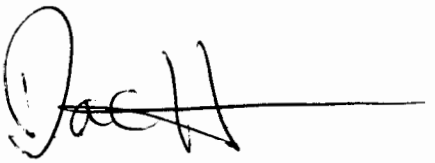
> "Local levy budget per pupil for the specific grade level" starting with the **1998-1999 school year means the "program budget per pupil."***** "Local levy budget per pupil for the specific grade level" is based on the prebudget year of the district of residence and non-resident district(s). (emphasis supplied)
>
> "Program budget" based on the prebudget year means the sum ***of (1) core curriculum standards aid, (2) supplemental core curriculum standards aid, (3) stabilization aid (including supplemental stabilization aid and supplemental tax reduction aid), (4) designated general fund balance, (5) miscellaneous local general fund revenue and (6) the district's general fund tax levy.***
>
> "Program budget per pupil" [is defined as] the apportionment among the district of residence and non-resident district's October 15 weighted resident enrollment consistent with *N.J.S.A.* 18A:7F-12 by grade category and then divided by the same districts' resident enrollment by grade as of October 15.***

Review of these definitions demonstrates that transportation aid is not a part of the regulatory or statutory framework upon which "local levy budget per pupil for the specific grade level" is currently based because the statutory scheme for transportation aid under CEIFA (*N.J.S.A.* 8A:7F-25), like that of its predecessor QEA, also envisions full support of the cost of providing required pupil transportation. Moreover, as indicated in the Legislative Fiscal Estimate for the Charter School Senate Bill, No. 1796, State aid for transportation of charter school students goes to the district providing such transportation. Consequently, respondent's double-dipping arguments with respect to the payment of transportation costs to charter schools must fail when viewed in light of the statutory scheme, both as it existed at the time of enactment and at present.

Accordingly, the Commissioner grants summary decision to the Teaneck Community Charter School insofar as he directs the Teaneck Board of Education to pay promptly to the Charter School the difference between the amounts it has already paid and those amounts owing and due the Charter School pursuant to *N.J.S.A.* 18A:36A-12, in conformance with this decision. He further orders that all payments henceforth made by respondent to the Teaneck Community Charter School must be calculated in the same manner. Since the issue of pre-judgment interest

involves a genuine issue of material fact, that issue will be transmitted to the Office of Administrative Law for a plenary hearing which shall be strictly limited to petitioner's allegation that respondent has acted in bad faith and/or deliberate violation of the law, unless petitioner notifies the Commissioner within ten (10) days of receipt of this decision on motion that it desires to withdraw this claim. [2]

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

March 30, 1999
Date of Mailing, March 30, 1999

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

100-99

CALLIE HAYES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

March 31, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5136-97
AGENCY DKT. NO. 414-9/96

CALLIE HAYES,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY,
Respondent.

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

Charlotte Kitler, General Counsel, for respondent,

Record Closed: February 2, 1999 Decided: February 16, 1999

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

Statement of the Case

This is an appeal by a teacher from a decision of the State-Operated School District of Jersey City ("District") to withhold her salary increment for the 1996-97 academic year under *N.J.S.A.* 18A:29-14.

Procedural History

Initially, this matter was one of fifteen consolidated cases filed with the Commissioner of Education ("Commissioner") on September 13, 1996. Count Seven of the multi-count petition alleged the wrongful withholding of the increment of petitioner Callie Hayes ("Hayes"). On October 2, 1996, the District filed its answer. Subsequently, on October 23, 1996, the Commissioner forwarded all fifteen cases to the Office of Administrative Law ("OAL") for hearing as a contested case under OAL Dkt. No. EDU 11161-96. Since each petitioner's situation involved different factual circumstances and different witnesses, the OAL divided them into separate cases for convenience of hearing.[1]

At a prehearing conference on March 3, 1997, the OAL scheduled the hearing in this matter to commence on December 17, 1997. However, that the judge adjourned that date due to a scheduling conflict. Thereafter, the OAL rescheduled the hearing to commence on June 1, 1998. By letter dated May 21, 1998, both parties requested an adjournment of the June 1, 1998 hearing date because of recent developments "affecting either the continuation of her appeal or its consolidation with another matter." Accordingly, the OAL granted the adjournment and rescheduled the hearing for November 13, 1998. That hearing date was also adjourned based on the parties' representation of a possible settlement.

On December 30, 1998, respondent's counsel notified the OAL that Callie Hayes "has resigned and we are in the process of verifying whether or not she wants to pursue her case." Again, the OAL granted an adjournment to determine whether a hearing was necessary. One week later, on January 5, 1999, the OAL conducted a telephone conference to ascertain the status of this appeal. As a result of this conference, respondent's counsel agreed to notify the OAL by February 2, 1999

[1] Uniform Administrative Procedural Rules permit consolidation of separate cases only where a single proceeding will promote savings of time and expense and avoidance of duplication and inconsistency. *N.J.A.C.* 1:1-17.3.

whether she wanted to proceed with her appeal. To date, the OAL has not heard anything further regarding Ms. Hayes' intentions.

Findings of Fact

I **FIND** the following facts:

As a result of the telephone status conference on January 5, 1999, the OAL wrote to counsel giving one month for Ms. Hayes to decide whether she wanted to continue with her case. Specifically, a letter from the OAL dated January 6, 1999 provides:

> With respect to *Hayes*, Mr. Feintuch will ascertain from his client whether she wishes to pursue her right to a hearing. If so, I shall schedule this matter for a hearing at the next available date. If not, Mr. Feintuch will send a letter stating that Ms. Hayes is withdrawing her request for a hearing before the Commissioner of Education. In the event that I do not receive a response by February 2, 1999, I shall dismiss her appeal for lack of prosecution.

N.J.A.C. 1:1-14.14(a) authorizes an administrative law judge to dismiss a case or take other appropriate case-related action "[f]or unreasonable failure to comply with any order of a judge[.]" It has now been two weeks since the February 2, 1999 deadline for Ms. Hayes to advise the OAL whether she still wants a hearing.

Order

It is **ORDERED** that the appeal of Callie Hayes is hereby dismissed for lack of prosecution.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Feb. 16, 1999
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

2/19/99
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 22 1999
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

al

OAL DKT. NO. EDU 5136-97
AGENCY DKT. NO. 414-9/96

CALLIE HAYES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon his independent and careful review of the record in this matter, the Commissioner is in accord with the conclusion of the Administrative Law Judge that this matter is properly dismissed for lack of prosecution as a consequence of petitioner's failure to comply with an order of the court directing her to confirm the status of her appeal.

Accordingly, the initial decision of the OAL is affirmed for the reasons stated therein and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 31, 1999
Date of Mailing, March 31, 1999

102-99 E

A.B., on behalf of minor child, S.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

April 7, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDU 336-99

AGENCY DKT. NO. 17-1/99

A.B. ON BEHALF OF MINOR CHILD,

S.B.,

Petitioner,

v.

BOARD OF EDUCATION OF THE

TOWNSHIP OF DEPTFORD,

GLOUCESTER COUNTY,

Respondent.

A.B., petitioner, *pro se*

Raymond J. Zane, Esq., for respondent (Zane & Lozuke, attorneys)

BEFORE **JOSEPH LAVERY,** ALJ:

THE MOTION

In a case challenging the expulsion of her fourteen-year-old son, **S.B.**, on November 19, 1998, without subsequent educational services, his mother, **petitioner, A.B.**, seeks emergency relief. She asks (a) that, at a minimum, immediate home instruction or other alternative schooling

be provided her son, and (b) that her son be referred for evaluation and classification under the Individuals with Disabilities Education Act (IDEA), 20 *U.S.C.* §1400, *et seq.*

Respondent, the Board of Education, Deptford Township, contests the motion.

Today's order denies petitioner's emergent motion.

ANALYSIS

Petitioner's argument:

Petitioner contends that, following an altercation which occurred on October 19, 1998, Monday, her son, S.B., was improperly expelled from school on November 17, 1998, as will be demonstrated in subsequent plenary hearing. However, in the meantime, S.B. is without education, and she asks that this be provided him immediately.

Ms. A.B. argues that, despite a long history of discipline (Exh. R-12), including fifteen suspensions, S.B. was not referred for evaluation and classification under the IDEA. In her view, this aberrant history of conduct on its face would require such a response by the school district. Additionally, Ms. A.B. stated that, before the incident prompting expulsion, she had informed at least four teachers that her son was suffering from attention deficit disorder, and that he was taking medicines which would affect his behavior. She did this at every parent-teacher conference, and in any instance when she was told by a teacher that her son was responsible for disruption. Ms. A.B. recalled that she repeatedly recommended referral for evaluation under the IDEA.

Petitioner therefore now demands that her son be provided with some instruction, whether through homebound teaching, or in alternative school. She also asks that S.B. be evaluated for possible special education.

Board's argument:

The Board responds that S.B.'s record of discipline and, most recently, his violent behavior in an ongoing brawl involving both a student and at least three teachers, warranted the expulsion. In support of its position, it supplies statements which it is prepared to confirm through testimony at full hearing (Exhs. R-2 through R-11). It maintains that expulsion, as a matter of law, leaves the Board of Education without any additional obligation to S.B. or his mother.

The Board observed further that the only indication of record that S.B. had any medical problem whatever requiring referral under the IDEA should have been found in the registration card provided to Mrs. A.B. when her son entered the school district (Exh. R-13). On that card, it was specifically asked that any health problems be indicated. The Board notes that petitioner's only asserted difficulty was: "wears contacts." Consequently, on the existing record, the motion for emergent relief on that account should be denied.

CONCLUSION OF LAW

The Test for emergent relief:

A motion for emergent relief is governed by the standards set forth at *N.J.A.C.* 6:24-1.5, which incorporates by reference the standards of our Supreme Court set forth in *Crowe v. DeGioia*, 90 *N.J.* 126, 132-34 (1982).[1] This case held: (1) that an order should not issue except to prevent irreparable harm, (2) that the order should not issue where a legal right is unsettled, (3) that an order should not issue where material facts are controverted, and (4) that the relative hardship to be visited on the parties by the grant or denial of relief should be considered.

[1] This tribunal at hearing proposed that "likelihood of success" was an element of the test. This was plain error. That requirement obtains only under *N.J.A.C.* 1:1-12.6(f)3, which contemplates an unavoidable *ex parte* circumstance not present here.

Application of the Law:

The request for immediate instruction for S.B.:

Adhering to the standards of *Crowe v. DeGioia, supra, first*, it must be concluded that petitioner will not suffer irreparable harm, because compensatory education can be provided should S.B. be successful in this appeal. *Secondly*, the law is not unsettled with respect to the authority of a school district to conclusively expel a student. *K.O.H. on behalf of his daughter, R.H. v. Bd. of Educ., Twp. of Edison*, 95 *N.J.A.R.*2d (EDU) 275, aff'd State Bd. of Educ., 96 *N.J.A.R.*2d (EDU) 445. *Third*, the material facts here *are* controverted, at least with respect to the incident which prompted expulsion. *Fourth*, and finally, the relative hardships preponderate in favor of the school, in light of S.B.'s acknowledged history of discipline for fighting, insubordination, and disruption, and considering the adverse balance of possibility that such behavior could reoccur. The Board would be required to confront the risk involved for home teachers, or for S.B., in home instruction, or in an alternative school setting. The better resolution of the relative hardships is to expedite the plenary hearing, and if petitioner is successful, to assure that compensatory education is provided.

What informs today's ruling is the Board's power to conclusively expel, with further instruction of the offending student left to its reasonably exercised discretion, pursuant to the holding of *K.O.H., supra*. The standard under which this tribunal may review the exercise of such power is set forth in, among other decisions, *K.L. v. Bd. of Educ. of Matawan Aberdeen H.S. Dist.*, 91 *N.J.A.R.*2d (Vol. 4) 74, 76 (Education). There, it was held that the discretionary action of a local school board may not be upset unless patently arbitrary, without rational basis, or induced by improper motives. None of these proscribed elements can be found in the limited record available on motion. Whether a complete record will disclose them must abide full hearing.

The request for referral for evaluation and classification under the IDEA:

Petitioner's mother argues that S.B.'s discipline history and his conceded propensity to act-out should have alerted the school to a need for referral for evaluation under the IDEA. The argument is not unreasonable, but cannot be examined here, for lack of jurisdiction.

If jurisdiction to consider petitioner's IDEA complaints exist, it first must be conferred by the Commissioner of Education, who alone has authority under that law to do so. Petitioner must separately seek her remedy through application to the **State Director of Office of Special Education Programs.** ***N.J.A.C.*** **6A:14-2.7.** If petitioner chooses to pursue IDEA jurisdiction, and is successful, and the appeal is forwarded by the Commissioner of Education for hearing, the parties should make that known on the present record, so that the two proceedings may go forward together. Otherwise, only the expulsion for reasons of discipline will be held at issue here, and plenary hearing on the merits of expulsion will not address IDEA demands.

ORDER

I ORDER therefore that the interim relief sought by petitioner be, and hereby is, **DENIED**.

I ORDER further that petitioner's appeal on the merits be **scheduled on an expedited basis.**

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

March 10, 1999

DATE

JOSEPH LAVERY, ALJ

DOCUMENTS IN EVIDENCE

For petitioner:

None

For respondent:

R-1 Letter to petitioner from respondent, dated October 27, 1998

R-2 Report of John Schilling, dated October 19, 1998

R-3 Report of Nicholas Yates, dated October 19, 1998

R-4 Report of Mary Ann Brown, dated October 20, 1998

R-5 Report of Gwendolyn A. Mills (undated)

R-6 Report of Debbie Shoemaker (undated)

R-7 Report of Karen G. Wick regarding incident of October 19, 1998

R-8 Memorandum to Donald Pallies from Graham Hall, dated October 20, 1998

R-9 Report of Dave Vignola, dated October 20, 1998

R-10 Memorandum to Donald W. Pallies from Peggy Whitman, dated October 20, 1998

R-11 Report of Jan Crick, dated October 20, 1998

R-12 History of discipline

R-13 Registration Card

R-14 Memorandum to petitioner's attorney from Donald W. Pallies, dated February 18, 1999

OAL DKT. NO. EDU 336-99
AGENCY DKT. NO. 17-1/99

A.B., on behalf of minor child, S.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

The record of this matter, which included an audiotape of the hearing conducted at the Office of Administrative Law (OAL), along with the initial decision and order of the Administrative Law Judge (ALJ) denying emergent relief, has been reviewed.[1] Pursuant to *N.J.S.A.* 18A:4-34, the hearing of the matter has been delegated to the Assistant Commissioner.

Upon his independent and careful review of the record, the Assistant Commissioner determines to reverse the decision of the ALJ finding, instead, that, under the circumstances existing herein, petitioner has satisfied the requisite standards for the granting of emergent relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), *i.e.*, the existence of irreparable harm absent the requested relief, settled legal principles governing the right to relief in the controversy, a reasonable probability of ultimate success on the merits, and a balancing of

[1]It is noted that, by letter dated March 16, 1999, the ALJ advised that Exhibit R-14 was misidentified in his decision and should be corrected to read "Memorandum to respondent's attorney from Donald W. Pallies, dated February 18, 1999."

the relative hardships to the parties favoring the grant of temporary relief pending the outcome of a final hearing.[2]

Initially, the Assistant Commissioner concludes that, contrary to the finding of the ALJ, irreparable harm has been demonstrated in this matter in that S.B., a 14-year-old child, has been and continues to be without benefit of educational services of any kind since November 17, 1998. No amount of "compensatory education" provided subsequent to the conclusion of this case on its merits would allow him to maintain the continuity of his educational program and satisfy credit year curriculum requirements. As to a balancing of the hardship to the parties in granting or denying emergent relief, the Assistant Commissioner finds that the interests of S.B. in receiving educational services through home instruction outweigh any inconvenience the Board may experience by providing such services, which may be delivered in a manner tailored to eliminate any possibility of compromising the safety of teaching staff members, during the pendency of this matter. Finally, as was correctly recognized by the ALJ, there is an underlying issue in this matter which the Commissioner does not have jurisdiction to hear. Specifically, petitioner's claim that, pursuant to the Individuals with Disabilities Act (IDEA), S.B.'s discipline history and his conceded propensity to act-out should have alerted the Board to a need for referral for a child study team evaluation to see whether this condition in any way mandated discipline of this student under the protections accorded to classified students under IDEA, is a determination which falls under the jurisdictional purview of the Office of Special Education Programs. As a prior resolution of this special education issue is essential to the Assistant Commissioner's determination on the merits of the question properly before him

[2] Notwithstanding the ALJ's footnote discussion on page 3 of his decision herein, it is observed that the *Crowe* standard, under which the Commissioner is required to decide emergent applications, requires a demonstration of each of these conditions in order to grant such relief.

herein, *i.e.*, the reasonableness of the Board's determination to expel S.B., this case will be transferred to the Office of Special Education Programs for its consideration of that question. Under these circumstances, the Assistant Commissioner concludes that petitioner has shown, to his satisfaction, a reasonable probability of success on the merits sufficient to satisfy the intendment of *Crowe*.

Accordingly, the recommended order of the OAL is reversed and petitioner's application for emergent relief is granted. The record of this matter will be transferred to the Division of Special Education for such proceedings as are necessary to hear and determine the IDEA issue raised herein. The Assistant Commissioner directs that the hearing on the merits of the reasonableness of the Board's expulsion of S.B. shall be held in abeyance until a determination on the underlying IDEA claim has been achieved. The Board is hereby ordered to immediately begin providing home-based instructional services to S.B., which shall continue throughout the pendency of this dispute.[3]

IT IS SO ORDERED.

ASSISTANT COMMISSIONER

April 7, 1999
Date of Mailing, April 7, 1999

[3] This decision, as the Commissioner's final determination in this interim matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

104-99

F.B., on behalf of minor child, M.K.G.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CUMBERL AND REGIONAL SCHOOL DISTRICT, CUMBERLAND COUNTY,

RESPONDENT,

AND

BOARD OF EDUCATION OF THE CUMBERLAND REGIONAL SCHOOL DISTRICT, CUMBERLAND COUNTY,

PETITIONER,

V.

F.B. AND A.R.G., custodial parents of minor child, M.K.G.,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning aunt challenged Board's residency determination.

ALJ concluded that pursuant to *N.J.S.A.* 18A:38-1, petitioner failed to prove by a preponderance of reliable evidence that her niece, M.K.G., was entitled to attend the Board's school for the 1996-97 school year free of charge as she was domiciled outside the Board's jurisdiction. ALJ dismissed the petition for failure of petitioner to attend the proceeding; ALJ affirmed the Board's cross claim for tuition. ALJ ordered F.B. and A.R.G., M.K.G.'s mother, to reimburse the Board for M.K.G.'s tuition for the 1996-97 school year in the amount of $7,155.

Commissioner adopted findings and determination in initial decision as his own with modification. Commissioner determined that petitioner failed to prove entitlement to free education pursuant to *N.J.S.A* 18A:38-1b(1), the affidavit student provision. Commissioner ordered the *resident*, F.B., not A.R.G., M.K.G.'s mother, to pay the Board the tuition due.

April 8, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6007-97

AGENCY REF. NO. 124-4/97

F.B., ON BEHALF OF MINOR CHILD, M.K.G.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CUMBERLAND REGIONAL SCHOOL DISTRICT, CUMBERLAND COUNTY,

Respondent,

AND

BOARD OF EDUCATION OF THE CUMBERLAND REGIONAL SCHOOL DISTRICT, CUMBERLAND COUNTY,

Petitioner,

v.

F.B. AND A.R.G., CUSTODIAL PARENTS OF MINOR CHILD, M.K.G.,

Respondents.

F.B., petitioner-respondent, *pro se*

No appearance by or for A.R.G., respondent

Samuel J. Serata, Esq., for respondent and petitioner on the Counterclaim-Crossclaim

Record Closed: January 8, 1999 Decided: February 11, 1999

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, F.B., appeals from a determination of the Board of Education of the Cumberland Regional School District (Board) to require that the tuition for M.K.G.'s attendance at its school for the 1996-97 school year be paid. The Board alleges, among other things, that M.K.G. was not a *bone fide* resident of its school district for 1996-97 school year and seeks tuition and other costs in its Counterclaim against F.B. and Crossclaim against A.R.G., the custodial parent of minor child M.K.G.

The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The hearing was scheduled to open at 9:00 a.m. on January 8, 1999, at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City, New Jersey. Neither petitioner F.B. nor respondent A.R.G. appeared at the appointed time. This tribunal delayed the opening of the record for forty-five minutes or until 9:45 a.m. The hearing record was closed on January 8, 1999.

Subsequently, petitioner F.B. arrived at the OAL at 10:45 a.m. believing that the matter was to commence at 10:00 a.m. This tribunal advised petitioner to review the Notice of Plenary Hearing issued to her, dated July 16, 1998, which clearly stated that the matter was to commence at 9:00 a.m. on January 8, 1999, at the Atlantic City OAL. Petitioner reviewed the Notice of Plenary Hearing and acknowledged that the matter was scheduled to be heard commencing at 9:00 a.m. Petitioner was advised that this tribunal conducted an *ex parte* hearing in petitioner's absence and with no notice that petitioner contemplated being late for the hearing, pursuant to *N.J.A.C.* 1:1-14.6(p).

Petitioner, F.B. failed to respond to the Board's counterclaim and respondent A.R.G. failed to respond to the Board's Crossclaim. Respondent A.R.G. did not appear at the hearing.

MOTION

Upon the opening of the record with respect to petitioner F.B.'s failure to respond to the Board's Crossclaim and her failure to appear at the hearing, the Board propounded an oral Motion to Dismiss F.G.'s Petition of Appeal. Having heard the Board's arguments *ex parte*, the Motion to Dismiss F.B.'s Petition of Appeal was granted.

FINDING OF FACT

The following recital constitutes my **FINDINGS OF FACT** in this matter.

The Board advanced its Motion of Crossclaim against A.R.G., the custodial parent of the minor child, M.K.G. In its Answer to F.B.'s Petition of Appeal and its Counterclaim-Crossclaim for tuition. The Board set forth four separate defenses together with its Counterclaim-Crossclaim and, says, in part, that F.B. is the aunt of M.K.G., a pupil attending the Board's High School at the time of the petition.

The Board was advised that on April 9, 1996, a fire destroyed a mobile home in which M.K.G. lived with her mother, A.R.G., within the school district. The fire occurred during the 1995-96 school year. M.K.G. was permitted to complete the 1995-96 school year at the Board's High School.

The Board asserts that its investigation of the circumstances of M.K.G.'s attendance at its High School and, based upon its investigation, it determined that M.K.G. was not entitled to a free education as provided by *N.J.S.A.* 18A:38-1, because F.B. was not the legal guardian of M.K.G. The Board also determined that M.K.G. was in receipt of support from her mother and

custodial parent, A.R.G., a resident of the City of Bridgeton, Cumberland County, New Jersey, which is not a constituent municipality of the Board's school district.

The Board offered a copy of a Complaint in a Civil Action in the Superior Court of New Jersey, Chancery Division, Family Part, Cumberland County, bearing Docket No. FD-06-001578-97, filed March 24, 1997, in which F.B. is the plaintiff and A.R.G. is the defendant. The Complaint was offered to the Board to show that F.B. was seeking to transfer custody of M.K.G. to F.B., her aunt, for the reason that "[A.R.G.] is transferring custody of [M.K.G.] to [F.B.] because their house burned and [A.R.G.] doesn't want to change [M.K.G.'s] school this late in the school year." (R-1, p.3).

Prior to the filing of the Complaint in Superior Court, A.R.G. had been in receipt of a letter, dated March 19, 1997, addressed to the mother's Bridgeton address, advising her that the Board had determined on March 13, 1997, that her daughter, M.K.G., was not entitled to a free education in the Board's school. The letter, signed by the Board's Superintendent of Schools, advised A.R.G., that M.K.G. could attend the Board's school until April 9, 1997. It is this letter, among other things, which prompted the Complaint in Superior Court. The Board contends that no Order of the Court transferring custody of M.K.G. from A.R.G. to F.B. had been provided to it. The Board alleges that F.B. and A.R.G. filed false and fraudulent affidavits and other supporting documents with the Board.

In her Civil Action Complaint to transfer custody of M.K.G. from her mother, A.R.G. to F.B., F.B. states the reason for the transfer as follows:

> [A] is transferring custody of [M] to [F] because their house burned and [A] doesn't want to change [M's] school this late in the year.
> (R-1, p. 5)

The Board maintains that notwithstanding the transfer of custody, M.K.G.'s parents still supported her and that F.B. did not support M.K.G. ". . . gratis as if [s]he were [F.B.'s] own child . . . ." *N.J.S.A.* 18A:38-1(b). The Board contends that F.G.'s affidavit to the contrary is false and fraudulent.

There being no proofs to the contrary, I **FIND** the Board's proofs to be credible.

On February 11, 1997, Louise Dillion, Secretary to the Superintendent of Schools placed a handwritten note on a Correction Form concerning M K.G.'s parents where the note states that:

> 2-11-97 [A.G.] called re: phone call from Hicke.[1] She admits she and her husband are residing at 11 Wiley St., Bridgeton & [M] lives w/[F.B.] at 16 Waldon Drive because husband has a drinking problem and mother doesn't want her exposed to problem and husband going through counseling. No custody papers on file.
> (R-1, p. 23).

On February 13, 1997, F.B. executed a sworn Affidavit of Support of Student by Non-Parent Resident where, among other things, F.B. stated that she was supporting M.K.G. as of May 1, 1996 and that F.B. received:

> . . . no payment or contributions either in money or in lodging, food, clothing, medical insurance/expenses, recreation or any other things or service of value in connection with the support, maintenance, and education of the child named above. The gratuitous support of the child named above shall continue throughout the entire calendar year and not merely through the school term or year. (R-1, p.21)

F.B. stated on the Affidavit that her address is 16 Walden Drive, Bridgeton, New Jersey. Prior thereto, on April 29, 1996, F.B. executed a handwritten note where she stated that M.K.G.'s parents resided with F.B. at the Bridgeton address.

CONCLUSIONS

The New Jersey Supreme Court established the criteria for residence for school purposes in *Mansfield Township Board of Education v. State Board of Education,* 101 *N.J.L.* 474, 129 *A.* 765 (1925) where it held:

[1] Konrad Hicke was the Assistant Principal in charge of discipline at the High School during the 1996-97 school year.

> A child, in law, can have no residence of its own, and can only lawfully acquire one when it has been emancipated. It's residence under school law follows that of its parents or guardian or other person having legal control of it.

As was further stated by the our Supreme Court in *State v. Garford Trucking, Inc.* 4 *N.J.* 346 (1950):

> . . . "Domicile" and "residence" are not convertible terms, although they are sometimes used interchangeably in legislative expressions. *Id.* 353.

The Court has defined "domicile" as:

> . . . the relation which the law creates between an individual and a particular locality or country. In a strict legal sense, the domicile of a person is the place where he has his true, fixed permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning, and from which he has no present intention of moving (citation omitted). It is the place with which he has a settled connection for certain legal purposes, either because his home is there or because that place is assigned to him by law . . . *Kurilla v. Roth,* 132 *N.J.L.* 213, 215 (Sup. Ct. 1944).

Given all of the facts set forth above and having considered the legal standards which provide for a free public education under *N.J.S.A.* 18A:38-1, I **CONCLUDE** that petitioner has failed to prove, by a preponderance of the reliable evidence, that her niece is or was entitled to attend the Board's school for the 1996-97 school year. The facts have clearly demonstrated that M.K.G. resided and was domiciled outside of the Board's jurisdiction and, therefore, not entitled to attend the Board's school tuition free.

Having concluded that petitioner's Petition of Appeal is dismissed for her failure to attend the herein proceedings and to set forth her claim on the hearing record, I now **CONCLUDE** that the Board's Crossclaim for tuition is hereby affirmed. The Board's proofs clearly demonstrate that petitioner's niece, M.K.G., resided and was domiciled outside of the Board's school district during the 1996-97 school year.

ORDER

Accordingly, it is **ORDERED** that F.B.'s Petition of Appeal is hereby **DISMISSED**. It is **FURTHER ORDERED** that F.B. and A.R.G. are obligated and responsible to reimburse the Board for M.K.G.'s tuition for the 1996-97 school year, in the amount of $7,155, as set forth by the New Jersey Department of Education and pursuant to *N.J.A.C.* 6:20-3.1.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

11 February 1999
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 23 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

FOR PETITIONER:

None

FOR RESPONDENT:

Konrad Hicke

DOCUMENTS IN EVIDENCE

FOR PETITIONER:

None

FOR RESPONDENT:

R-1 Letter, 12/9/98 (with attachment)

R-2 RE: Mattie Gibbons (26 pages)

OAL DKT. NO. EDU 6007-97
AGENCY DKT. NO. 124-4/97

F.B., on behalf of minor child, M.K.G.,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CUMBERL AND REGIONAL SCHOOL DISTRICT, CUMBERLAND COUNTY,	:	
RESPONDENT,	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
BOARD OF EDUCATION OF THE CUMBERLAND REGIONAL SCHOOL DISTRICT, CUMBERLAND COUNTY,	:	
PETITIONER,	:	
V.	:	
F.B. AND A.R.G., custodial parents of minor child, M.K.G.,	:	
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions.

Upon careful and independent review of the record in this matter, the Commissioner determines that petitioner has failed to carry her burden of proving, by a

preponderance of credible evidence, that M.K.G. was entitled to a free education in the Board's District, pursuant to *N.J.S.A.* 18A:38-1b(1), affidavit student provision.[1]

Accordingly, the Commissioner determines to affirm the initial decision of the Administrative Law Judge, with modification as set forth herein.[2] Petitioner is hereby ordered to reimburse the Board the amount of $7,155 for M.K.G.'s tuition for the 1996-97 school year. The Commissioner declines, however, to assess A.R.G., M.K.G.'s mother, with tuition due and owing, inasmuch as the enabling statute, *N.J.S.A.* 18A:38-1b(1) authorizes him to assess *the resident*, F.B., with tuition, if he determines that the evidence does not support her claims, but neither the statute nor the equities in this particular matter warrant such assessment against A.R.G.[3]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION.

[1] The affidavit student provision establishes a "test," or list of criteria, which a resident must satisfy in order to demonstrate that the student residing with F.B. is entitled to a free education in the District. Thus, it was petitioner's burden to demonstrate that M.K.G. "is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child ***." *N.J.S.A.* 18A:38-1b(1). The statute further requires that the domiciliary provide the local board of education, if so required by the board, with (1) a sworn statement that she is domiciled within the district and is supporting the child *gratis and* will assume all personal obligations for the child relative to school requirements *and* that she intends to keep and support the child gratuitously for a longer period of time than merely through the school term; (2) a copy of the lease, if a tenant, or a sworn statement by her landlord acknowledging tenancy if residing as an attendant without a lease; and (3) a sworn statement by the child's parent or guardian that such parent/guardian is not capable of supporting or providing care for the child due to family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. *N.J.S.A* 18A:38-1b(1). Further, "[t]he statement shall be accompanied by documentation to support the validity of the sworn statements ***." (*Id.*)

[2] To the extent that the initial decision may be read to suggest that this matter should be analyzed as a domicile case under *N.J.S.A.* 18A:38-1a (see initial decision at p. 6), the Commissioner herein clarifies that this matter is properly analyzed under *N.J.S.A.* 18A:38-1b(1).

[3] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

105-99

IN THE MATTER OF THE TENURE	:	
HEARING OF KEVIN TAYLOR,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF NORTH	:	DECISION
BERGEN, HUDSON COUNTY.	:	
_____	:	

April 8, 1999

AGENCY DOCKET NO. 32-3/99

IN THE MATTER OF THE TENURE	:	
HEARING OF KEVIN TAYLOR,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF NORTH	:	DECISION
BERGEN, HUDSON COUNTY.	:	
	:	

For the Board: Joseph J. Ryglicki, Esq.

This matter having been opened before the Commissioner of Education on March 1, 1999 through the certification of tenure charges of chronic absenteeism and other just cause by the Board of Education of North Bergen against respondent, a tenured custodian; and

Respondent, having been served, via hand delivery, the Board's resolution, the tenure charges and the Certificate of Determination on February 25, 1999, and

The Commissioner having directed respondent, via both certified and regular mail on March 2, 1999, to file an Answer to the tenure charges against him; and

Whereas, such communication clearly provided respondent notice that, pursuant to *P.L.* 1998, *c.* 42, effective July 1, 1998, an individual against whom tenure charges are certified "*shall have 15 days to submit a written response to the charges to the commissioner,*" and that failure to answer within the prescribed period will, absent granting of an extension for good cause shown, result in the charges being deemed admitted and the Commissioner deciding the matter on summary judgment pursuant to *N.J.A.C.* 6:24-1.4(e); and

In that no reply has been received from respondent in response to the Board's charges, each count of the charges against respondent is deemed to be admitted; and

The Commissioner's review of the tenure charges certified against respondent by the Board and the statement of evidence in support of those charges indicate that respondent has a pattern of persistent chronic absenteeism in that he has been absent a total of 80.5 days related to sick leave since the 1995-1996 school year, notwithstanding the Board's efforts to bring about improvement of respondent's attendance through such measures as verbal and written warnings and withholding of salary; and

Deeming such charges to be admitted, and noting that respondent has not replied to the specific allegations contained therein, the Commissioner finds that respondent's actions constitute excessive absenteeism, warranting his dismissal from his tenured custodian position; now, therefore

IT IS SO ORDERED this 8th day of April 1999 that summary judgment shall be granted to the Board, and Kevin Taylor shall be dismissed from his tenured position as a custodian in the Board's employ as of the date of this order.*

COMMISSIONER OF EDUCATION

April 8, 1999
Date of Mailing, April 8, 1999

*This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties..

106-99

ROBERT PLATT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 8, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11496-97

AGENCY DKT. NO. 437-11/97

ROBERT PLATT,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

Respondent.

Alan S. Porwich, Esq., for Petitioner
(Feintuch, Porwich & Feintuch, attorneys)

Charlotte Kitler, Esq., for Respondent

Record Closed: February 10, 1999 Decided: February 19, 1999

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the New Jersey Department of Education on December 9, 1997, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

Settlement discussions were held and a settlement was reached.

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

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

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

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

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

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

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

February 19, 1999
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

2/25/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 25 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

jb

FEINTUCH, PORWICH & FEINTUCH
26 Journal Square
Jersey City, New Jersey 07306
(201) 656-8600
Attorneys for Petitioner

ROBERT PLATT Petitioner vs. STATE OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, COUNTY OF HUDSON Respondent	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY Agency Ref. No. 437-11/97 OAL DKT NO. EDUOR-11496-97N CONSENT ORDER

THIS MATTER having been brought before the Office of Administrative Law by Feintuch, Porwich & Feintuch, attorneys for petitioner, and Charlotte Kitler, Esq., attorney for respondent, consenting hereto, and it appearing that the Division of Workers' Compensation has ruled on the length of petitioner's temporary disability in Robert Platt vs. Jersey City Board of Education, C.P. No. 97-035464, and for good cause being shown,

IT IS on this 17 day of February, 1999,

ORDERED that Respondent shall restore all Petitioner's sick days deducted from Petitioner's sick leave bank from September 4, 1997 through September 3, 1998.

Maria M La Fiandra

MARIA MANCINI LA FIANDRA, A.L.J.

WE HEREBY CONSENT TO THE FORM AND ENTRY OF THE WITHIN ORDER.

FEINTUCH, PORWICH & FEINTUCH
Attorneys for Petitioner

By: _____
ALAN S. PORWICH
DATED: ~~January~~ 2/9/99, 1999

_____
CHARLOTTE KITLER, ESQ.
Attorney for Respondent
DATED: January , 1999

CONSENT AS TO FORM; NO OBJECTION AS TO ENTRY BASED ON ORDER OF JUDGE OF WORKERS' COMPENSATION DATED December 23, 1998 (copy attached hereto):

Charlotte K.

CHARLOTTE KITLER
Attorney for Respondent
Dated: 2/5/99

AMADEO & MILLER
1767 Kennedy Boulevard
Jersey City, New Jersey 07305
(201) 433-8510
Attorneys for Petitioner

Petitioner	:	NEW JERSEY DEPARTMENT
	:	OF LABOR AND INDUSTRY
Robert C. Platt	:	
	:	DIVISION OF WORKERS'
vs.	:	COMPENSATION
Respondent	:	Claim Petition No: 97-035464
	:	
Jersey City Board of Educ.	:	ORDER

This matter having been opened to the Court by Michael F. Miller, Attorney for the Petitioner, appearing and the Attorney for the Respondent-Employer appearing; and there being no objections thereto and good cause having been shown;

IT IS on this 23rd day of December, 1998;

ORDERED as follows:

1. That the Petitioner is entitled to temporary disability benefits from Sept 2, 1997 to Sept 9, 1998 or 53 weeks at $ 496.00 per week, ~~and that the Respondent will continue to pay the petitioner temporary disability benefits~~ in accordance with N.J.S.A. 34:15-1, et seq.; K.C.

2. Furthermore, that the Respondent will pay the following medical bills: NONE AT THIS TIME. K.C.

RECEIVED
MAR 16 1998
WORKERS' COMPENSATION
JERSEY CITY, NJ 07306

3. That the respondent will provide medical treatment for the petitioner into the future as long as is necessary to relieve and cure his condition.

R.C. 4. North Jersey Reporting Service
Stenographic fees: $280.00
Payable by Respondent:

Louis J. Camisa
LOUIS J. CAMISA
JUDGE OF COMPENSATION

RECEIVED
MAR 16 1998
WORKERS' COMPENSATION
JERSEY CITY, NJ 07306

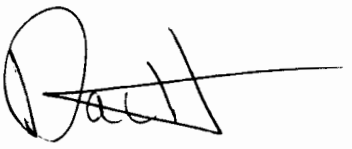
2d

OAL DKT. NO. EDU 11496-97
AGENCY DKT. NO. 437-11/97

ROBERT PLATT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

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



COMMISSIONER OF EDUCATION

April 8, 1999
Date of Mailing, April 8, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

IN THE MATTER OF THE TENURE	:	
HEARING OF SANDRA CONNORS,	:	
SCHOOL DISTRICT OF THE CITY	:	COMMISSIONER OF EDUCATION
OF CAMDEN, CAMDEN COUNTY.	:	DECISION
_____	:	

April 8, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 04936-97S

AGENCY DKT. NO. 166-5/97

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,

Petitioner,

v.

SANDRA CONNERS,

Respondent.

Karen A. Murray, Esq., for petitioner (Murray, Murray and Corrigan, attorneys)

Arnold M. Mellk, Esq., for respondent (Wills, O'Neill and Mellk, attorneys)

Record Closed: February 24, 1999 Decided: February 26, 1999

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from a filing of tenure charges by the Board of Education of the City of Camden, Camden County, ("petitioner") with the Commissioner of Education on May 22, 1997, against Sandra Conners ("respondent"), seeking to remove her tenure based upon allegations contained in a statement of charges and evidence. The matter was transmitted to the Office of Administrative Law on July 1, 1997, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached Settlement Agreement indicating the terms of settlement. In addition, counsel for the petitioner submitted a letter, dated February 23, 1999, clarifying Paragraph IV of the Settlement Agreement, which is attached hereto.

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

1. The parties have voluntarily agreed to the settlement on the record.

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

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

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

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

February 26, 1999
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

March 1, 1999
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 2 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm
Attachments

MURRAY, MURRAY & CORRIGAN
COUNSELLORS AT LAW
25 SYCAMORE AVENUE
LITTLE SILVER, NJ 07739
(732) 747-2300

FAX NO. (732) 758-8095
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PARKADE BUILDING
519 FEDERAL STREET
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CAMDEN, NJ 08103
(609) 338-1113
FAX (609) 757-0196

ROBERT EMMET MURRAY•
KAREN A. MURRAY••
DAVID F. CORRIGAN

LINDA SABAT•
VALERIE J. DION△
YVONNE D. CATLEY△
WILLIAM R. HORWITZ•
NORMAN R. JIMERSON△△
LAWRENCE M. FOX•
JOAN M. DAMORA
LAURA ELRASHEDY

• MEMBER OF N.Y. BAR
•• MEMBER D.C. & N.Y. BARS
△ MEMBER OF PA. BAR
△△ MEMBER OF N.Y. BAR ONLY

February 23, 1999

Via Fax & Regular Mail
Hon. Jeff S. Masin, A.L.J.
Office of Administrative Law
9 Quakerbridge Plaza
P.O. Box 049
Trenton, New Jersey 08625-0049

Re: Camden Board of Education and Sandra Conners
OAL Docket No. EDU-04936-97S; Agency Docket No. 166-5/97
Our File No. 27,446R

Dear Judge Masin:

This letter is written to clarify Paragraph IV of the Settlement Agreement in the above-referenced case. After a full investigation of the relevant facts and potential violations in this case, the Board found no fraudulent actions had been committed by Ms. Conners in connection with the incident in question. Rather, several Board policies and procedures had either been improperly followed or not followed in the first instance. It is these several violations and/or omissions of Board policies and procedures for which Ms. Conners will be given a reprimand.

Thank you for your consideration in this matter.

Respectfully yours,

MURRAY, MURRAY & CORRIGAN

KAREN A. MURRAY

KAM:ks
cc: Dr. Roy J. Dawson, Jr., Superintendent
Leon Freeman, Bus. Admin./Bd. Sec.
Linnell Wright, Director of Personnel
Arnold M. Mellk, Esq.

MURRAY, MURRAY & CORRIGAN
25 Sycamore Avenue
Little Silver, NJ 07739
(732) 747-2300
Attorney for Petitioner, Camden Board of Education

IN THE MATTER OF THE TENURE HEARING OF SANDRA AND CONNERS, CAMDEN BOARD OF EDUCATION, CITY OF CAMDEN .	**OFFICE OF ADMINISTRATIVE LAW** **AGENCY REF NO. 166-5/97** **OAL DOCKET NO. 4936-97S** **SETTLEMENT AGREEMENT**

INTRODUCTION

Counsel for the Camden Board of Education (hereinafter "Board") and counsel for its tenured employee Sandra Conners join in moving for an order finding that the following Settlement Agreement between the parties meets the requirement of N.J.A.C. 1:1-19.1, recommending that the attached Settlement Agreement be adopted by the Commissioner of Education, and ordering on condition that the Commissioner approves the Settlement Agreement without modification, that the Settlement Agreement be implemented and the tenure charges filed by the Board, be withdrawn and this matter be dismissed.

SETTLEMENT AGREEMENT IN THE ACTION PENDING BEFORE THE COMMISSIONER OF EDUCATION

This Settlement Agreement is entered into by and between the Board and Ms. Conners.

I. STATEMENT OF INTENT

On May 22, 1997, the Board filed tenure charges against Ms. Conners with the Commissioner of Education captioned In the Matter of the Tenure Hearing of Sandra M. Conners, Board of Education, City of Camden, Camden County, OAL Docket No. EDUTH 04936-97S, Agency Ref. No. 166-5/97; and

WHEREAS this Agreement is the end product of settlement negotiations conducted by the parties and is intended to fully and finally depose of the issue in controversy as based upon the mutual understanding set forth below;

II. DISMISSAL OF TENURE CHARGES

The Board shall withdraw the pending tenure case against Ms. Conners. The Board shall take all necessary actions to notify the Clerk of the Office of the Administrative Law and the Administrative Law Judge Jeff S. Masin that it is withdrawing the tenure charges.

III. CONTINUATION OF ACTIVE EMPLOYMENT

It is agreed that Ms. Conners shall continue to be employed by the Board consistent with her certification and the tenure laws as an elementary school teacher at the salary and increment level to which she would have been assigned had the tenure charges not been brought against her with all benefits and emoluments. Ms. Conners shall be reimbursed back pay, with standard and ordinary deductions, for the 120 days suspension served pursuant to the tenure charge. She shall be considered as reinstated to the payroll as of September 17, 1997, with all benefits and emoluments accruing as of that date. It being further agreed that Ms. Conners shall reserve the

right to review health insurance premiums payments on her behalf to ascertain whether she pa for insurance coverage for any period for which it was not received, and where appropriate request adjustment. It being further agreed that should there be any unused sick and/or personal days accumulated by Ms. Conners during the 1996/97 school year, prorated in view of the 120 day suspension, they shall accrue to the extent permitted by Board policy.

IV. LETTER OF REPRIMAND

It is agreed that the Board shall issue a letter of reprimand to Ms. Conners in connection with the allegations which are the subject of the tenure charges, and such reprimand shall be placed in Ms. Conners' personnel file. It is further agreed that Ms. Conners shall be permitted to submit a response to that letter and that response shall be placed in her personnel file. The aforesaid letter of reprimand is to be sent to Ms. Conners with a copy to her attorney herein.

V. AGREEMENT MAY NOT BE USED AS EVIDENCE IN ANY SUBSEQUENT PROCEEDING

The Board and Ms. Conners agree that this Agreement shall not be used as evidence in any subsequent proceeding should the Commissioner not approve the terms and conditions agreed hereto by the parties.

VI. VOLUNTARINESS OF AGREEMENT

The signatories to this Agreement certify that they have read the terms of this Agreement, that they have had the opportunity to discuss the terms with their respective attorneys, are satisfied with the services of their respective attorneys in connection therewith, and that they understand the terms of this Agreement and its effects. The signatories to this Agreement acknowledge further that they are executing it of their own volition, with full understanding of its terms and effects, and with the intention of releasing all claims herein for consideration which

acknowledge is adequate and satisfactory to them. The signatories to this Agreement further acknowledge that they have not received any representations concerning its terms and effects other than those contained herein. The signatories to this Agreement acknowledge that they enter into it with a full understanding of their rights.

VII. ENTIRE AGREEMENT

This Agreement represents the full and entire agreement between the Board and Ms. Conners. It can only be modified by a written agreement between the parties. It is binding upon the Board and its officers, agents, servants and employees as well as their successors and assigns. It is binding upon Ms. Conners as well as her heirs, executors and administrators.

VIII. BINDING AGREEMENT

Intending to be legally bound hereby, the Board and Ms. Conners execute the foregoing Agreement.

FOR THE CAMDEN BOARD OF EDUCATION

By: Karen Murray
Karen A. Murray, Esq.
Attorney for the Petitioner

Date: 1/8/98

FOR SANDRA CONNERS:

By: _____
Arnold M. Mellk, Esq.
Attorney for Respondent

Date: 1/6/98

Sandra Conners

Date: Jan. 6, 1998

OAL DKT. NO. EDU 4936-97
AGENCY DKT. NO. 166-5/97

IN THE MATTER OF THE TENURE	:	
HEARING OF SANDRA CONNORS,	:	
SCHOOL DISTRICT OF THE CITY	:	COMMISSIONER OF EDUCATION
OF CAMDEN, CAMDEN COUNTY.	:	DECISION
	:	

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

Upon thorough review of the record, in particular the clarification to Paragraph IV of the settlement forwarded to the Administrative Law Judge (ALJ) on February 23, 1999 by Board Counsel and memorialized in the initial decision, the Commissioner is compelled to express his strong reservations about accepting a settlement of this tenure matter, given the serious allegations set forth in Count One of the tenure charges certified by the Board and the statement of evidence in support of those charges submitted to him by the Board in May 1997. However, he must give due consideration to the Board's February 23, 1999 letter of clarification to the ALJ which states

> ***After a full investigation of the relevant facts and potential violations in this case, the Board found no fraudulent actions had been committed by Ms. Conners in connection with the incident in question. Rather, several Board policies and procedures had either been improperly followed or not followed in the first instance. It is these several violations and/or omissions of Board policies and procedures for which Ms. Conners will be given a reprimand.

Upon consideration of this clarification stipulated by the Board, together with the record of this matter, the Commissioner is at a loss to understand why the Board did not engage in a full investigation of the relevant facts *prior* to the filing of the tenure charges and emphasizes to this Board and all others that a failure to investigate fully alleged serious misconduct of an employee *before* the filing and certification of tenure charges can result, as is apparently the case herein, in a board's inability to prosecute fully the charges it certifies to the Commissioner. Such a failure, of course, carries the major consequence of needless expenditure of large amounts of taxpayer money, to say nothing of the potential impact on the personal and professional reputation of the person who has been charged with serious misconduct.

Nonetheless, given the factual circumstances as set forth in the record of this matter, the Commissioner is compelled to conclude at this point in the adjudication of the instant matter, that it is in the public interest to approve the settlement (*In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board of Education April 6, 1983, 1990 *S.L.D.* 842, 846).

Accordingly, the matter is hereby dismissed, subject to the parties' compliance with the terms of the settlement.*

COMMISSIONER OF EDUCATION

April 8, 1999
Date of Mailing, April 8, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

108-99

E.M. AND J.M., on behalf of minor child, K.G.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners, guardians of K.G., a citizen of Poland, contested the Board's determination that K.G. was not entitled to a free public education in the District.

ALJ concluded that petitioners supported K.G. *gratis* as if she were their own child; that they intended to keep and support her beyond merely the school term; that K.G.'s father was not capable of supporting her due to family or economic hardship; that K.G. was not residing in the District solely for the purpose of obtaining a free public education; and that K.G. was entitled to a free public education while residing with petitioners. ALJ ordered that petitioners be granted relief in the form of a free public education for the period of time that K.G. was residing with petitioners and that the portion of the petition requesting admission to public school be dismissed as moot due to K.G.'s return to Poland.

Citing *Gunderson*, Commissioner adopted findings and determination in initial decision as his own. Commissioner denied award of attorney fees as that relief is not within the Commissioner's scope of authority. (*Balsley*)

April 9, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9186-97
AGENCY DKT. NO. 300-8/97

E.M. ON BEHALF OF MINOR CHILD, K.G.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,
Respondent.

Paul J. Lader, Esq., for petitioner
(Rakoski & Ross, P.C. attorney)

Eric Bernstein, Esq., for respondent
(Mauro, Savo, Camerino & Grant, attorney)

Record Closed: June 30 , 1998 Decided: February 11, 1999*

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

This matter comes as a petition by E.M. & J.M. on behalf of K.G., a minor, originally filed on September 3, 1997 and an amended petition filed on September 17, 1997. The posture of the case at the conclusion leaves open only the question of whether petitioners must reimburse the respondent district for the tuition of K.G. who was living in their home and attending school in Boonton High School where the respondent has a sending receiving relationship.

On September 16, 1997 the matter was transmitted to the Office of

Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

Although originally scheduled to be heard by another ALJ, the matter was transferred to the undersigned for hearing on May 27 and 28, 1998. At the conclusion the hearing record remained open for post-hearing submissions by the parties until June 30, 1998. *The 45 day period to issue an initial decision was extended by several Orders of extension the last of which made the date upon which the decision was due February 11, 1999.

This case consists of a large number of facts which are not in dispute and as a result will be set out first for clarity.

UNCONTESTED FACTS

1. K.G., a minor, was a citizen of Poland during the pertinent time frame of this case.

2. E.M. and J.M., husband and wife, are residents of the Borough of Lincoln Park and are not related to K.G.

3. K.G. arrived in the United States in June 1997 to stay with EM and J.M.

4. Upon K.G.'s arrival, EM. And J.M. sought her enrollment in Boonton High School with which the respondent has a sending receiving relationship.

5. At the time they sought K.G.'s enrollment they presented the district with a notarized statement from H.T.G., K.G's father (P-1Ev.) as well as an affidavit from E.M. and J.M. (P-2Ev.).

6. The statement submitted from K.G.'s father states that he , as her father, does "pass over guardian of my daughter to E.M. ... for a time of my daughter (sic) stay in United States which is June 1997 till (sic) September 1998."

7. E.M. and J.M.'s affidavit stated that they are friends of K.G. who arrived at their home at the request of her parent and that they assume all personal obligation for the child and intend to support her

"indefinitely."

8. Based upon the information reviewed by the respondent and with advice of counsel, they determined that she was not entitled to a free public education. It is from this determination that petitioners appealed.

9. During the pendency of the matter K.G. was enrolled and attended Boonton High School.

10. The cost to Lincoln Park to send a student to Boonton High School is approximately $9,400 per annum.

11. No further affidavit was supplied to the Board of Education as to any special circumstances or family hardship until less than five days before the hearing which began on May 27, 1998.

12. K.G. had at all times pertinent only one visa which was a temporary visitor's visa which expired on December 12, 1997. No other visa or change in status was ever sought by or for K.G.

13. As of the time of the hearing K.G. had scheduled her return to her family in Poland for June 5, 1997, thus meaning she would not finish classes for the school year at issue.

As these facts are uncontroverted I **FIND** these to constitute **FACTS** in this case.

TESTIMONY

The testimony set out herein is that which deals with both the stated reasons for K.G.'s presence in the home of E.M. and J.M. as well as the timing of when these things were made known to the respondent Board of Education.

Having heard the testimony in this case and having had the opportunity to observe the demeanor of the witnesses and having reviewed the documentary evidence in this case I **FIND** the following recitation along with the **UNCONTESTED FACTS** above to constitute the **FACTS** in this case.

E.M. testified that she and her husband J.M. had lived in Lincoln Park since

December 1995. They have a twenty two-year-old son who does not reside with them and did not attend the schools. They were friends of K.G.'s father in Lublin, Poland. K.G.'s mother had also been a friend but she died in approximately 1990 of cancer when K.G. was eleven. This was the first year when E.M. and her family were in the United States. She, K.G.'s mother and father were all physicists in Lublin. Their children were all raised together. K.G. also has an older brother, P.G. who remains in Poland.

E.M. saw K.G. about a year after her mother's death. She characterized K.G. as being like a scared rabbit. It was now her responsibility to take care of her father and brother who is an insulin dependent diabetic. The family had to get by on half the income they previously would take in and K.G.'s father was making only the equivalent of $300 monthly with most of the money going for the injections that P.G. needed. She stated That K.G.'s needs were considered last. She was enrolled in school in Poland and was an average student.

E.M. stated that she felt K.G. had many problems and that she discussed with K.G's father numerous times the idea of K.G. staying with her family. She felt this would be better for K.G. and the family could give her things which she could not have in Poland such as clothing, fruit, books and they could take her places. She stated that when K.G. was sixteen her father finally agreed and they initially planned to have her stay as long as K.G. would like.

E.M. received the sworn statement from T.G. (P-1Ev.) She states that she never discussed the dates with him and has no idea why he used June 1997 to September 1998. After K.G.'s arrival they never discussed the dates either. She states that if K.G. had wanted to go home she could have or had she wished to stay she could remain as long as she liked. She turned this over to the Board of Education as well as an affidavit from herself and her husband so that K.G. could attend school.

When K.G. arrived in June 1997 she had only one piece of carry on size

luggage and very little clothing or possessions. E.M. and her husband took on full responsibility for K.G.'s well being and bought her clothing, books and other necessities and were never reimbursed by K.G.'s father. (P-3(a) to (q) Ev.)

During the hearing E.M. stated that although the original plan had been for K.G. to remain indefinitely as far as she and her husband were concerned, K.G. was returning to Poland on June 5, 1998 due to her brother's health problems. She states that this decision was made in the spring, however, up until the winter the plan was for the situation to remain the same for at least two years. K.G. was nearly eighteen and could get a part time job to help her father care for her brother. She acknowledged that school did not end until June 17, 1998 and that they are aware that she will not complete the grade by only a few days.

E.M. also acknowledged that even with the statement from K.G.'s father saying he would "pass over guardianship" to her it was her father that could make decisions until K.G. was eighteen. She continued to consult with him.

At no time did E.M. ever provide the respondent with further information as to K.G.'s stay nor did E.M. seek to revise or amend her affidavit P-2. At no time did E.M. and her husband seek a custody order from any court with respect to K.G. She acknowledges that there was at least a six-month period between the decision to have K.G. come and the attempt to enroll her.

K.G. also testified at the hearing as to the reasons for her coming to stay with E.M. and J.M. At the time of the hearing she was seventeen and stated that her brother was twenty-three. Her mother died when K.G. was eleven years old and her father never remarried. After her mother's death she took care of her brother and did all the cleaning and washing as well as going to school. When her mother was alive the family had her income as well. After her death her father worked all the time and there was not enough money. What money there was went for her brother's health and medical care. She never could have new clothing or shoes or do things with friends. She was not doing well in school. In

December 1996 her father spoke with E.M. and J.M. when they came to Poland for a visit. She was very excited about coming and did not know for how long she would be here. She never discussed this with her father or E.M. or J.M. The only thing she discussed with E.M. and her husband was that if she wanted to stay she could or if she wanted to go back she would be able to.

She came in June 1997 and liked it here although was a bit homesick at times. E.M. and J.M. paid for everything and her father never sent her any money. She stated that she learned about one month prior to the hearing that her brother's condition had worsened and told them she wants to go back. If not for the decline in P.G.'s health she would not go back on June 5, 1998. She will get a job and try to help her father and care for her brother.

K.G. acknowledged that she was here on a temporary tourist visa. She never sought to extend it because she was a minor. Her father did not seek to extend it. She never showed the visa to anyone at Boonton High School or anyone at the Lincoln Park Board of Education. The visa was from June 13, 1997 to December 12, 1997.

An affidavit of T.G. was provided during the hearing dated April 22, 1998. This had only been turned over in discovery less than the five days required prior to the hearing and was objected to by respondent. Because of the relevance to the proceeding the affidavit was allowed in over the objection of respondent with respondent preserving the right to argue the timeliness of the submission as to the overall question presented. (P-4 Ev.)

LEGAL DISCUSSION

The only questions presented at this posture of the case is whether or not E.M. and J.M. are liable to the respondent for the amount of tuition expended on the education of K.G. while she resided with them and attended High School or

whether K.G. was entitled to a free education. The pertinent statute is *N.J.S.A.* 18A:38-1(b) which provides that a free education shall be provided to:

> "Any person kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and will support the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time period than merely through the school term... and upon filing of a sworn statement of the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. *N.J.A.C.*18A38-1(b)1

In this case there is substantial testimony as to the family situation of K.G. Although there was no sworn statement from her father at the time of application indicating family or economic hardship the facts in this case support that there was indeed an economic and family hardship based on her brother's condition and the resources available to the family. There is no question that based upon what the district had at the time of application they appropriately concluded that K.G. did not meet the statutory criteria. It was at this time that E.M. took the appeal.

The question then becomes whether the failure to bring forward proof of the claim of hardship by way of affidavit until the time of the hearing is fatal to E.M.'s claim. It is upon the unique facts and circumstances in any particular case that a decision must be made. The hearing process provides E.M. and J.M. the ability to establish all of the components of *N.J.S.A.*18A:38-1(b). This includes testimony and affidavits. No one piece of proof as to any underlying fact is necessarily dispositive but all are to be considered and appropriately weighed.

Respondent argues that K.G. was not entitled to a free education based upon her visa status during the time she was with E.M. This argument is predicated on the fact that when K.G. entered the United States she had a tourist

visa which later expired on December 12, 1998. At no time did K.G., E.M. and J.M., or K.G.'s father seek to extend the visa or to change the visa classification. As a result respondent argues that K.G. is not entitled to a free public education.

The fact that K.G. was not an illegal alien but only had a valid visa only for part of the time does not result in her denial of a free public education. Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act in 1996, P.L. 104-208, which prevents a non immigrant in the United States on a visa from receiving a free public education. 8 *U.S.C.A.*§1184(1). However, K.G. does not fall under the coverage of the Act. The Act states that an alien may not be accorded status under 8 U.S.C.A.§11`1(a)(15)(F) to pursue a course of study at a public secondary school unless the alien reimburses the local school district for tuition. ***Id*** at §1184(1). However, K.G. is not an alien who has been accorded status under 8 *U.S.C.A.* §1101(a)(15)(F). This deals only with situation where aliens may not be accorded "nonimmigrant" status in order to pursue a course of study at public expense.

Section 1101(a)(15) defines an "immigrant" as used within the Act as every alien except an individual who falls within one of the classes of non immigrants as listed within the section. Part (F) includes the following category of "non immigrant":

> (I)an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing a course of study consistent with section 1184(1) of this title at an established college, university, seminary, conservatory academic high school, elementary school, or other academic institution or in a language training programming the United States, particularly designated by him and approved by the Attorney General after consultation with the Secretary of Education, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn, and (ii) the alien spouse and minor children of any such alien if accompanying him or following to join him;

[8*U.S.C.A.*§1101(a)(15)(F)]

The pertinent question is whether there has been a finding that K.G. entered the country solely for the purpose of attending public school. In this case based solely on the particular and sensitive facts found attendance at a public school was not the purpose for K.G. coming to live with E.M. The testimony was credible as to the motivating factor of K.G.'s family situation. E.M. took her in and offered her a home. Although there was no medical documentation as to P.G.'s condition or specific expenses that arise as a result, the testimony credibly portrayed a hardship which is appropriately recognized in the statute.

Respondent also argues that the fact that K.G. planned to leave about two weeks before the end of the academic term also supports a conclusion that K.G. was here for a limited term of duration and not an indefinite stay. There is no indication that her intent, or that of E.M. and her husband, was to keep her only for the one year other than the wording of the original statement from the father which gave finite dates. While the respondents position on this issue was correct when they made their determination, the facts found in this proceeding support conclusively that the intent was for the stay to be indefinite for so long as she was comfortable with the family. Circumstances changed this plan and to say a departure prior to the end of the school year show other intent is no more persuasive than saying a departure after the school term and beyond the one year period would show the same intent. This factor can only be properly weighed when weighed in conjunction with the other facts in this case.

Nothing in this decision should be read to minimize in any way the necessity of providing the necessary information for the school board to review at the time of the application. It is entirely possible that this entire matter might have been avoided by providing the necessary documentation and supporting proof at the time required by the statute for the Board the review. Although there were reasons indicated as to why certain items were not provided somewhere between the time of the initial application and the hearing it would seem that further proof,

whether by affidavit or conference with counsel and E.M. as well as K.G. might have helped. While there is no obligation to do so perhaps a more practical approach by future petitioners and counsel might be able to effectuate a resolution acceptable to the parties rather than merely waiting for the hearing date.

CONCLUSION

Based upon the unique circumstances in this case as presented during the hearing:

I **CONCLUDE** that K.G. was supported gratis by E.M. gratis as if their own child and that they intended to keep and support her beyond merely the school term.

I further **CONCLUDE** that K.G.'s father was not capable of supporting K.G. due to family or economic hardship.

I also **CONCLUDE** that K.G. was not residing in Lincoln Park solely for the purpose of obtaining a free public education.

As a result I **CONCLUDE** that K.G. was entitled to a free public education while residing with E.M. and J.M.

ORDER

It is hereby **ORDERED** that petitioner be granted relief in the form of a free public education for the period of time that K.G. was residing with E.M. and J.M.

Additionally it is **ORDERED** that the portion of the petition requesting admission to public school is dismissed as moot due to K.G.'s scheduled departure.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE**

DEPARTMENT OF EDUCATION for consideration.

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

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

2/11/99
DATE

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

Feb 23, 1999
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 25 1999
DATE

Barbara A Harner
OFFICE OF ADMINISTRATIVE LAW

MXL

APPENDIX

Witnesses

For Petitioner:

E.M.
K.G.

For Respondent:

John Farr

Evidence:

For Petitioner

P-1 Statement from T.G. dated May 26, 1997

P-2 Affidavit of E.M. and J.M. dated May 27, 1997

P-3 (a-q) Copies of receipts

P-4 Affidavit of T.G. dated April 22, 1998

For respondent:

R-1 Letter from Alexander Ross to Eric Bernstein dated June 16, 1997

R-2 Letter from Alexander Ross to Eric Bernstein dated July 9, 1997

R-3 Copy of letter dated Aug. 14, 1997 and attached petition

R-4 Copy of Visa

R-5 Copy of U.S. Department of State March 1997 Legal Requirements for F-1 foreign students in public schools

R-6 Copy of acknowledge of receipt of petition

OAL DKT. NO. EDU 9186-97
AGENCY DKT. NO. 300-8/97

E.M. AND J.M., on behalf of minor child, K.G.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of petitioners were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Petitioners fully support the Administrative Law Judge's (ALJ) finding that K.G. was entitled to a free public education in the District, excepting solely to the ALJ's failure to award attorney fees which she specifically requested in her Amended Petition filed in this case. Petitioners aver that although fees of counsel in the within matter easily exceed $15,000, "***as a gesture of good faith to the Board of Education, and in order to promptly resolve this matter for settlement purposes[, they are] prepared to accept the sum of $2,500 by way of legal fees in this matter so as to put an end to this unpleasant episode[,]" and requests the Commissioner to award such fees. (Petitioners' Exceptions at p. 2)

Upon careful review and consideration of the entire record in this matter, the Commissioner affirms the conclusion of the ALJ that K.G. was entitled to a free public education, financed by the Board, during the period of time she resided with E.M. and J.M, as the surrounding facts and circumstances existing here indicate to his satisfaction that petitioners have met the

underlying requirements of *N.J.S.A.* 18A:38-1b. (See *Gunderson v. City of Brigantine Board of Education*, 95 *N.J.A.R.* 2d (EDU) 39 (1994), aff'd State Board, 95 *N.J.A.R.* 2d (EDU) 132.) In reaching his determination, the Commissioner specifically notes that it was unnecessary to reach to the ALJ's analysis of this matter vis-à-vis the Illegal Immigration Reform and Immigrant Responsibility Act (Initial Decision at pp. 7-9), as K.G.'s visa status is purely an immigration issue and is of no moment whatsoever when considering her eligibility for a free public education pursuant to *N.J.S.A.* 18A:38-1.

With respect to petitioners' exceptions wherein they are seeking attorney fees in this matter, the Commissioner observes that it is long-established that, notwithstanding that the Commissioner of Education "has fundamental and indispensable jurisdiction over all disputes and controversies arising under the school laws[,] *N.J.S.A.* 18A:6-9," (*Hinfey v. Matawan Regional Board of Education*, 77 *N.J.* 514, 525 (1978)), he does not have plenary authority to award counsel fees to a successful complainant in an education controversy. (See *Balsley v. North Hunterdon Board of Education*, 117 *N.J.* 434, 442-43 (1990).) (Also see *State, Department of Environmental Protection v. Ventron Corp.*, 94 *N.J.* 473 (1983).) As such, the additional relief sought in petitioners' Amended Petition cannot be granted as a matter of law, as an award of attorney fees or costs of suit is not within the Commissioner's scope of authority.

Accordingly, the initial decision of the OAL, determining that K.G. was entitled to a free public education financed by the Borough of Lincoln Park during the period of time she resided with petitioners, is affirmed for the reasons set forth therein.[1]

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

April 9, 1999
Date of Mailing, April 9, 1999

[1] It is noted that the record confirms that K.G. returned to Poland on June 5, 1998.

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

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

April 12, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

APPROVING SETTLEMENT

OAL DKT. NO. EDU 733-98

AGENCY DKT. NO. 15-1/98

I/M/O TENURE CHARGES
AGAINST HOWARD MASSEY,

Philipp Duvilla, Esq., for petitioner

Michael Damm, Esq., for respondent (Selikoff & Cohen, attorneys)

Record Closed: February 22, 1999 Decided: February 24, 1999

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

Petitioner Board of Education of the Borough of Paulsboro (BOE) brought charges against respondent Howard Massey, a tenured teacher in the BOE's school system, and respondent denied the BOE's allegations and demanded dismissal of the charges. The parties have entered into the attached settlement agreement.

PROCEDURAL HISTORY

On January 20, 1998, the BOE's tenure charges and supporting documents were filed with the Department of Education. N.J.S.A. 18A:6-9. On January 30, 1998, the respondent's answer and defenses were so filed. The Department transmitted the matter to the Office of Administrative Law (OAL), where, on February 11, 1998, it was filed as a contested case. N.J.S.A. 18A:6-11, N.J.S.A. 52:14B-2(b). On April 16, 1998, the case was assigned to me and I sent out a letter scheduling discovery, etc. On June 15, 1998, the attorneys and I conferred and they advised me that they were engaged in settlement negotiations. A hearing was scheduled, but by letter received August 4, 1998, the BOE's attorney, represented that BOE witnesses were unavailable, requested that it be adjourned. On September 16, 1998, the attorneys advised me that settlement negotiations continued. The hearing was rescheduled to begin January 27, 1999; but, on the record closed date, the OAL received the "Joint Request for Approval of Settlement Providing for Dismissal of Tenure Charges" and "Settlement Agreement . . ." J-1, J-1A.

FINDINGS OF FACT

Since 1966, the BOE has continuously employed respondent as a teaching staff member. In 1997, the BOE certified the tenure charges, alleging grading discrepancies and charging conduct unbecoming a teacher. As stated in the procedural history above, the respondent's answers and defenses to the tenure charges were filed and, in his answer and defenses, he alleged racial discrimination. Respondent also filed a complaint with the New Jersey Division of Civil Rights and filed a complaint with the U.S. Equal Employment Opportunity Commission, alleging racial discrimination. The BOE filed answers and defenses to these complaints. See J-1, J-1A.

The parties were interested in amicably resolving their claims and defenses in all cases. The BOE investigated the matter and determined that it probably could not meet its burden of proof of the tenure charges against the respondent. The parties voluntarily, intelligently and lawfully entered into a settlement agreement. Pursuant to the settlement agreement, conditioned upon approval by the Commissioner of the Department of Education, actions will be taken, including the following: The parties will release, waive, etc., all charges, claims, etc., that they

may have against one another. The tenure charges and other charges, claims, etc., that the parties may have against one another will be dismissed. The BOE will continue to employee respondent (who has not been suspended and who has remained an active member of the BOE's teaching staff) until July 1, 1999 and respondent, who has represented that he suffers from health problems and that he intends to retire at the end of the 1998-99 school year, will submit his resignation, effective July 1, 1999. See J-1, J-1A.

Given respondent's 32 years of employment, his contributions to youth of the BOE's district and given the settlement agreement's efficient resolution of the parties' differences, avoiding expense of further litigation, the settlement is in the interest of the public. Given respondent's intention to retire, the settlement agreement is in his interest. See J-1, J-1A.

CONCLUSIONS OF LAW

The settlement agreement, voluntarily, intelligently and lawfully entered into by the parties, is consistent with relevant facts and law, is in the public interest and fully and lawfully disposes of all issues in controversy. The settlement agreement should be and is approved.

ORDER

I **ORDER** the parties to comply with the settlement agreement and **ORDER** that these proceedings be ended.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is

otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

Feb 24, 1999
DATE

JOHN R. TASSINI, ALJ

Receipt Acknowledged:

2/25/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 26 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

EDU 733-98

1998 FEB 22 P 12:33

IN THE MATTER OF THE TENURE HEARING OF HOWARD MASSEY, SCHOOL DISTRICT OF THE BOROUGH OF PAULSBORO, COUNTY OF GLOUCESTER, STATE OF NEW JERSEY

BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY

DOCKET NO. 15-1/98

JOINT REQUEST FOR APPROVAL OF SETTLEMENT PROVIDING FOR DISMISSAL OF TENURE CHARGES

INTRODUCTION

Counsel for the Board of Education of the School District of the Borough of Paulsboro ("Board") and counsel for its tenured employee Howard Massey ("Massey") join in moving for an order finding that the Settlement Agreement between the parties, attached hereto as Exhibit A, meets the requirements of N.J.A.C. 1:1-19.1, recommending that the Settlement Agreement be adopted by the Commissioner of Education, and ordering on condition that the Commissioner approves the Settlement Agreement without modification, that the Settlement Agreement be implemented and the tenure charges filed by the Board be dismissed with prejudice.

PROCEDURAL STATEMENT

This matter arises out of tenure charges against a tenured teaching staff member on grounds of unbecoming conduct due to alleged grading discrepancies. The tenure charges were transmitted to the Department of Education on or about January 30, 1998, and to the Office of Administrative Law (OAL) on or about February , 1998.

EDU 733-98
J-1

The parties have agreed under the terms of the Settlement Agreement attached hereto as Exhibit A that the tenure charges will be dismissed. Inasmuch as Massey, a 32 year teaching staff member (date of birth 9/1/37), has not been suspended from his teaching position in connection with this matter, he will continue in that teaching position consistent with his certification as a computer keyboarding instructor at the salary grade/step to which he is entitled under the most recently negotiated collective bargaining agreement or any subsequently ratified agreements with the understanding, however, that Massey will tender his resignation and retire at the end of the 1998/1999 school year effective July 1, 1999.

The parties have further agreed under the terms of the Settlement Agreement attached hereto as Exhibit A, that conditioned upon the Commissioner's approval of the Settlement Agreement without modification, the tenure charges against Massey shall be dismissed with prejudice. Furthermore, should the Commissioner fail to approve the Settlement Agreement attached hereto as Exhibit A without modification, the parties have agreed to make every reasonable effort to reform their Settlement Agreement to meet his objections.

THE BOARD'S REASONS FOR SEEKING DISMISSAL OF TENURE CHARGES

The Board makes the following representations:

In or about December, 1997, the Board certified tenure charges of unbecoming conduct against Howard Massey, a teaching staff member of some thirty-two (32) years in the employ of the Board,

alleging, inter alia, discrepancies in Massey's grading policies during the 1996-97 school year.

The Board instituted the tenure charges against Massey based upon initial information received from others concerning his grading policy. However, as a result of additional information and documentation obtained through discovery and in preparation for the hearing, including an evaluation of the expected testimony of witnesses, the Board has concluded that it cannot meet its burden of proof by a preponderance of the credible evidence. Based upon this, and as a result of its ongoing investigation, in particular with regard to the expected testimony of witnesses, the Board believes it cannot sustain the allegations. Furthermore, Massey was not suspended from employment upon certification of the tenure charges; rather, he has remained a member of the Board's teaching staff during the pendency of the tenure charges, and it is the Board's intention for Massey to continue in active employment through his retirement at the conclusion of the 1998-99 school year, the Board having, upon further review, concluded that the penalty of dismissal is not warranted. Finally, the Board has been made aware of Massey's stated health problems and intention to resign and retire at the end of the 1998-99 school year in any event.

The full investigation and assessment of the evidence that might be presented during the tenure hearing has provided the Board with the opportunity to explore means of resolving this dispute in a manner consonant with the public interest. In this connection,

the Board has taken into consideration that: Massey, for the most part, has maintained a commendable employment record over his long standing tenure of thirty-two (32) years; he has exhibited dedication and contribution to the youth of the Paulsboro community in the form of scholarships funded out of his own personal monies, and has been involved in activities and organizations promoting the betterment of youth. Accordingly, the Board has concluded that it is in the best interest of the public, including the students in the Paulsboro community, that Massey continue in his long standing position as a teaching staff member and computer keyboarding instructor for the Paulsboro Board of Education until his retirement on July 1, 1999.

Under the circumstances, the Board of Education has directed its counsel to dismiss the charges and request that the Commissioner of Education approve the dismissal.

CONCLUSION

The Settlement Agreement was negotiated between counsel based upon all the attendant facts and circumstances, some of which did not come to light until the tenure charges had been certified to the Commissioner of Education. Counsel, as well as Massey and the Board which approved it, are satisfied with the Settlement Agreement and believe that it fulfills the public interest with respect to these matters. For the reasons outlined above, and for good cause shown, this tribunal should conclude that the Settlement Agreement meets the requirements of N.J.A.C. 1:1-19.1, recommend that the Settlement Agreement be adopted without modification by

the Commissioner of Education, order that the Settlement Agreement be implemented on condition that it is so approved, and that upon such approval the tenure charges be dismissed with prejudice.

Respectfully submitted,

PHILIPP DUVILLA
Attorney for the
Paulsboro Board of Education

BY: _____ 2/12/19
PHILIPP DUVILLA

SELIKOFF & COHEN, P.A.
Attorneys for ~~Howard~~ Massey

BY: _____
MICHAEL C. DAMM

EXHIBIT "A"

SETTLEMENT AGREEMENT REGARDING TENURE CHARGES PENDING BEFORE THE COMMISSIONER OF EDUCATION AND OTHER MATTERS

This Settlement Agreement is entered into by and between the Borough of Paulsboro Board of Education ("Board") and its tenured employee Howard Massey ("Massey").

WHEREAS, Massey has been continuously employed by the Board as a teaching staff member since September 1966; and,

WHEREAS, on December 18, 1997, the Board certified tenure charges against Massey to the Commissioner of Education under the Tenure Employees Hearing Law alleging unbecoming conduct on account of alleged grading discrepancies, which charges were captioned:

IN THE MATTER OF THE TENURE HEARING OF HOWARD MASSEY, SCHOOL DISTRICT OF THE BOROUGH OF PAULSBORO, GLOUCESTER COUNTY

OAL DKT NO. 15-1/98
AGENCY REF. NO. EDUTH 00733-98S

AND, WHEREAS Massey filed an Answer contesting the tenure charges, and as set forth below had already asserted an affirmative defense in the form of a complaint of racial discrimination with the New Jersey Division on Civil Rights and the U.S. Equal Employment Opportunity Commission filed on July 9, 1997, on the same issue; and,

WHEREAS, the aforesaid tenure charges were assigned for hearing before Administrative Law Judge John R. Tassini; and,

WHEREAS, during the course of the continued investigation into the allegations made against Massey following the

J-1A

certification of the tenure charges to the Commissioner f Education, the Board concluded that in light of Massey's employment history spanning over 32 years, and the witnesses' expected testimony, it could not have sustained the allegations contained in its tenure charges, and it would be in the best interest of the Board and the students of the district for which it is responsible to continue Massey in his position and to continue to compensate him at the salary to which he is entitled under the collectively negotiated agreement or any recently negotiated agreement between the parties; and,

WHEREAS, on July 9, 1997, Massey filed verified complaints with the New Jersey Division on Civil Rights and the U.S. Equal Employment Opportunity Commission captioned:

HOWARD MASSEY v. PAULSBORO BOARD OF EDUCATION
DCR Docket No. EH14RE-43147
EEOC Docket No. 17E980264

alleging race discrimination in connection with, inter alia, the Board's policy toward him with respect to grading practices, and the Board having answered those allegations in or about January of 1998, denying those allegations; and Massey having subsequently in or about July of 1998 amended the charges of race discrimination to allege unlawful reprisal, and the Board having answered the amended charges in or about November of 1998; and in recognition that the charges as amended are presently pending before both agencies; and,

WHEREAS, the parties, neither of which admit liability wish to resolve their differences amicably, which both parties

believe is in the best interest of the Board, Massey, students and the Paulsboro community;

NOW THEREFORE, the matter in dispute having been amicably adjusted by and between the parties, it is hereby stipulated and agreed as follows, subject to and conditioned upon the approval of the Commissioner of Education:

1. The Board will seek the Commissioner's approval for this Settlement Agreement, and if the Commissioner approves the Settlement Agreement without modification, ask the Commissioner to allow the tenure charges against Massey to be dismissed, with prejudice;

2. Massey will cooperate with the Board in seeking the Commissioner's approval for this Settlement Agreement;

3. Should the Commissioner fail to approve this Settlement Agreement attached hereto as Exhibit A without modification, the parties have agreed to make every reasonable effort to reform this Settlement Agreement to meet any objections;

4. Provided the Commissioner approves of this agreement the Board shall continue to employ Massey in his current full time position consistent with his certification as a computer keyboarding instructor at his current salary grade/step to which he is entitled under the currently negotiated collective bargaining agreement or any subsequently negotiated agreement until his resignation by reason of retirement on July 1, 1999. Massey shall be entitled to receive the benefit of any newly ratified collective bargaining agreement which takes effect during that time.

5. Provided the Commissioner approves of this agreement, Massey agrees that he will resign and retire effective July 1, 1999. Massey realizes that the decision to resign from his employment position with the Board upon the Commissioner's approval of this agreement is irrevocable.

6. Provided the Commissioner approves of this agreement Massey agrees to dismiss with prejudice his verified complaints with the New Jersey Division on Civil Rights and the U.S. Equal Employment Opportunity Commission captioned:

HOWARD MASSEY v. PAULSBORO BOARD OF EDUCATION
DCR Docket No. EH14RE-43147
EEOC Docket No. 17E980264

7. Provided that the Commissioner approves this agreement, in consideration of the mutual covenants contained herein, Massey hereby remises, releases, acquits, satisfies, and forever discharges the Board its assigns, employees, agents and attorneys of all and from all actions, suits, debts, dues, sums of money, accounts, covenants, attorneys fees, expenses, controversies, agreements, promises, damages, judgments, claims and demands whatsoever, in law or in equity, which he has in connection with the matters entitled **HOWARD MASSEY v. PAULSBORO BOARD OF EDUCATION**, Docket No. EH14RE-43147 and Docket No. 17E980264.

8. Provided that the Commissioner approves this agreement, in consideration of the mutual covenants contained herein, the Board hereby remises, releases, acquits, satisfies, and forever discharges Massey his heirs, assigns, agents and attorneys of all and from all actions, suits, debts, dues, sums of money, accounts, covenants, attorneys fees, expenses, controversies, agreements, promises, damages, judgments, claims and demands

whatsoever, in law or in equity, which it may have in connection with the matters entitled **HOWARD MASSEY v. PAULSBORO BOARD OF EDUCATION**, Docket No. EH14RE-43147 and Docket No. 17E980264.

9. Massey and the Board have entered into this stipulation with a full understanding of their rights, recognizing that this stipulation and their agreement is subject to the review and approval of the Commissioner of Education.

10. The parties certify that they have had the opportunity to discuss this Settlement Agreement with counsel. They are fully satisfied with the services of their counsel with respect to both this Settlement Agreement and all other aspects of this case and they enter into this Settlement Agreement knowingly, willingly and without any coercion or improper inducements.

11. By signing this Settlement Agreement, each signatory represents that she or he is a party or has been duly authorized by a party to sign on that party's behalf.

12. The parties agree that this Settlement Agreement may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

Intending to be legally bound hereby, Massey and the Board execute the foregoing Settlement Agreement this 16 day of February, 1999.

WITNESS:

Michael C. Damm

HOWARD MASSEY

WITNESS:

BOARD SECRETARY

PAULSBORO BOARD OF EDUCATION,

Rita M. Kelly

BOARD PRESIDENT

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OAL DKT. NO. EDU 733-98
AGENCY DKT. NO. 15-1/98

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

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

Upon careful and independent review of the full record of this matter and the terms of the proposed settlement agreement, the Commissioner approves the settlement terms as they comport with the appropriate standards for setting aside tenure matters as expressed in *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board of Education April 6, 1983, 1990 *S.L.D.* 842, 846. He, therefore, adopts the settlement as the final decision in this matter, which is hereby dismissed, subject to the parties' compliance with the terms of the settlement.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

April 12, 1999
Date of Mailing, April 12, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

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F.P., on behalf of N.P. & S.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF POINT	:	DECISION
PLEASANT BEACH, OCEAN COUNTY,	:	
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning parent challenged Board's determination that he was not domiciled in Point Pleasant Beach.

ALJ concluded that pursuant to *N.J.S.A.* 18A:38-1(a), petitioner failed to prove by a preponderance of credible evidence that his sons, N.P. and S.P., were entitled to attend the Board's schools for the 1997-1998 school year free of charge as he was domiciled in Brick Township. ALJ ordered F.P. to pay the Board for his sons' tuition for the 1997-1998 school year in the amount of $37,338.16. ALJ further concluded that for the 1998-1999 school year, it is probable that petitioner and his sons are domiciled within Point Pleasant Beach and, therefore, are entitled to continue attending the Board's schools without charge for this school year. ALJ denied the Board's counterclaim for attorney's fees.

Commissioner adopted findings and determination in initial decision that petitioner failed to prove by a preponderance of the credible evidence that he was domiciled in Point Pleasant Beach for the 1997-1998 school year. However, Commissioner rejected the ALJ's conclusion that petitioner's domicile was Point Pleasant Beach for the 1998-1999 school year, finding that the record in this matter was not sufficiently developed to reach a conclusion that petitioner had changed his domicile back to Point Pleasant Beach for the 1998-1999 school year. The matter was, therefore, remanded to OAL for further proceedings to supplement the record on this issue and to calculate the amount of tuition owed for the 1998-1999 school year, in the event petitioner is not found, on remand, to be domiciled in Point Pleasant for the 1998-1999 school year. (*Cranford Bd. of Ed. v. A.McG. and L.McG.*) Moreover, because the record indicated that one of petitioner's sons is a special education student, Commissioner directed reexamination of the any tuition owed by petitioner for the 1997-1998 school year, as well as any monies which may be owing for 1998-1999 be calculated, taking into consideration what impact, if any, the FAPE provisions of IDEA may have on the amount of tuition owed to the Board by petitioner.

Commissioner adopted ALJ's order denying the Board attorney's fees and also denied Board's claim for interest.

April 13, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6951-98

AGENCY DKT. NO. 379-8/98

F.P., N.P. & S.P.,

Petitioners,

v.

POINT PLEASANT BEACH

BOARD OF EDUCATION,

Respondent.

Richard J. Kaplow, Esq., for petitioners

Seymour J. Kagan, Esq., for respondent (Berry, Kagan, Sahradnik, Kotzas & Riordan, attorneys)

Record Closed: February 4, 1999 Decided: February 24, 1999

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

Pursuant to N.J.S.A. 18A:38-1, respondent Board of Education (BOE) held a hearing and determined that petitioner F.P. and his children N.P. and S.P. were not "domiciled" within the BOE's school district, although they continued to attend the BOE's school. Consequently, the

BOE also decided that the children should be removed from the school and that F.P. should pay tuition for the children.

F.P. alleges that he and the children were domiciled in the district and claims that the BOE was and is required to provide his children with a free public education. The BOE submits that F.P. has not met his burden of proof and counterclaims for an order requiring F.P. to pay the tuition.

PROCEDURAL HISTORY

The petition recites that, on or about July 30, 1998, petitioner's attorney received written notice of the BOE's determinations and, on August 12, 1998, the petition and its accompanying exhibits were filed with the Department of Education. On August 19, 1998, the BOE's answer and counterclaim were so filed. N.J.S.A. 18A:6-9, 38-1. The Department transmitted the matter to the Office of Administrative Law (OAL), where, on August 27, 1998, it was received and filed as a contested case. N.J.S.A. 52:14B-2(b). With much difficulty, the hearing was scheduled and held on October 29, 1998; December 14, 1998; and January 7, 1999. At the parties' request, the record was closed with the submission of their written summations. In this decision initials identify parents and children to avoid embarrassment and resulting harm to the children.

FINDINGS OF FACT

F.P. is the father of five children. By P.M., to whom he was married from 1968 to 1992, F.P. is the father of K.P., born August 23, 1971, and F.P. Jr., born February 13, 1973. By K.W., to whom he was married from 1992 to 1995, F.P. is the father of S.P., born September 11, 1989, and N.P., born November 30, 1990. By C.M., to whom he has not been married, F.P. is the father of T.P., born May 8, 1998. C.M., by a man other than F.P., is also the mother of M.M., born October 17, 1981.

F.P. testified that, in 1991, he, F.P. Jr., K.W., S.P. and N.P. began to reside in a Cape Cod-type house located at 207 Curtis Avenue in Point Pleasant Beach, i.e., within the BOE's district. Title to the Point Pleasant Beach house is held by F.F., F.P.'s uncle, who also heads IDM, the business that employs F.P. There is no written lease, but F.P. testified that he is F.F.'s tenant.

During relevant times, S.P. and N.P. have attended the BOE's school. During the 1997-98 school year, S.P. was in the BOE's third grade, and for N.P., diagnosed as autistic and classified, the BOE provided special education services. During the 1998-99 school year, S.P. has been in the BOE's fourth grade, and for N.P., the BOE has again provided special education services. P-1.

Since at least 1994, F.P. has used the Point Pleasant Beach house as his address for records including his tax returns, records of Friends of Autistic Children, Inc. (of which F.P. is an officer), applications and certificates for engaging in environmental remediation, licenses and registrations for motor vehicle operation and ownership, insurance policies, motor vehicle lease and rental payments, utility payments for accounts in his name, and payment of New York State Thruway E-Z Pass commuter toll charges. See, e.g., P-10; P-11; P-12; P-16; P-17; P-19; P-20; P-21; P-22.

F.P. testified that in October 1995, he and K.W. were divorced; he received custody of their children and K.W. had weekend visitation. However, despite the divorce, in F.P.'s 1995 tax records he showed them as married.

F.P. testified that, in 1996, the nanny who had provided care for his children left. Thereafter, C.M. ended her employment in New York and began to provide care for F.P.'s children. In 1996 also, F.P. presented C.M. with an engagement ring and F.P., F.P. Jr., S.P., N.P., C.M. and M.M. resided in the Point Pleasant Beach house. Since the 1997-98 school year, M.M. has been a student in the BOE's high school. C.M. testified that she began an environmental consulting business with an office in Middletown, New Jersey, but her description of the business and the income derived from it was vague and incredible. Instead (as detailed

below), it is probable that, since 1996, F.P. has provided a substantial amount of C.M.'s income. See P-37; BOE-1.

In 1996, after C.M. and F.P. became engaged, C.M. contracted to have a house built at 139 Duchess Lane in Brick Township. The Brick house was to have four bedrooms and a two-car garage, i.e., it would be larger than the Point Pleasant Beach house and larger than that needed by only C.M. and M.M. On cross-examination, F.P. denied knowing why the Brick house was built larger than the Point Pleasant Beach house. However, F.P. and C.M. were engaged to be married; reasonably, they intended to be domiciled with their children; and, therefore, the Brick house was larger because they intended to be domiciled there. That is to say, in this and other testimony, F.P. was incredible.

C.M. testified that after completion of the Brick house there was a title problem, so title was not conveyed until 1997. She testified that, after furnishing and decorating, in the fall of 1997, she became domiciled there. However, she was indefinite and largely incredible about relevant dates in this regard.

F.P. testified that, beginning in 1997, on weekends he, S.P. and N.P. stayed overnight in the Brick house, but that on school nights, after dinner in the Brick house, he, S.P. and N.P. traveled to the Point Pleasant Beach house, where they spent the night. F.P. also called the following witnesses: Tracey Kaiserian testified that she provided occasional child care for N.P. in the Point Pleasant Beach house. Barry Hefferman testified that F.P. (for IDM) leases equipment from his (Hefferman's) company and that he observed F.P. in the Point Pleasant Beach house, which was decorated for Christmas. Vincent Mastria testified that he has been F.P.'s friend since childhood, he is also employed by IDM, and during Christmas 1996 and 1997 he observed F.P. and his children in the Point Pleasant Beach house. F.P. was indefinite and substantially incredible in his testimony and the above-described witnesses had only occasional opportunities to see F.P., S.P. and N.P.

The BOE's determination that, during the 1997-98 school year, the Brick house was F.P.'s, S.P.'s and N.P.'s domicile is supported by facts including the following:

In 1996 C.M. and F.P. were engaged to be married and sharing the same domicile in the Point Pleasant Beach house, and in 1997 they remained engaged and they knew she was pregnant with his child, so presumedly they intended to continue to share the same domicile.

By 1997 F.P. and C.M., S.P. and N.P. had their own rooms in the Brick house and S.P. and N.P. had their personality and toys there.

By 1997 F.P. had telephone service (two numbers) in his name established to the Brick house and K.W. testified that, during relevant times, often when she telephoned the Brick house she reached S.P. and N.P. there.

By 1997 C.M. was transporting S.P. and N.P. from school to the Brick house, and they and F.P. ate dinner in the Brick house. Reasonably, one would want to avoid the disruption of nightly transporting such young children from the home to which they go after school, where they eat dinner as a family unit and where they have their own rooms, etc., to another house.

Sandra Pasola, a neighbor across the street from the Point Pleasant Beach house and a credible witness, beginning about 1992, regularly saw F.P., S.P. and N.P. in the neighborhood. However, beginning in 1997 she saw F.P., S.P. and N.P. less frequently around the Point Pleasant Beach house. Also, she saw more young adults coming and going from the Point Pleasant Beach house. Also, as the BOE attendance secretary, when she telephoned the Point Pleasant Beach house to inquire about S.P.'s and N.P.'s absence from school, persons answering the telephone were unfamiliar with S.P. and N.P. and could not tell her why they were absent from school.

In 1997 S.P. told Maureen Pritchard, a teacher in the BOE's school system and a credible witness, about the "new" house in Brick with a special room for N.P. Also, F.P. told Celeste Burd, a special education case manager concerned about N.P.'s welfare and a

credible witness, that the family lived in both Point Pleasant Beach and Brick and that they might move from Point Pleasant Beach. Also, N.P.'s March 13, 1997 and April 16, 1997 Annual Review/Individualized Education Plan Conference reports, developed with input from F.P., state, "The [P.'s] live between two residences." P-1; BOE-4.

F.P. admitted that his work often required travel out of state, e.g., in 1997 he was away more than fifty days, and that when he was out of state S.P. and N.P. stayed overnight in the Brick house.

In F.P.'s Case Information Statements (CISs) prepared for his divorce case, he certified that he paid to C.M. $2,150 monthly for "housekeeper" services; $1,100 monthly for "rent"; and $583 monthly for a "special room" for N.P. See P-37; BOE-1. That is, F.P. contributed substantially (although indirectly) to the costs of maintenance of the Brick house.

During the late night or early morning of March 15, 1997, in the Point Pleasant Beach house, teenagers, including M.M., were engaging in excessive consumption of alcoholic beverages and the police arrived and arrested F.P. Jr.; F.P., S.P. and N.P. were not present.

From the spring until the fall of 1998, the heating system that served most of Point Pleasant Beach was out of service (due to water damage). Reasonably, a parent with young children in the house would have restored the heating service. (In 1998 F.P. was discharged as a bankrupt. However, he has a substantial income; since 1987 he has owned and garaged a Corvette; and he leased a 1998 Lincoln Town Car for $599 monthly. P-20.) The absence of heating service at the Point Pleasant Beach house during that period makes it more probable that the children were not domiciled there and that they were domiciled in the Brick house.

Finally, in F.P.'s December 23, 1997 CIS, he certified to the Family Part judge that he, S.P. and N.P. were residing in the Brick house, which he described as "a lovely home"

with a "special room" for N.P., a fenced-in yard, and other features beneficial to the children, and he certified that he paid a total of $1,683 monthly to live in that house. BOE-1.

That is to say, F.P. has not met his burden of proof that, during the 1997-98 school year, he, S.P. and N.P. were domiciled in the Point Pleasant house.

Based upon the BOE's superintendent's certification that S.P. and N.P. were not domiciled in the district, the BOE's attorney sent to F.P. and C.M. a letter, dated May 5, 1998, wherein he wrote the following:

> I represent the [BOE]. We have received information from a private investigator who indicates that your stated residence, namely 207 Curtis Avenue, Point Pleasant Beach, New Jersey is owned by another person and that [F.P.'s] mother resides there. Our private investigation further reveals that your address is 139 Duchess Lane, Brick, New Jersey 08724. It is our understanding that you have four children, [M.M., H., S.P. and N.P.], enrolled in the Point Pleasant Beach School District, falsely claiming your permanent domicile as 207 Curtis Avenue, Point Pleasant Beach, New Jersey when in fact the children's domicile is in Brick, New Jersey. The back tuition for [M.M.] is $6,537.38, [H.] $7,132.57. [S.P.] $7,132.57 and [N.P.] $22,927.53. Demand is made for the payment of the entirety of the aforesaid sums.
>
> Additionally, we demand that [M.M.], [H.], and [S.P.] terminate their enrollment in Point Pleasant Beach School District at the end of the school day, May 15, 1998 and that you should make arrangements to have the children transferred to the appropriate school district.
>
> With respect to [N.P.], inasmuch as he is a special education student, we will work with you for the placement in another school district. In the interim, you should pay for the normal tuition rate for [N.P.] until the transfer is secured.
>
> [P-36.]

During the spring of 1998, C.M. attended a BOE meeting relative to the issue of M.M.'s domicile. She testified that she was nervous during the meeting and mistakenly stated to the BOE

that, in 1996, she learned she was pregnant and moved to the Brick house. Based on her misstatement, the BOE billed her for M.M.'s tuition from 1996 forward. C.M. filed a petition with the Commissioner of Education and the case was transmitted to the OAL, where it was filed bearing docket number EDU 6703-98. However, as found above, C.M. learned she was pregnant in 1997 and, in October 1998, C.M. and the BOE settled with the agreement that, for M.M.'s out-of-district attendance during the 1997-98 and 1998-99 school years, C.M. would pay tuition to the BOE. (This allowed M.M. to complete high school in the BOE's school.) BOE-6.

F.P. retained an attorney who filed a petition on behalf of N.P. against the BOE. The Department of Education transmitted the case to the OAL, where it was filed bearing docket number EDS 4568-98 and scheduled for hearing on June 23, 1998. However, on that date, the BOE appeared and F.P. withdrew the petition.

On July 28, 1998, the BOE held a hearing relative to F.P.'s, S.P.'s and N.P.'s domicile. See N.J.S.A. 18A:38-1. F.P. and his attorney appeared and were afforded an opportunity to be heard and F.P. declined to testify. By way of the BOE's attorney's July 30, 1998 letter, he notified petitioners' attorney of the following: The BOE had determined that S.P. and N.P. were not domiciled in the district, that they would be transferred to the Brick school system. The BOE demanded tuition for the children's unauthorized out-of-district attendance in the BOE's school during the 1997-98 school year. If petitioners filed a (another) petition with the Commissioner, in addition to the tuition, the BOE would demand attorney's fees for the June 1998 appearance in the OAL and for defense of the (second) petition. See N.J.S.A. 18A:38-1(b)(2).

By the start of the 1998-99 school year, F.P. was faced with the BOE's determination and claim for tuition and this case had been filed in the OAL. Given these circumstances, it is probable that, to avoid additional liability on the BOE's claim for tuition, etc., F.P., S.P. and N.P. would have returned to domicile in the Point Pleasant House. This is corroborated by Ms. Pritchard's testimony that, after the BOE took action relative to S.P.'s and N.P.'s domicile, petitioners were around the Point Pleasant Beach home more often and corroborated by the repair of the heating system there in October 1998. Given these circumstances, during the 1998-99

school year, it is probable that F.P. and the children were domiciled in the Point Pleasant Beach house and F.P. would have no liability for tuition for that year.

Brian Savage, during relevant times, he has been the BOE's business administrator and secretary a credible witness, has made and maintained the BOE's records, including those relative to school days and tuition for out-of-district students and testified credibly as follows:

During the 1997-98 184-day school year (when S.P. attended the BOE's third grade), given the estimated cost per pupil, for an out-of-district student attending the BOE's third grade the cost per pupil/tuition would be $47.19 per diem and $8,682.96 for the year.

During the 1997-98 school year (when the BOE provided special education and services for N.P.), for an out-of-district student to receive special education and the particular services received by N.P. the cost/tuition would total $31,600.20 for the year. The BOE received $2,945.00 for these special education services, so reducing $31,600.20 by $2,945.00 leaves $28,655.20.

During the 1998-99 school year (when S.P. attended the BOE's fourth grade), given the estimated cost per pupil, for an out-of-district student attending the BOE's fourth grade the estimated cost per pupil/tuition would be $47.87 per diem, or $3,590.25 up to January 7, 1999, when Mr. Savage testified (75 days).

During the 1998-99 school year (when the BOE provided special education and services for N.P.), for an out-of-district student to receive special education and the particular services received by N.P. the estimated cost/tuition would total $10,365.82 up to January 7, 1999, when Mr. Savage testified (75 days). Mr. Savage said that the Board would receive $1,232.25 for these special education services, so reducing $10,365.82 by $1,232.25 leaves $9,133.57. BOE-5.

CONCLUSIONS OF LAW

N.J.S.A. 18A:38-1(b)(2) states, in pertinent part:

> If the superintendent . . . of a school district finds that the parent or guardian of a child who is attending the schools of the district is not domiciled within the district and the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, the superintendent or administrative principal may apply to the board of education for the removal of the child. The parent or guardian shall be entitled to a hearing before the board and if in the judgment of the board the parent or guardian is not domiciled within the district or the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, the board may order the transfer or removal of the child from school. The parent or guardian may contest the board's decision before the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. The board of education shall, at the time of its decision, notify the parent or guardian in writing of his right to contest the decision within 21 days. No child shall be removed from school during the 21-day period in which the parent may contest the board's decision or during the pendency of the proceedings before the commissioner. If in the judgment of the commissioner the evidence does not support the claim of the parent or guardian, the commissioner shall assess the parent or guardian tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced. Nothing shall preclude a board from collecting tuition from the parent or guardian for a student's period of ineligible attendance in the schools of the district where the issue is not appealed to the commissioner.
>
> [Emphasis added.]

"Domicile" is defined as "**1.** A residence; a home. **2.** One's legal residence." American Heritage Dictionary 550 (3d ed. 1996). Domicile has been described as "the place of [a person's] abode where he has the present intention of remaining and to which, if absent, he intends to return." Mercadante v. City of Paterson, 111 N.J. Super. 35, 39 (Ch. Div. 1970), aff'd, 58 N.J. 112 (1971). "A person may have several residences or places of abode. However, he can only have one domicile at one time." Collins v. Yancey, 55 N.J. Super. 514, 520 (Law Div. 1959). Between residences, factors used to identify the domicile include: (1) the physical characteristics of each residence, (2) the time spent and things done in each residence, (3) other persons found in each residence, (4) the person's mental attitude about each residence, and (5) whether, when absent, the person has an intention to return. Mercadante, supra, 111 N.J. Super. at 39-40. Acts, statements and documents may be relevant in determining domicile.

Consistent with N.J.S.A. 18A:38-1, after the BOE superintendent's application, the BOE afforded petitioners a hearing and determined that, during the 1997-98 school year, S.P. and N.P. were not domiciled in the district and that they should be removed from its school system. Also consistent with N.J.S.A. 18A:38-1, and with the usual presumption that public entities act lawfully, reasonably and in good faith, in these circumstances, petitioners bear the burden of proof by a preponderance (the greater weight) of the competent and credible evidence that the BOE's determination was incorrect and that they were domiciled in the district.

Relative to the 1997-98 school year, consistent with my "Findings of Fact," petitioners have not met their burden of proof and relative to the BOE's counterclaim, F.P. is liable for tuition.

Relative to the 1998-98 school year, consistent with my "Findings of Fact," petitioners have proven that they resided in the district and relative to the BOE's counterclaim, F.P. is not liable for tuition.

Relative to the BOE claim for attorney's fees, etc., the usual rule is that each party bears his or her own attorney's fees and costs. See, e.g., In the Matter of the Spill Compensation and Control Act Claim of Raymond and Theresa Thomas, 93 N.J.A.R.2d (EPE) 79, aff'd, 278 N.J. Super. 580 (App. Div.), certif. denied, 141 N.J. 94 (1995). The OAL is not a court within the

meaning of, e.g., N.J.S.A. 2A:15-59 and -59.1, and I do not see in N.J.S.A. 18A:38-1, or any other law, authority to award attorney's fees to the BOE as prevailing party. Therefore, no attorney's fees are ordered.

ORDERS

(1) The petition is **DISMISSED WITH PREJUDICE**.

(2) The BOE's counterclaim for tuition is **GRANTED** and I **ORDER** F.P. to pay tuition for the 1997-98 school year: $37,338.16.

(3) The BOE's counterclaim for attorney's fees is **DENIED**.

(4) Because of F.P.'s, S.P.'s and N.P.'s return to domicile in the district, they may continue in the BOE's school system.

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

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

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

Feb. 24, 1999
DATE

John R. Tassini
JOHN R. TASSINI, ALJ

Receipt Acknowledged:

2/25/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

For Petitioners:

P-1EV	Annual Review/IEP Conference, January 15, 1998
P-2	Form 1040 U.S. Individual Income Tax Return, 1997, of F.P. (cover sheet only)
P-3	Form 1040 U.S. Individual Income Tax Return, 1996, of F.P. (cover sheet only)
P-4	Form 1040 U.S. Individual Income Tax Return, 1995, of F.P. (cover sheet only)
P-5	Form 1040 U.S. Individual Income Tax Return, 1994, of F.P. (cover sheet only)
P-6	Form 1040 U.S. Individual Income Tax Return, 1991, of F.P. (cover sheet only)
P-7	Form 1040 U.S. Individual Income Tax Return, 1997, of F.P. (cover sheet only)
P-8	Form 990 Return of Organization Exempt from Income Tax, 1997, of Volunteers for Autism, Inc., (cover sheet only)
P-9	Annual Report Filing Form, State of New Jersey, Department of State, The Friends of Autistic Children, Inc., March 1997 (cover sheet only)
P-10EV	State of New York, renewal Application for an Asbestos Certificate of F.P., May 15, 1998
P-11EV	Pennsylvania Asbestos Certification(s) of F.P., November 5, 1996 & 1997; State of New York, Department of Labor, Asbestos Handling Certificate of F.P.; New Jersey Motor Vehicle Services, driver's license of F.P., October 20, 1994; State of Louisiana, Department of Environmental Quality, certificate of F.P.; State of New Jersey, Department of Labor, Asbestos Control and Licensing, permit of F.P., May 12, 1997; State of Connecticut, Department of Public Health, asbestos consult - inspector, card of F.P.; Commonwealth of Massachusetts, Department of Labor and Workforce Development, Asbestos Inspector, card of F.P., December 16, 1996
P-12EV	New York State Throughway Authority E-Z Pass Statement of F.P., February 10, 1998
P-13	State of New Jersey, 1997 Income Tax Refund of F.P., June 1, 1998
P-14	Letter from BOE, December 15, 1997

P-15	New Jersey Division of Taxation, postcard for F.P.
P-16EV	1997 W-2 and Earnings Summary of F.P.
P-17EV	1996 W-2 and Earnings Summary of F.P.
P-18	Card certification of voter's address of F.P., March 4, 1991
P-19EV	UNUM, Statement of Individual Disability Premiums Due of F.P., January 1, 1998
P-20EV	Ford Motor Credit Company billing statement of F.P., March 10, 1998
P-21EV	GPU Energy bill of K.W. and F.P., March 20, 1998
P-22EV	GPU Energy bill of K.W. and F.P., April 21, 1998
P-23	Good Sam Vehicle Insurance Plan of F.P., stamped paid January 23, 1998
P-24	New Jersey Natural Gas Company bill of K.P., March 10, 1998
P-25	New Jersey Natural Gas Company bill of K.P., April 8, 1998
P-26	Comcast Statement for April 1998
P-27	Comcast Statement for May 1998
P-28EV	Travel Cost 1997 & 1998, Logbook
P-29	T.D.C. Plumbing & Heating Contractors, Inc., billing invoice to F.P., March 4, 1998
P-30EV	Ohio Department of Health, Application for Certification of F.P., May 11, 1998
P-31	Letter from State of New Jersey, Department of Labor, to F.P., February 6, 1997
P-32	Letter of Phoenix Home Life Mutual Insurance Company to F.P., March 31, 1998
P-33	Letter of Confederation Life Insurance Company to F.P., September 26, 1997
P-34	Allstate Life Insurance Company, Certificate of Term Life and Accidental Death Insurance of F.P., March 11, 1998
P-35	Letter of Frank A. Falco, October 28, 1998
P-36EV	Letter of BOE's attorney, May 5, 1998
P-37EV	Case Information Statement of F.P., July 15, 1998
P-38EV	National General Insurance Company, Personal Automobile, Declarations Page, June 5, 1997, to December 5, 1997
P-39EV	By Laws of Volunteers for Autism, Inc.
P-40EV	Certificate of Incorporation of Volunteers for Autism, Inc., 1994
P-41EV	Hanover Insurance, Homeowners Policy, Renewal Declaration, June 14, 1996, to June 14, 1997

P-42 Envelope addressed: "To the Parent/Guardian of: [M.M.]," postmarked December 8, 1998

P-43 Envelope addressed to Ms. M., postmarked December 8, 1998

For Respondent:

BOE-1EV Case Information Statement, December 23, 1997

BOE-2EV Reply Certification to Defendant's Responsive Certification of January 2, 1998

BOE-3 Point Pleasant Beach, Crimes Management System, Incident Report, March 15, 1997; Supplemental Report, April 4, 1997

BOE-4EV Annual Review/IEP Conference, April 16, 1997;
Parental Agreement/Rights, April 16, 1997;
Current Educational Status (undated)

BOE-5EV BOE Statement of Tuition Reimbursements, 1997-98 & 1998-99

BOE-6EV Consent Order, October 20, 1998; Initial Decision Settlement, October 20, 1998

WITNESSES

For Petitioners:

Barry Hefferman

Tracey Kaiserian

Vincent Mastria

C.M.

F.P.

For Respondent:

Celeste Burd

Sandra Pasola

Maureen Pritchard

Brian Savage

K.W.

OAL DKT. NO. EDU 6591-98
AGENCY DKT. NO. 379-8/98

F.P., on behalf of N.P. & S.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF POINT	:	DECISION
PLEASANT BEACH, OCEAN COUNTY,	:	
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Both parties filed timely exceptions pursuant to *N.J.A.C.* 1:1-18.4.

Petitioner takes exception to the Administrative Law Judge's (ALJ) findings and conclusions that he has not met his burden of proof that during the 1997-1998 school year he and his children, S.P. and N.P., were domiciled in the Point Pleasant Beach house. Petitioner avers that the ALJ's determination is not based on any affirmative proofs offered by respondent as evidence in the case but, rather, are based upon the ALJ's finding that "it is probable that, since 1996, F.P. has provided a substantial amount of C.M.'s income***" (initial decision at p. 4) and that "[t]he absence of heating service at the Point Pleasant Beach house during that period [Spring 1998-Fall 1998] makes it more probable that the children were not domiciled there and that they were domiciled in the Brick [Township] house" (*id.* at p. 6). Further, petitioner argues that neither of these findings is even arguably sufficient, in the absence of other affirmative findings by the ALJ based upon evidence of record in the case to support the conclusion that he was not domiciled in Point Pleasant Beach during the 1997-1998 school year.

Petitioner points to Exhibits P-10 to P-12, P-16 to P-17, P-19 to-P-22, P-28, P-30 and P-36 in support of his argument that

> ***These exhibits, both individually and in the aggregate, support the clear conclusion that Petitioner at all times during the 1996-1997, 1997-1998 and 1998-1999 school years intended his family's residence at 207 Curtis Avenue in Point Pleasant Beach to be his domicile as matter of both fact and law. The reported administrative and state court decisions in New Jersey which involve a domicile dispute within the public school context all utilize an analysis which takes into account this exact type of indicia of domicile in the form of licenses, correspondence, registration forms, tax and other legal forms and documents which support the respective contentions of the parties. Similarly, in this case the court has before it, Petitioner's asbestos removal certifications from New Jersey, New York, Pennsylvania, Massachusetts, Louisiana and Ohio, all of which have uniformly identified 207 Curtis Avenue, Point Pleasant Beach as Petitioner's permanent mailing address (P10, P11, P30) as well as his monthly E-Z pass billing statements from New York State Throughway Authority (P12). Petitioner's 1996 and 1997 W-2 earnings summaries set forth his address and are in fact received by Petitioner at Point Pleasant Beach (P16, P17). [He} receives his monthly automobile lease statement, his monthly utilities billing statements and his monthly disability insurance premium notices and bills at Point Pleasant Beach [P19–P22]. Significantly, as recently as May 1998 and continuing through the present, Petitioner has received all correspondence from the Board and the Point Pleasant Beach School District at 207 Curtis Avenue, notwithstanding the Board's ongoing contention that [he] and his sons are not actually living there. (Petitioner's Exceptions at pp. 3-4)

Petitioner's exceptions go on to reiterate his testimony before the ALJ regarding the temporary flooding of the Curtis Avenue home, averring, *inter alia,* that the family members had, for the most part, been able to inhabit several of the living portions of the house and recounting his efforts to repair or replace the furnace which had suffered water damage. As to this, petitioner argues that although counsel for respondent suggested his open skepticism of the "furnace problem" at the hearing, virtually no evidence was offered to contradict petitioner's testimony in this regard and, in fact, petitioner's account was fully corroborated by the testimony of C.M., his fiancée and the subpoenaed witness of respondent. Petitioner further avers

> Moreover, the mere fact that the ALJ may have believed that either [he] or C.M. were "incredible" with regard to some of the details of their description of the facts surrounding the construction of C. M.'s home or the problems with [his] furnace, this type of bare skepticism, with no other factual support or evidential basis in the record cannot support the legal conclusion that Petitioners were not domiciled within Point Pleasant Beach during the 1997-1998 school year. (*Id.* at p. 6)

Petitioner's exceptions recite at length arguments presented to the ALJ in his post-hearing brief which were considered by the ALJ in rendering the initial decision, and therefore, shall not be repeated herein. Petitioner does add, however, that it is not within the province or authority of the ALJ to second guess the manner in which he and C.M. have structured their personal relationship, averring that the plain fact is that there is no contradiction in the record upon which to discount their testimony regarding his domicile and that of his sons in the instant matter. (*Id.* at p. 15) Petitioner further argues, *inter alia,* that

> Upon reviewing the nature and quality of the proofs in the record, it should be immediately apparent that [he] has sustained the burden of proof and has adequately demonstrated his domicile in Point Pleasant Beach***. In fact, even the temporary flooding and heating problem in the Point Pleasant home does not rise to the level of a change in domicile since there is absolutely no testimony that anyone in [his] family ever intended for a single day not to return to Point Pleasant Beach or to transfer their permanent home to C.M.'s house in Brick. This testimony was completely undisputed by the Respondent, and was not even addressed by a single witness for Respondent. (*Id.* at p. 17)

Lastly, petitioner supports the ALJ's findings and conclusions that he sustained the burden of proof for domicile in Point Pleasant Beach during the 1998-1999 school year. However, he goes on to argue that "***[t]here is no basis in this case to disbelieve the proofs presented by Petitioners regarding their domicile during the 1997-1998 school year or upon which to find factual and/or legal support for assessing a tuition obligation against [them] for any portions of the [school years in dispute]. (*Id.* at p.17)

Respondent is fully supportive of the those portions of the initial decision in which the ALJ dismisses the petition and orders petitioner to pay $37,338.16 for tuition for the 1997-1998 school year. It excepts, however, to the ALJ's failure to address the issue of interest and the award of attorney fees and his determination that because of petitioner's return to domicile in the District his children may continue in the Point Pleasant Beach school system.

Respondent avers that the ALJ correctly concluded in his opinion and decision that the relevant statute defining the proceeding in the instant matter is *N.J.S.A.* 18A:38-1 *et seq.* which imposes on petitioner the burden of proof by a preponderance of the evidence to establish that the F.P.'s children are residents of the Point Pleasant Beach School District.[1] Respondent also contends the ALJ correctly concluded that in 1997 the family unit defined as F.P. and C.M. had completed construction and took occupancy of a home in Brick Township to house the entirety of the family unit. It also avers, *inter alia*, that the ALJ correctly describes on page 4 of the initial decision the four-bedroom, two car garage home as being designed to house the entire family unit of petitioner and C.M. and that, given their testimony, they reasonably intended to be domiciled with all their children in the Brick Township home constructed by C.M. Respondent further avers, *inter alia,* that the ALJ accurately concluded that petitioner's testimony that he intended to be domiciled in Point Pleasant Beach was not credible, nor was C.M. in large portions of her testimony. Regarding the issue of petitioner's credibility, respondent emphasizes that F.P. intentionally misrepresented facts when, in sworn documents submitted to the Superior Court of New Jersey Chancery Division, petitioner claimed he lived in Brick, while simultaneously taking an inconsistent position in these proceedings that he and his two sons were domiciliaries of Point Pleasant Beach.

[1] The Commissioner notes for the record that the ALJ correctly determined that *N.J.S.A.* 18A:38-1(b)2 is the statutory provision applicable in the instant matter and that the provision requires proof of *domicile*, not residency.

Respondent flatly rejects the ALJ's conclusion that petitioner changed his domicile back to Point Pleasant Beach by the start of the 1998-1999 school year, contending that the only factual basis for that conclusion was that Ms. Pritchard (one of respondent's witnesses) testified that petitioner was seen more often at the Point Pleasant Beach home after the Board took action against petitioner and that in October 1998, the heating system was repaired. Of this, respondent states:

> ***It is respectfully submitted that given the burden [of] proof upon the petitioner under the statutory criteria and given the Court's conclusion that the petitioner and his [fiancée's] testimony were not credible and that the admissions by FP and CM that they had lied to both the Superior Court Chancery Division and this Court that such limited factual conclusion by [the ALJ] was inadequate to meet the petitioner's burden of proof that he once again switched back the domicile from Brick Township to Point Pleasant Beach. The mere fact that once litigation is initiated, that someone tries to create an appearance for purposes of litigation, is not sufficient credible evidence to cause a major change of domicile of this family unit from the large recently constructed home in Brick Township to a small cape cod, totally inadequate for the family unit. Furthermore, any ambiguous inferences to be drawn from the facts should be resolved in favor of the Board of Education given the lack of credibility and truthfulness of this [petitioner's] testimony as determined by [the ALJ].
>
> [Respondent] contends that nothing has changed with respect to the Brick Township residence. The home has not been sold or that FP and CM are not engaged to be married and living together as they were during the 1997-1998 school year. The absence of a finding of credible evidence found by the Court except in a short statement found on the bottom of page 8 of his report fails to meet the burden of proof required of the petitioner.*** (Respondent's Exceptions at p. 4)

Given the above, respondent argues that the sum for tuition owing to the Board should be recalculated and petitioner should immediately remove his children from the Point Pleasant Beach School District, or, if they are to remain to the end of the school year, the Commissioner should construct a per diem charge.

COMMISSIONER'S DETERMINATION

Upon careful and thorough consideration of the record before him, which it is noted does not include a transcript of the proceedings in the instant matter, the Commissioner concludes that the ALJ properly analyzed the law of domicile to mean

> "Domicile" is defined as "**1**. A residence; a home **2**. One's legal residence." Domicile has been described as "the place of [a person's] abode where he has the present intention of remaining and to which, if absent, he intends to return." *Mercadante v. City of Paterson*, 111 *N.J. Super.* 35, 39 (Ch. Div. 1970), *aff'd*, 58 *N.J.* 112 (1971). "A person may have several residences or places of abode. However, he can only have one domicile at one time." *Collins v. Yancey*, 55 *N.J. Super.* 514, 520 (Law Div. 1959). Between residences, factors to identify the domicile include: (1) the physical characteristics of each residence, (2) the time spent and things done in each residence, (3) other persons found in each residence, (4) the person's mental attitude about each residence, and (5) whether, when absent, the person has the intention to return. *Mercadante, supra,**** at 39-40. Acts, statements and documents may be relevant in determining domicile. (Initial Decision at p. 11)

As indicated above and by the Courts in matters such as *Matter of Unanue,* 225 *N.J. Super.* 362 *(*Law Div. 1991*)* and *Kurilla v. Roth*, 132 *N.J.L.* 213, 215, 38 *A.*2d 862 (Sup. Ct. 1944), domicile, in a strict legal sense," ***is the place where [a person] has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving." Domicile is thus intrinsically identified with the concept of home. As stated by the *Unanue* court, "***identification of domicile with the concept of home continues to have vitality in New Jersey '[h]ome is the place where a person dwells and which is the center of his domestic, social and civil life.'" (*Unanue*, supra at 374) Moreover, the concepts of home and domicile "mean more than physical residence. They also embody the subject's objective and subjective relationship to that residence." (*Id.* at *375)*

Establishing a domicile involves an act of volition, *i.e.*, a person has the right to choose his own domicile; moreover, a person's motive in doing so is immaterial "so long as the necessary ingredients for establisment of the new domicil are present." *Lyon v. Glaser*, 60 *N.J.* 259, 264, 288; *Unanue, supra* at 375.

Central to the issue of determining true domicile, particularly when multiple residences are involved in the dispute, is the concept of "indicia of domicile." The *Unanue* Court concluded "[it] is clear that a choice of domicile by a person, irrespective of his motive, will be honored by the court, provided there are sufficient objective indicia, by way of proofs, supporting the actual existence of that domicile. Thus, a person may not arbitrarily designate a given residence as his domicile. It is necessary that requisite subjective intent be present since domicile is 'very much a matter of the mind – of intention.'" (*Unanue, supra* at 376, citing *Lyon, supra*) Such indicia oftentimes are statements relative to domicile in such documents as tax returns, wills, trusts, or other formal documents and statements made by an individual to others as to his/her domicile. The *Unanue* decision indicates that such recitals are evidential of actual domicile but the Court concluded, they are not at all conclusive, rather "[t]hey are of value evidentially to the extent that they are not intended to deceive and other proofs support such domicile." (*Id.* at 377)

As correctly noted by the ALJ, a change in domicile is a matter of intention, *i.e.*, "[a] change of domicile*** is effected if a person actually moves to a new abode intending to remain there for an indefinite period of time and establishing it as a place of fixed present domicile, notwithstanding that he entertains merely a possibility, or floating intention, of returning to his former domicile at some later time." (*Unanue, supra* at 378, citations omitted)

The following passage from *Lyon, supra,* synthesizes well the concurrence of elements referenced above which one has to consider when determining which particular residence is a person's true domicile.

> Domicil is very much a matter of the mind - of intention. One may be acquired, or changed to a new one, when there is a concurrence of certain elements, *i.e.*, an actual and physical taking up of an abode in a particular State, accompanied by an intention to make his home there permanently or at least indefinitely, and to abandon his old domicil. A person has the right to choose his own domicil, and his motive in doing so is immaterial. ***A very short period of residence in a given place may be sufficient to show domicil, but mere residence, regardless of its length, is not sufficient. It has been said that concurrence, even for a moment, of physical presence at a dwelling place with the intention of making it a permanent abode, effects the change of domicil. And once established, the domicil continues until a new one is found to have been acquired through an application of the same tests. (*Lyon, supra* at 264)

The U*nanue* court identified three elements which must be considered when trying to ascertain if a change of domicile has occurred,

> 1) whether there had been an actual and physical taking up of an abode in a particular state;
> 2) whether the subject had an intention to make his home there permanently or at least indefinitely; and
> 3) whether the subject had an intention to abandon his old domicile. (*Unanue, supra* at 376)

One must evaluate all of the facts and circumstances of the case to determine the place in which there is the necessary concurrence of physical presence and an intention to make that place one's home. (*Id.*, citations omitted) Furthermore, if there are sufficient objective proofs brought to the record to support the actual existence of domicile, a person's choice of domicile must be honored, even when the person has multiple residences. (*Id.*)

After a thorough and comprehensive review of the law on domicile and the record before him, the Commissioner concludes that the arguments advanced by petitioner are insufficient to disturb the findings and conclusions relative to domicile for the 1997-1998 school year reached by the ALJ, who as the trier of fact had the opportunity to assess firsthand the credibility of the witnesses as to the proofs offered by petitioner that his intention was to retain his residence in Point Pleasant Beach as his choice of domicile. While petitioner offers numerous

exhibits such as licenses, tax returns, billing, insurance, etc., as evidence that the Point Pleasant Beach residence continued to be his domicile, such documents unto themselves are not conclusive of domicile unless there are also sufficient objective proofs to bear out his claim, a burden which the ALJ concluded he failed to carry. That F.P. and his sons continued to be, on occasion, at the Point Pleasant Beach residence does not serve to render erroneous the ALJ's conclusion, upon consideration of all the facts, circumstances and testimony presented to him, that petitioner's domicile was the Brick Township residence during the 1997-1998 school year. That petitioner did not entirely abandon the Point Pleasant Beach *residence* does not unto itself, compel a conclusion that he retained it as his domicile. Such a conclusion must be based on the totality of the evidence presented, because, as stated above, a determination of domicile is very much a matter of mind and intention, intrinsically identified with the concept of home, the place which is the center of a person's life. *Lyon, supra; Unanue, supra; Mercadante, supra.*

The Commissioner further finds and concludes that respondent's arguments set forth above excepting to the ALJ's determination that petitioner was domiciled in Point Pleasant Beach for the 1998-1999 school year are persuasive. On page 8 of the initial decision, the ALJ finds

> By the start of the 1998-99 school year, F.P. was faced with the BOE's determination and claim for tuition and this case had been filed in the OAL. Given these circumstances, it is probable that, to avoid liability on the BOE's claim for tuition, etc. F.P., S.P. and N.P. would have returned to domicile in the Point Pleasant House. This is corroborated by Ms. Pritchard's testimony that, after the BOE took action relative to S.P.'s and N.P.'s domicile, petitioners were around the Point Pleasant home more often and corroborated by the repair of the heating system there in October 1998. Given these circumstances, during the 1998-99 school year, it is probable that F.P. and the children were domiciled in the Point Pleasant house and F.P. would have no liability for tuition for that year. (Initial Decision at p. 8)

Upon consideration of these findings and conclusions of the ALJ, the Commissioner determines that insufficient factfinding has been reached by the ALJ to

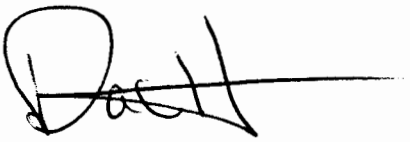
substantiate the conclusion that petitioner changed his domicile back to Point Pleasant Beach. Rather, the findings and conclusions appear to be primarily speculative in nature, and so insufficient in the absence of further indicia to meet the established tests in law discussed above. The Commissioner, therefore, remands the matter to the Office of Administrative Law for further factfinding on this issue and to calculate any tuition owing for 1998-1999 in the event that petitioner, upon further factfinding, is not found to be domiciled in Point Pleasant Beach for the 1998-1999 school year. *Board of Education of the Township of Cranford v. A. McG. and L McG.*, 95 *N.J.A.R.* 2d (EDU) 74, aff'd 96 *N.J.A.R.* 2d (EDU) 140, rev'd and remanded, App. Div., February 10, 1998, A-4742-95T3, slip opinion at pp. 8-10. Furthermore, in examining the order for tuition payment for the 1997-1998 school year and the bases for the amounts calculated, it is noted that petitioner is being assessed the costs for the provision of special education and related services for his son, N.P. In light of the fact that under the provisions of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400 *et seq.*, disabled students are entitled to a free appropriate public education (FAPE), the Commissioner, therefore, also directs that the calculation for N.P.'s tuition for the 1997-1998 school year be reexamined and that any tuition which may, on remand, be found owing for N.P. for the 1998-1999 school year be calculated, taking into consideration what impact, if any, the FAPE provisions of IDEA have in determining the amount petitioner must pay to the Point Pleasant Beach Board of Education.

Lastly, the Commissioner rejects respondent's position that interest must be awarded in this matter. Although the ruling herein does not support petitioner's claim that his choice of domicile was the Point Pleasant Beach residence and, notwithstanding petitioner's and C.M.'s lack of credibility relative to this claim during the hearing proceedings, the record does not demonstrate that F.P. acted in bad faith in his belief that Point Pleasant Beach was his domicile or that his actions were taken in deliberate violation of statute or law. *N.J.A.C* 6:24-

1.16 (c)1 The IEP (Exhibit P-1) developed for his son, N.P., on January 15, 1998 states on page 3 that the family was living between two residences. It also states that the information for that particular portion of the IEP was formulated for N.P.'s *April 16, 1997* IEP Annual Review. Thus, there does not appear to have been an intent of subterfuge on petitioner's part to hide information about dual residence from school personnel at least as early as the spring of 1997. Likewise, the Commissioner rejects respondent's arguments that he has the jurisdiction and legal authority to grant legal fees in this matter. The ALJ accurately sets forth the basis for such a conclusion on pages 11 and 12 of the initial decision. See also *Balsy v. North Hunterdon Regional High School*, 117 *N.J.* 434, 442-443 (1990) and *State, Department of Environmental Protection v. Ventron Corp.*, 94 *N.J.* 473 (1983).

Accordingly, the Commissioner affirms in part and rejects in part the initial decision issued by the OAL and, for the reasons set forth above, he modifies in part the order for payment of tuition. [2]

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

April 12, 1999
Date of Mailing, April 13, 1999

[2] This decision, as the Commissioner's determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

111-99

PATSY N. MARINO, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

SYNOPSIS

Board contended that petitioning physical education teacher, who had a petition for benefits under *N.J.S.A.* 18A:30-2.1 before the Commissioner which had been held in abeyance pending his pursuit of remedies under the Workers' Compensation Act, had by virtue of his settlement of the Workers' Compensation matter (Section 20 settlement – *N.J.S.A.* 34:15-20), waived his right to any claim for benefits under that provision or, alternatively, that the Commissioner lacked jurisdiction to hear such appeal.

ALJ in a letter decision denied Board's application for summary decision, finding that a settlement under *N.J.S.A.* 34:15-20 does not, without more, dispose of claims arising under separate enactments. ALJ further concluded that the proceedings before the Compensation Court clearly revealed that the question of sick leave was specifically reserved by petitioner, and such reservation was not objected to by the Board. Board filed for interlocutory review of such determination.

Assistant Commissioner reversed the order of the ALJ and granted summary decision to the Board, concluding that under the circumstances herein, the Commissioner should refrain from exercising jurisdiction over petitioner's claim for benefits. Assistant Commissioner determined that although it was conceded that petitioner's accident occurred in the course of his employment, his entitlement to relief pursuant to *N.J.S.A.* 18A:30-2.1 was dependent upon resolution of the contested issue as to whether such accident was the "cause" of his injury. The Division of Workers' Compensation, not the Commissioner of Education, is the forum with the expertise to decide this issue. (*Hackensack; Hinfey*) Having chosen to forego such determination in the forum recognized as possessing "expertise" in this area, petitioner could not be allowed to come before the Commissioner seeking a more favorable outcome. Assistant Commissioner dismissed the Petition of Appeal.

April 13, 1999

OAL DKT. NO. EDU 8580-98
AGENCY DKT. NO. 19-1/97

PATSY N. MARINO, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

For Petitioner: Barbara E. Riefberg, Esq., (Baron & Riefberg)

For the Board: James F. Schwerin, Esq., (Carroll, Weiss & Josephson)

This interim matter comes before the Commissioner by way of a motion for interlocutory review of the appended letter of the Administrative Law Judge (ALJ), denying the Board's application for summary decision which was based on its contention that, by virtue of his entering into a Section 20 settlement on his workers' compensation claim, petitioner waived adjudication of his appeal, pursuant to *N.J.S.A.* 18A:30-2.1, before the Commissioner or, alternatively, the Commissioner lacks jurisdiction to hear such appeal. Pursuant to *N.J.S.A.* 18A:4-34, the hearing of the matter has been delegated to the Assistant Commissioner.

In support of its motion here the Board argues that petitioner, who has a petition for benefits under *N.J.S.A.* 18A:30-2.1 before the Commissioner which has been held in abeyance pending his pursuit of remedies under the Workers' Compensation Act, has, by virtue of his settlement of the Workers' Compensation matter, waived his right to any claim for benefits

under this provision. Specifically, it posits that the parties agreed to settle the workers' compensation claim pursuant to *N.J.S.A.* 34:15-20 ("Section 20"), which specifies

> In case of a dispute over or failure to agree upon a claim for compensation between employer and employee...when it shall appear that the issue or issues involve the question of...causal relationship...and the petitioner and respondent are desirous of entering into a lump-sum settlement of the controversy, a judge of compensation may...enter an order approving settlement. Such settlement...**shall be a complete surrender of any right to compensation or other benefits arising out of such claim under the statute**....(emphasis in text) (Board's Letter in Support of Interlocutory Review at p. 2)

Notwithstanding the clear language of this statutory provision, the Board advances, the ALJ erroneously found that counsel for petitioner's statement on the record before the Workers' Compensation judge that he reserved his client's claim for benefits under *N.J.S.A.* 18A:30-2.1, along with the Board's failure to object to such an arrangement, effectively precluded a waiver of this claim. (*Id.* at pp. 2-3) The Board cites the Commissioner's decision in *Sweet v. Board of Education of Jackson*, 96 *N.J.A.R.* 2d (EDU) 471, for the proposition that benefits sought pursuant to *N.J.S.A.* 18A:30-2.1 necessarily arise out of a workers' compensation claim and it, therefore, contends the Section 20 settlement, on its face, bars petitioner from seeking compensation under this education provision. (Board's Letter in Support of Interlocutory Review at p. 4)

Irrespective of the waiver issue, the Board argues that the within ALJ fully ignored a similarly pressing question here, that of the Commissioner's jurisdiction to adjudicate a claim for benefits under *N.J.S.A.* 18A:30-2.1, when there has been no workers' compensation decision establishing petitioner's right to benefits under that Act. In this regard, it advances that the Commissioner has historically declined jurisdiction over petitions under such circumstances.[1]

[1]It notes that limited exceptions to this general rule exist "where the time lost from work is too short to be cognizable under the Act, or where no petition is filed with the Division for that reason. See *Dorfman v. Board of Education of Neptune*, 97 N.J.A.R. 2d (EDU) 512, 517, citing to *Hern v. Board of Education of Union City*, App.

In support of this contention, it cites *Basile v. Board of Education of Roselle Park*, 97 *N.J.A.R.* 2d (EDU) 429, 431 wherein the ALJ, relying on the precedent established by *Forgash v. Lower Camden County School*, 208 *N.J. Super.* 461 (App. Div. 1985) that "*N.J.S.A.* 18A:30-2.1 contemplates a prior determination of a compensable injury by the compensation court before consideration by the commissioner of the eligibility for the additional benefits provided by statute," (*Id.* at 467) concluded

> ...since the compensation court is the only court with the expertise to determine whether an injury is work related under the workers' compensation statutes, a proceeding pursuant to N.J.S.A. 18A:30-2.1 regarding sick leave may not be used to supersede the function of the compensation court. *Id.* at 431-32***.
> (Board's Letter in Support of Interlocutory Review at p. 6)

Consequently, the Board contends that, although a petition of appeal to the Commissioner seeking benefits pursuant to *N.J.S.A.* 18A:30-2.1 should be filed prior to resolution of the compensability issue by Workers' Compensation, it cannot be adjudicated by the Commissioner unless and until a determination on this issue has been made by that Division. (*Id.*) In this matter, the Board argues, even though petitioner had an opportunity to obtain the necessary ruling, he failed to do so. (*Id.*) The Board further charges that the ALJ's decision incorrectly states that it admitted compensability. To the contrary, the Board argues, this very issue was extensively addressed in its brief before the ALJ wherein it argued "that while the accident may have occurred during the course of employment, it was the Board's contention that the injury complained of was pre-existing" and, therefore, a legitimate dispute existed as to whether this particular accident was the *cause* of petitioner's injury. (*Id.*) Moreover, it advances, the record amply demonstrates that the Compensation Judge, while accepting the parties' settlement

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Div. Dkt. No. A-339-91T3 (unpublished, October 23, 1992) [,]" which, it asserts, is inapplicable in the instant matter. (Board's Letter in Support of Interlocutory Review at p. 3)

agreement, clearly recognized that no decision was being made with respect to compensability when he stated

> This matter comes before the Court for an application for an order Approving Settlement for Dismissal under Section 20 of the Act, it being represented to the court if this matter were tried to conclusion that serious issues would arise regarding petitioner's entitlement to an award; more specifically, substantial issues regarding liability as well as causal relationship...T11:21-12:4. (*Id.* at pp. 6-7)

It further argues that whether or not the Board objected to petitioner's attempt to reserve his education action at the workers' compensation hearing, which the within ALJ viewed as significant in his decision, is of no moment here as "subject matter jurisdiction cannot be conferred by agreement of the parties." (Board's Letter in Support of Interlocutory Review at p. 3)

The Board, therefore, urges that the Commissioner grant its request for interlocutory review here "especially in light of the hearing involving medical causation issues that will be necessary should it not be granted, as well as the significant jurisdictional issue which [it] believe[s] has been avoided in [the ALJ's] letter opinion." (Board's Letter in Support of Interlocutory Review at p. 2)

In opposition to the Board's within motion, petitioner argues that the ALJ's decision was in all ways correct and should not be reviewed on an interlocutory basis by the Commissioner.[2, 3] Petitioner asserts that, contrary to the contention of the Board, a reasoned

[2]Petitioner's opposition papers initially assert that the Board's request for interlocutory review is untimely filed, having been submitted outside the time specified by *N.J.A.C.* 1:1-14.10(b) and urges such request should, therefore, be rejected. By letter dated March 31, 1999, from Assistant Commissioner Douglas B. Groff, the Commissioner's delegate pursuant to *N.J.S.A.* 18A:4-34, the parties were advised that the Commissioner would consider the request for interlocutory review, notwithstanding that the Board's request was filed beyond the 5-day regulatory timeframe as, pursuant to *N.J.A.C.* 1:1-14.10(h), he found that the reason for the submission's untimeliness was caused by honest mistake, accident, or a cause compatible with due diligence. This letter additionally directed the Board to submit its Brief in Support of Summary Decision which was referenced in its submission here but not included in the record.

reading of *N.J.S.A.* 34:15-20 confirms that the only rights he relinquished by entering into a Section 20 settlement were those which arose under the workers' compensation statutes, and such settlement does not operate to automatically surrender his entitlements under other statutory provisions. He additionally maintains that the record in this matter confirms that his reservation of his rights pursuant to *N.J.S.A.* 18A:30-2.1, "was clearly placed upon the record, in open Court, in front of the Workers' Compensation Judge." (Petitioner's Letter in Opposition to Interlocutory Review, at p. 1) Also, of particular import, petitioner avows, is the fact that in its Answer to the workers' compensation petition, and during the course of the settlement proceedings in that forum, the Board specifically "admitted that the accident arose out of and in the course of Petitioner's employment." (*Id.* at pp. 1-2) As such, he proffers, compensability here is undisputed by the parties and the expertise of a Workers' Compensation Judge to make such determination is unnecessary. Petitioner contends that to allow the Board to now challenge the very issue it previously conceded is "grossly unfair" and it should be "collaterally estopped" from doing so. (*Id.* at p. 2)

Finally, petitioner advances that interlocutory review in this case is unwarranted as, subsequent to the adjudication of the limited issue remaining here, the Board will have an opportunity to file exceptions to any initial decision of the ALJ if it disagrees with his recommendations. (*Id.*)

Upon review and consideration of the record in this matter,[4] the Assistant Commissioner reverses the order of the ALJ and grants summary decision to the Board as he concludes that, under the circumstances existing here, he should refrain from exercising

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[3]Petitioner's Letter in Opposition to Interlocutory Relief included a copy of his Brief in Opposition to Notice of Motion for Summary Decision, dated February 4, 1999, which had been submitted to the ALJ below and which he incorporated herein by reference.

[4]It is noted that the record includes a transcript of the settlement proceedings conducted before the Workers' Compensation Judge on August 10, 1998, and future indications of "T" in the text of this decision reference portions of this document.

jurisdiction over petitioner's claim for benefits pursuant to *N.J.S.A.* 18A:30-2.1, and dismiss his Petition of Appeal.

Initially, it is observed, *N.J.S.A.* 18A:30-2.1 provides:

> a. Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave of the accumulated sick leave provided in sections N.J.S. 18A:30-2 and 18A:30-3. Salary or wage payments provided in this section shall be made for absence during the waiting period and during the period the employee received or was eligible to receive a temporary disability benefit under chapter 15 of Title 34, Labor and Workmens' Compensation, of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this section shall be reduced by the amount of any workmens' compensation award made for temporary disability.

It is evident that, pursuant to this provision, the Commissioner is empowered to direct the payment of benefits to petitioners who have experienced personal injury caused by an accident arising out of and in the course of their employment. It is equally clear, as a result of decisions of the Court and the State Board, that where petitioner has also made a claim under the Workers' Compensation Act, and the facts existing in the matter indicate that there is a question or dispute as to whether an injury "arose out of and in the course of employment," such a determination of causal connection is controlled by the standards established under the Workers' Compensation Act, (see *Theodore v. Dover Bd. of Ed.*, 183 *N.J. Super.* 407 (App. Div. 1982), and the Commissioner should defer exercising his jurisdiction pending a determination of that issue by the Division of Workers' Compensation. (*Amos v. Board of Education of the Borough of Red Bank*, decided by the State Board, February 3, 1988; *Tompkins v. Board of Education of the Township of Hamilton*, decided by the State Board, December 2, 1987, see *City of Hackensack v. Winner*, 82 *N.J.* 1 (1980); *Forgash v. Lower Camden County School*, 208 *N.J. Super.* 461 (App.

Div. 1985). As recognized by the Court in *Basile v. Borough of Roselle Park,* 97 *N.J.A.R.* 2d (EDU) 429, 432, citing *Forgash*

> [T]he Commissioner *** may not utilize the sick leave benefits statute to supplant the function of the compensation court. *Forgash*, 208 *N.J. Super.* at 467. Here, pursuant to *N.J.S.A.* 34:15-49, the Division of Workers' Compensation has exclusive original jurisdiction over this matter as it involves a work related injury. The express function of *N.J.S.A.* 18A:30-2.1 is to complement workers' compensation benefits by allowing the injured party to continue to receive his or her salary and not lose sick leave time due to compensable work related injuries. *Ibid.* at 466. By its terms, *N.J.S.A.* 18A:30-2.1 contemplates a prior decision by the compensation court before the additional sick leave benefits can be awarded. *Ibid.* Thus, the Commissioner ***cannot exercise jurisdiction in this case until the compensation court has rendered a final determination. To do otherwise would result in the ***Commissioner supplanting the function of the compensation court.

In the instant matter, the record reflects that petitioner, by entering into a Section 20 settlement of his workers' compensation claim, knowingly and willingly chose to forego an opportunity for a full trial to determine the causal relationship of his accident to his claim that he suffered a work related injury and, therefore, whether such injury did, indeed, "arise out of and in the course of his employment," in that forum. (T-6, L. 6-12; T-8, L. 1-8) The record further reflects the following discourse with respect to the nature and purpose of such a settlement

> **THE COURT:** [T]his matter is before me for what is known as an Order Approving Settlement with Dismissal under Section 20. There's nothing mysterious about the word Section 20. Section 20 is just a number in the Statute that permits this type -- or provides for this type of a settlement when there are substantial issues as to whether or not, if this matter went to trial, you would be in a position to prove your case. And instead of taking the chance you may not prevail, you're asking the Court to approve of a settlement in the amount of $6,500.
>
> Do you understand that?
>
> **THE WITNESS**: Yes, I do. (T-9, L. 16-25; T-10, L. 1-4)

The Assistant Commissioner finds and determines the circumstances here establish that, although it is conceded that petitioner's accident occurred in the course of his employment, his entitlement to relief pursuant to *N.J.S.A.* 18A:30-2.1 is dependent upon resolution of the contested issue as to whether such accident was the "cause" of his injury. The Division of Workers' Compensation, not the Commissioner of Education, is the forum with the expertise to decide this issue. See *Hackensack v. Winner, supra*; *Hinfey v. Matawan Regional Board of Education,* 77 *N.J.* 514 (1978). Having chosen to forego such determination in the forum recognized as possessing "expertise" in this area, petitioner cannot be allowed to come before the Commissioner, essentially forum shopping, seeking to find a jurisdiction which may, by virtue of its lack of expertise in such matters, reach a conclusion on this issue which provides him a more favorable outcome. Additionally, as the question of whether an injury arose out of and in the course of employment, within the meaning of *N.J.S.A.* 18A:30-2.1, is controlled by the standards established under the Workers' Compensation Act (*Theodore, supra)*, consideration of petitioner's appeal here would require the Commissioner to construe and apply statutory provisions outside of the scope of his jurisdiction.

The Assistant Commissioner does not find this outcome to be altered by petitioner's claim that "compensability" was admitted by the Board. As determined by the New Jersey Supreme Court in K*ristiansen v. Morgan*, 153 *N.J.* 298 (1998)

> ***The Act provides that "[t]he Division of Workers' Compensation shall have the exclusive original jurisdiction of all claims for workers' compensation benefits." *N.J.S.A.* 34:15-49. **Regardless of whether the employer admits or denies the compensability of an accident, the Division is the forum best suited to decide whether the accident falls within the coverage formula of the Act.** The Legislature recognized that the Division, through the Judges of Compensation, is highly qualified to decide disputed factual and legal contentions related to whether an accident is compensable. (emphasis added) (153 N.J. at 313)

Moreover, the within record amply demonstrates that, notwithstanding the nomenclature utilized by the Board in its so-called admissions, "compensability," within the intendment of the Workers' Compensation statutes, is clearly at issue herein. Under these circumstances, the appropriate course for the Commissioner of Education is to refrain from exercising his jurisdiction over petitioner's claim and to dismiss the instant Petition of Appeal. (See *Angela Rotella-Suarez v. Board of Education of the Town of West New York*, decided by the State Board December 3, 1997.)[5]

Accordingly, the recommended order of the OAL is reversed. Summary decision is hereby granted to the Board and the instant Petition of Appeal is dismissed.[6]

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

April 13, 1999
Date of Faxing, April 13, 1999

[5]The Assistant Commissioner's determination herein does not reach to the question of whether petitioner's settlement of his workers' compensation matter, pursuant to *N.J.S.A.* 34:15-20, forecloses his claims in other forums, as such a determination, of necessity, requires an interpretation and application of this Workers' Compensation statute, which is clearly outside the jurisdictional purview of the Commissioner of Education and is not necessary to the resolution of this matter.

[6] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

111-99

EDU #8580-98
C # 111-99
SB # 25-99

PATSY N. MARINO,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
WILLINGBORO TOWNSHIP BOARD OF EDUCATION, BURLINGTON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decision on motion by the Commissioner of Education, April 13, 1999

For the Petitioner-Appellant, Baron & Riefberg (Barbara E. Riefberg, Esq., of Counsel)

For the Respondent-Respondent, Carroll, Weiss & Josephson (James F. Schwerin, Esq., of Counsel)

In January 1997, Patsy N. Marino, Jr. (hereinafter "petitioner") filed a petition of appeal with the Commissioner of Education seeking sick leave benefits under N.J.S.A. 18A:30-2.1 from the Board of Education of the Township of Willingboro (hereinafter "Board") for the period from September 1 through November 11, 1996.[1] The case was

[1] N.J.S.A. 18A:30-2.1 provides, in pertinent part:

> a. Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in N.J.S. 18A:30-2 and 18A:30-3. Salary or wage payments provided in this section shall be made for absence during the waiting period and during the period the employee received or was eligible to receive a

MAR. 1, 2000

placed in abeyance while the petitioner pursued his remedies under the Workers' Compensation Act. The petitioner and the Board ultimately agreed to settle petitioner's workers' compensation claim for $6,500 pursuant to N.J.S.A. 34:15-20.[2] During the proceedings for approval of the proposed settlement in the Division of Workers' Compensation, counsel for the petitioner clearly indicated that, in settling the workers' compensation claim, the petitioner was not waiving any entitlement he might have to sick leave benefits under N.J.S.A. 18A:30-2.1.

The Board thereafter filed a motion for summary decision with the administrative law judge ("ALJ") assigned to hear petitioner's sick leave claim, contending that the petitioner, by agreeing to settle his workers' compensation claim, had waived any entitlement he might have had to additional relief under N.J.S.A. 18A:30-2.1. In the alternative, the Board argued that, as a result of the settlement, the Commissioner lacked jurisdiction to hear the petitioner's school law claim.

On March 9, 1999, the ALJ rejected the Board's arguments, finding that it had interpreted N.J.S.A. 34:15-20 of the Workers' Compensation Act too broadly. The ALJ concluded that:

> ...[A] settlement under that section does not, without more, dispose of claims arising under separate enactments. Primary jurisdiction to hear compensation matters rests with the Division of Workers' Compensation and the

---

> temporary disability benefit under chapter 15 of Title 34, Labor and Workmen's Compensation, of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this section shall be reduced by the amount of any workmen's compensation award made for temporary disability.

[2] N.J.S.A. 34:15-20 provides, in pertinent part, that a settlement of a workers' compensation claim "shall have the force and effect of a dismissal of the claim petition and shall be final and conclusive upon the employee and the employee's dependents, and shall be a complete surrender of any right to compensation or other benefits arising out of such claim under the statute."

> Commissioner should defer, as he has done. Nevertheless, the proceedings before the Compensation Court clearly reveal that the question of sick leave was reserved for hearing before the Commissioner. [Schwerin cert. Exh. A.] The Board cannot accede to such an arrangement and then argue here that the claim should have been handled there.
>
> The instant matter could have been resolved before a Judge of Compensation and that might have been the preferred course, see, Basile v. Board of Education of Roselle Park, 97 N.J.A.R.2d (EDU) 429. However, the Commissioner retains jurisdiction over disputes arising out of N.J.S.A. 18A:30-2.1, see, Vemeret v. Elizabeth City Board of Educ., 95 N.J.A.R.2d (EDU) 134, and where the parties reserve the issue, it would be improper to close off this forum.

Initial Decision, slip op. at 2.

On April 13, 1999, an Assistant Commissioner, acting on a request for interlocutory review filed by the Board, reversed the ALJ's decision and granted summary decision to the Board.[3] The Assistant Commissioner found that the petitioner, by settling his workers' compensation claim, had "knowingly and willingly chose[n] to forego an opportunity for a full trial to determine the causal relationship of his accident to his claim that he suffered a work related injury and, therefore, whether such injury did, indeed, 'arise out of and in the course of his employment,' in that forum." Assistant Commissioner's Decision, slip op. at 7. The Assistant Commissioner observed that, although it was conceded that petitioner's accident had occurred in the course of his employment, his entitlement to relief under N.J.S.A. 18A:30-2.1 was dependent upon determination of whether such accident was the cause of his injury and that the Division

[3] N.J.S.A. 18A:4-33 authorizes the Commissioner to "designate an assistant commissioner as deputy commissioner with full power to act in his place and stead during any absence or inability of the commissioner and at such other times as the commissioner may designate." Such authority expressly includes assignment by the Commissioner of the "hearing and determination of controversies and disputes which may arise under the school laws...." N.J.S.A. 18A:4-34.

of Workers' Compensation, not the Commissioner of Education, was the forum with the expertise to decide that issue.

Stressing that the question of whether an injury arose out of and in the course of employment within the meaning of that statute was controlled by the standards established under the Workers' Compensation Act, the Assistant Commissioner pointed out that consideration of petitioner's appeal would require the Commissioner to construe and apply statutory provisions outside the scope of his jurisdiction. He concluded that the appropriate course would be to refrain from exercising jurisdiction over the petitioner's claim and to dismiss the petition.

The petitioner filed the instant appeal to the State Board.

After a careful review of the record, we reverse the decision of the Assistant Commissioner and remand this matter for such proceedings as are necessary to determine petitioner's claim. Like the ALJ, we conclude that settlement of the petitioner's workers' compensation claim did not preclude him from continuing to pursue his claim for sick leave benefits under N.J.S.A. 18A:30-2.1.

It is true, as pointed out by the Assistant Commissioner, that a determination with regard to whether an injury arose "out of and in the course of" employment within the meaning of N.J.S.A. 18A:30-2.1 is controlled by the standards established under the Workers' Compensation Act. It is also true that in those instances in which entitlement to relief under N.J.S.A. 18A:30-2.1 is dependent upon whether the injury arose out of and in the course of employment within the meaning of N.J.S.A. 34:15-7 of the Worker's Compensation Act, the Commissioner should refrain from exercising his jurisdiction pending a determination of that issue by the Division of Workers' Compensation.

Verneret, supra. However, the Commissioner does not lack the jurisdiction to make such a determination himself. Indeed, the Appellate Division has held that, under appropriate circumstances, the Commissioner has "original exclusive jurisdiction" to decide a claim for benefits under N.J.S.A. 18A:30-2.1 despite the need to determine in the first instance whether the claim arose out of and in the course of the staff member's employment. Hern v. Board of Education of the City of Union City, Docket #A-339-91T3 (App. Div. 1992).

In Hern, a teacher who had not filed a claim for workers' compensation benefits filed a petition with the Commissioner of Education seeking sick leave benefits under N.J.S.A. 18A:30-2.1. The State Board affirmed the Commissioner's determination to dismiss the petition, agreeing that the Commissioner did not have jurisdiction to render such a decision without a prior determination by the Division of Workers' Compensation with regard to whether the illness or injury was work-related. The Appellate Division reversed. The Court, observing that a claim for workers' compensation benefits would have been dismissed in this instance for failure to satisfy the seven-day waiting period required by the Workers' Compensation Act, could "perceive no valid reason to require petitioner to engage in a futile gesture or to manufacture an unfounded workers' compensation claim." Hern, supra, slip op. at 4. Under such circumstances, the court concluded that the Commissioner of Education had "original exclusive jurisdiction" to decide the teacher's request for benefits under N.J.S.A. 18A:30-2.1, including a determination as to whether the claim arose out of and in the course of his employment.

We stress, in addition, that "[t]he settlement of litigation ranks high in our public policy." Nolan v. Lee Ho, 120 N.J. 465 (1990), quoting Jannarone v. W.T. Co., 65 N.J.

Super. 472, 476 (App.Div.), certif. den. 35 N.J. 61 (1961). In precluding litigants who settle their claims for benefits under the Workers' Compensation Act from pursuing a statutory claim to benefits under the education laws, the Assistant Commissioner's decision would have the effect of discouraging such settlements, contrary to public policy.

Thus, although the Commissioner properly refrained from exercising his jurisdiction over the petitioner's claim for sick leave benefits under N.J.S.A. 18A:30-2.1 while his workers' compensation claim was still pending, we agree with the ALJ that, under the particular circumstances presented herein, the settlement of that claim did not bar the petitioner from continuing to pursue his claim for additional benefits under N.J.S.A. 18A:30-2.1. We note in that regard that the parties to a workers' compensation case are free to agree in settling such a claim that the claimant is thereby waiving his statutory right to benefits under N.J.S.A. 18A:30-2.1. In order to be valid, such a waiver must be "the intentional relinquishment of a known right." West Jersey Title & Guar. Co. v. Industrial Trust Co., 27 N.J. 144, 152 (1958). In the case now before us, there is no indication that the petitioner, in settling his workers' compensation claim, made a knowing relinquishment of his statutory right to sick leave benefits under N.J.S.A. 18A:30-2.1. To the contrary, the petitioner expressly reserved his claim to such benefits. See supra, at 2.

Accordingly, we reverse the Assistant Commissioner's decision to dismiss the petition and remand this matter to the Commissioner for such further proceedings as are necessary to determine the petitioner's claim for benefits under that statute.[4]

Attorney exceptions are noted.

March 1, 2000

Date of mailing _____

[4] Pursuant to N.J.S.A. 18A:30-2.1, any amounts awarded to the petitioner by the Commissioner would be reduced by the amount of the workers' compensation benefits received by the petitioner as a result of his settlement.

114-99R

BOARD OF EDUCATION OF THE TOWNSHIP OF CRANFORD, UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ANDRE L. McGUIRE AND LISA C. McGUIRE,	:	DECISION ON REMAND
RESPONDENTS.	:	

April 15, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
STIPULATION OF DISMISSAL
OAL DKT. NO. EDU 7085-98

BOARD OF EDUCATION OF THE TOWNSHIP OF CRANFORD, UNION COUNTY,
Petitioner,
v.
ANDRE L. AND LISA C. McGUIRE
Respondent.

Anthony P. Scirarrillo, Esq., for petitioner
(Lindabury, McCormick & Estabrook, attorneys)

Andre L. and Lisa C. McGuire, *pro se*

Record Closed: Februray 12, 1999 Decided: February 26, 1999

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF CASE

This case was transmitted to the Office of Administrative Law (OAL) on July 23, 1998 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

The parties entered into an agreement and have prepared a stipulation of dismissal which is attached and fully incorporated herein.

I have reviewed the record and the stipulation of dismissal and **FIND**:

1. The parties have voluntarily agreed to a dismissal of this matter.

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

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

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

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

February 26, 1999
DATE

MUMTAZ BARI BROWN, ALJ

March 5, 1999
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

MAR 9 1999
ATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

LINDABURY, McCORMICK & ESTABROOK
A Professional Corporation
53 Cardinal Drive, P.O. Box 2369
Westfield, New Jersey 07091
(908) 233-6800
Attorneys for Petitioner

BOARD OF EDUCATION OF THE TOWNSHIP OF CRANFORD, UNION COUNTY,	:	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION BEFORE THE COMMISSIONER OF EDUCATION
Petitioner,	:	OAL DKT. NO.: EDU-L-7085-98
v.	:	
ANDRE L. And LISA C. MCGUIRE,	:	STIPULATION OF DISMISSAL WITH PREJUDICE
Respondents.	:	

THE MATTER in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same (including all claims, counterclaims, crossclaims, third party claims, etc.) be and it is hereby dismissed with prejudice and without costs against any party.

LINDABURY, McCORMICK & ESTABROOK

By: Anthony P. Scirarrillo — Dated: 2/10/99
Anthony P. Scirarrillo
Attorney for Petitioner

By: Andre L. McGuire — Dated: 2/12/99
Andre L. McGuire
Respondent

By: Lisa C. McGuire — Dated: 2/12/99
Lisa C. McGuire
Respondent

89456-1/JRM

OAL DKT. NO. EDU 7085-98
AGENCY DKT. NO. 395-11/93

BOARD OF EDUCATION OF THE TOWNSHIP OF CRANFORD, UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ANDRE L. McGUIRE AND LISA C. McGUIRE,	:	DECISION ON REMAND
RESPONDENTS.	:	

The record and notice of withdrawal based on a joint stipulation of dismissal of the parties transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal.[1] Consequently, the matter is no longer deemed to be a dispute before the Commissioner and is accordingly dismissed.[2]

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

[1] *It is noted that this matter was characterized as a Settlement, pursuant to *N.J.A.C.* 1:1-19.1, by the ALJ in her initial decision. The Assistant Commissioner determines that because no settlement terms were brought to the record and the document signed by the parties was entitled a joint stipulation of dismissal this matter is more appropriately categorized as a withdrawal under *N.J.A.C.* 1:1-19.2.

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

April 15, 1999
Date of Mailing, April 15, 1999

MIDDLESEX COUNTY EDUCATIONAL SERVICES COMMISSION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Commission sought recalculation by the Office of Compliance (Department) of the sum determined by audit to be due to the Department. Commission sought reversal of the decision requiring the Commission to return $90,709 to the Department.

ALJ concluded that the money in controversy was Chapter 192-193 unused funds that had been *borrowed* for use as teachers' salary differential payments and that those funds had to be reimbursed once the Commission received Teacher Quality Employment Act funds from the State. Commission was to return $90,709 to the Department with interest earned.

Commissioner adopted findings and determination in initial decision as his own. Commissioner directed Commission to reimburse the Department $90,709, along with any interest earned on such funds. Petition was dismissed.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6565-98
AGENCY DKT. NO. 189-6/98

MIDDLESEX COUNTY EDUCATION SERVICES COMMISSION,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION,
Respondent.

Anthony B. Vignuolo, Esq., for petitioner (Borrus, Goldin, Foley, Vignuolo, Hyman, Stahl & Clarkin, attorneys)

Terri A. Cutrera, Deputy Attorney General, for respondent (Peter Verniero, Attorney General of New Jersey, attorney)

Record Closed: January 29, 1999 Decided: February 26, 1999

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

In this case, the Middlesex County Education Services Commission, petitioner, (hereinafter, Commission), seeks recalculation by the Office of Compliance in the New Jersey Department of Education, respondent, (hereinafter, Department), of the sum determined by audit to be due to the Department and the Commission seeks reversal of an Office of Compliance decision to require the Commission to return $90,709 to the Department.

The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A.*

52:14F-1 through -13. The matter was heard at the Office of Administrative Law, Trenton, on January 13, 1999. Counsel timely filed posthearing papers and the record closed on January 27, 1999.

This matter arises from an audit or investigative review of the Commission's nonpublic auxiliary and handicapped services programs, commonly known as Chapter 192-193 activities, for the period July 1, 1988 - June 30, 1995. Through meetings between the parties and other exchanges of information, the remaining issue in the case is the appropriate application of an existing balance of $90,709. The parties agree that these funds are an existing balance of monies the district received under the Teacher Quality Employment Act.

PAROL AND DOCUMENTARY EVIDENCE

The Commission presented its Business Administrator-Board Secretary. He has been in the position for more than eight years and is familiar with audits of the period 1982 through 1988. The witness stated at least one audit was ongoing when he arrived to work in the district.

The witness identified Exhibit P-1, a letter from the Division of Compliance to the Board's counsel dated September 5, 1990. Enclosed with the letter was another letter from the Division of Compliance to the superintendent dated June 15, 1990 and a portion of the audit and report for July 1, 1982-June 30, 1988. The Exhibit represents part of the decision on second appeal concerning balances in the Chapter 192-193 program. In the June 15 document, signed by Edward D. Kent, Chief of the Auditing Bureau, at item C he identifies $90,709 of TQEA funds not needed as of the June 30, 1988 audit, but to be used in future years to adequately compensate teachers in the Chapter 192-193 program.

Kent goes on to say

> Accordingly, your petition to set aside $977,613 of the subject surplus as unspent TQEA funds is dismissed because it is in violation of the law and code. Furthermore, because of the issues you have raised concerning the Chapter 192-193 program and the TQEA funds not being properly allocated, I plan to schedule a full and complete audit of the Commission's TQEA funding during the 1990-1991 school year.

The audit did identify and hold in reserve $90,709. All funds related to that audit have been held by the Commission pending all appeals.

In the first appeal, more than $1 million was returned to the State with interest. In December 1995, an embezzlement was uncovered. In another Compliance audit, the $90,709 again was identified. Again, all funds are retained pending all appeals.

The witness identified P-2, Notice of Determination, Second Level Appeal, Office of Compliance to Board President, April 8, 1998. This letter also refers to the $90,709 as TQEA funds. The Commission had teachers in earlier years who could have been paid, at least in part, with these funds, but the Commission held all monies pending all appeals.

The witness also testified that the $90,709 identified in the earlier audit was held with regular Commission funds, it was not dedicated or held in a special account. The witness identified Exhibit R-1, a letter from the Office of Compliance to the Board President dated June 27, 1997 with the investigative report produced that month attached. The attachment points out that $223,950 was "overstated." That same amount is identified in Exhibit P-2. However, there is no reference in Exhibit R-1 to these funds being TQEA monies. The Commission believed the funds had to be frozen pending the outcome of all appeals.

Scott A. Clelland, a Senior Manager with Ernst and Young, testified. He has been involved in public sector accounting for more than 14 years. In his opinion, the Commission's retention of the $90,709 was consistent with generally accepted accounting principles and appropriate.

The witness is not the auditor of record, but has been involved in this audit appeal. He was not aware of any Departmental order not to expend the funds.

The Department presented Robert W. Ortley, Chief Auditor. He has been in the Investigations and Special Auditing Unit for three and one-half years and has been a supervising auditor for more than six years. He assists the manager of special audits; he does emergent audits, and he directs audits of federally funded programs, such as Title I.

He had his first contact with the district in July 1988 when he served in the capacity of Senior Field Auditor. He calculated that Chapter 192-193 monies had been retained over and above costs to local education agencies (LEAs) who send pupils to the Commission. The witness identified Exhibit P-1, the determination of the audit appeal. Concerning Issue 3, paragraph C, the witness stated that this responds to the Commission argument then made that all monies were TQEA funds and could be retained. Paragraph C recognizes only $90,709 in TQEA funds. The Department did not order the Commission not to spend the $90,709.

As the negotiations and audit processes continued, the Commission returned more than $1 million to the Department. Exhibit R-1 reviews Commission surpluses in the period 1988-1995.

In Exhibit R-1, no TQEA monies are identified. The Commission had not segregated the funds nor had it identified the funds as being TQEA monies.

In the 1980s, the Legislature passed a minimum salaries act. There was an appropriation of State aid to LEAs to assist them in meeting the new minimum salary requirements.

The witness identified the Notice of Determination of April 8, 1998 (P-2). This is the second level of appeal determination concerning the June 27, 1997 audit. The Department's final response is found on page 3 in paragraph 1:

> During subsequent field work at the Commission, Department auditors reviewed the existed collective bargaining agreement between the Commission and the Middlesex County Education Services Association. The minimum staring salary for the Commission teachers during FY 1997-1998 is approximately $30,000. In accordance with *N.J.S.A.* 18A:29-5 *et seq.* Local Education Agencies must use TQEA funds to compensate for the difference between the starting teachers' salary and $18,500 when the starting salary is less than $18,500.

The response also states:

> The TQEA funds of $90,709 cited by the Commission represents TQEA funds not previously used to compensate for starting salaries that are less than $18,500. Since the current minimum starting salary is approximately $30,000 for Commission teachers, it is inconceivable that these funds can be expended for their original intended purpose. Therefore, the Commission's request to reduce the balance due to the State by $90,709 of TQEA funds is denied.

The witness stated he believed that, at the time Exhibit P-2 was created, the Commission employed no one at less than $18,500 per year. Educational service commissions use accounting systems involving cost centers. The commissions bill sending school districts in an amount roughly equal to the amount the LEAs receive in Chapter 192-193 money.

The original TQEA administrative code provisions provided money for teachers' salaries. Excess TQEA funds were not transferable to any other account. Salaries paid with TQEA monies

should not be included in per pupil costs billed to sending districts. This reduces the need for Chapter 192-193 funds and could lead to Chapter 192-193 funds being refunded to LEAs. Chapter 192-193 monies were returned to the Department.

Teachers in the Commission's Chapter 192-193 program did require TQEA funds to raise their salaries to the $18,500 minimum. The monies appropriated then could have been used then. This would reduce Chapter 192-193 expenditures. Chapter 192-193 funds not expended can be used for costs other than salaries, but must remain within the Chapter 192-193 program.

Concerning Issue 3, paragraph c in Exhibit P-1, the District has a right to rely on directions given by Department officials. This communication identified monies as TQEA funds and indicates the funds can be used in future years. The witness conceded that the funds possibly could have been used earlier. However, it is reasonable to "preserve" amounts directed to be returned. The witness believes that Exhibit P-1 says that the Commission could use the $90,709 at the time of the communication.

The Commission accumulated a surplus when it, in effect, charged LEAs tuition as opposed to actual per pupil costs. The original investigation into the present audit (R-1) was prompted by an employee theft. The $223,950 mentioned includes the $90,709 in question. The witness recalls the amount as being the difference between TQEA monies received for 1987-1988 and expenditures actually made. Originally, TQEA involved some retroactivity.

In the 1980s, educational service commissions billed LEAs what LEAs received from the State in Chapter 192-193 money. When the witness looked at the Commission's general ledger, he saw $90,709 unexpended. The Commission requested retroactive use. The money should have been shown as expended, but the Department advised the Commission, in effect, if you use the $90,709 then you will owe us money.

ARGUMENTS

Petitioner

The petitioner asserts the testimony of its Business Administrator-Board Secretary confirms the identification of the $90,709 as TQEA funds in an earlier audit proceeding (P-1). The identity of the earlier fund balance as the sole remaining issue in this matter was confirmed by the Department in Exhibit P-2.

The Administrator testified that, as a result of an earlier audit, the funds were preserved and identified in the Commission's general fund balance to be used upon completion of the audit and audit appeal in accordance with directions of the Chief Auditor, Edward Kent (P-1).

The earlier audit appeal concluded in 1995 when the funds that formed the principal issue of the first audit appeal were returned to the Department, together with accrued interest. These funds exceeded $1,299,000.

The Administrator testified that at or about the same time, as a result of an employee theft, the Commission became involved in the present audit appeal. The present audit first directed the return of $861,037 to the Department. As a result of intermediate appeals, all other issues related to that audit have been resolved. The only unresolved issue is the propriety from an accounting perspective of the identification and retention of the $90,709 during dependency of the first audit appeal and the disposition of those funds.

The Administrator also testified that he believed it was the appropriate course of conduct because the appeal had not been entirely resolved. The Chief Auditor for Special Audits at the Department admitted that the Department is claiming the funds not only as unexpended TQEA funds, but would, alternatively, make claim to them as Chapter 192-193 funds not expended in accordance with the statutory requirements. *N.J.S.A.* 18A:46-19. This testimony reenforced the Administrator's decision to preserve the monies until all issues had been settled.

The Commission's auditor confirmed that it was appropriate to preserve the funds pending the appeal from an accounting perspective. On the basis of undisputed facts, this tribunal should determine that the holding of the disputed funds at issue was appropriate.

The consequences of holding the funds while the first appeal pended are now addressed. The Department asserts that because these monies no longer can be expended as TQEA funds, they must be returned to the Department (R-1). This position wrongfully penalizes the Commission for acting in a responsible and appropriate accounting manner with respect to the funds. The Commission had a right to rely on Kent's letter which specifically identified the funds as TQEA monies, available for expenditure in future years. The Commission's auditor confirmed the fact that the Commission should and could have relied on Kent's comments as a representative of the Department. The Department's present position is really an extension of the first appeal when it attempts to recapture funds that it had identified as available to the Commission. The delay in the expenditure of these monies notwithstanding, the Commission should now be permitted to retain these monies.

The Commission's auditor also testified that the purpose of the TQEA funds was to retroactively reimburse districts for the difference between the teachers' salaries paid by them and the newly guaranteed $18,500 minimum salary. The auditor confirmed that the Commission must have already expended these funds in prior years in order to receive these funds as reimbursement from the State. Therefore, although the monies were labeled as TQEA funds and available for expenditure in future years, they were in reality reimbursement for prior years' expenditures. The State's position would penalize the Commission where it has already expended these monies in good faith.

Although the present audit has identified these funds as TQEA funds, the Commission's auditor testified that the salaries for which these funds were authorized related to the teaching positions in the Chapter 192-193 program. Therefore, in the event that these funds were expended as TQEA funds, that would have resulted in a surplus in the Chapter 192-193 account in the years in which they were expended. Although this issue was not previously identified in the present audit appeal, it was pursued in cross-examination. The Commission's auditor freely admitted that the Chapter 192-193 program expenditures were not limited solely to teachers' salaries. He confirmed that the Commission could have appropriately expended these funds in other areas and utilized the $90,709 in earlier years for other than teachers' salaries, provided the expenditures were related to the Chapter 192-193 program. Finally, the auditor confirmed that his review of the records in connection with the first audit appeal verified that there were a sufficient number of teachers against whose salaries these TQEA funds could have been applied.

Based upon the foregoing, the Department's request to return the funds should be denied and the Commission should be permitted to use the funds prospectively based on its appropriate accounting practice of preserving these funds for expenditure in the Chapter 192-193 program in future years.

Respondent

The Department asserts that on February 15, 1989, it issued an audit report of the financial accounts and internal controls of the Commission for the period July l, 1987 - June 30, 1988. The Commission appealed the results of this audit, first via the Department's internal appeals process and then by filing a petition with the Commissioner of Education. During the appeal process, a letter containing the findings of the Department's first level audit review was written by Chief Auditor Edward D. Kent, to the Commission Superintendent. The letter identified $90,709 of TQEA funds not needed by the Commission as of June 30, 1988.

Ultimately, the 1987-1988 audit was finalized when the Commissioner ordered the Commission to refund $1,299,100 to the Department and that decision was affirmed by the State Board of Education and by the Appellate Division.

In 1995, the Department again audited the Commission. It conducted a review of the Commission's Chapter 192-193 program for the period July 1, 1988 - June 30, 1995. In June 1997, the Department issued an investigative report that concluded that the Commission owed the Department $861,037. The Commission appealed the audit determination arguing, among other things, that the existing fund balances should be reduced by $90,709 representing the TQEA funds identified in the 1987-1988 audit, but never isolated. On April 8, 1998, the Department issued a second level appeal determination that rejected the Commission's argument. This case followed.

At hearing, the Commission argued that the $90,709 was kept frozen pending the final determination of its appeal of the 1987-1988 audit and again frozen because of the 1988-1995 audit. The Commission seems to believe that it would fair to allow it to apply the money to teachers' salaries now. The argument must fail for several reasons. First, it was unreasonable for the Commission to freeze the TQEA funds. Second, the Commission failed to keep the funds in an isolated account. Third, the funds have long since been expended for teachers' salary differential payments and teachers' salaries. Fourth, retention of the funds resulted in double billing to the sending school districts. Last, using the funds now would be contrary to the purpose and provisions of the TQEA.

It was not reasonable for the Commission to freeze the $90,709 after it received the June 15, 1990 letter from Kent. In Issue III, paragraph C, the letter states

> Our original audit, however, did not identify and hold in reserve $90,709 of TQEA funds not needed as of the June 30, 1988 audit, but to be used in future years to adequately compensate teachers in the Chapters 192/193 program. (P-1).

The letter clearly informs the Commission that the $90,709 was not counted as money owed to the Department and that the Commission could use the money in future years for teacher compensation. All witnesses at hearing agreed that the Department never directed the Commission to freeze those funds. Given the clear content of the June 15, 1990 letter and the Commission's own belief that the funds were TQEA money, retaining the funds in a comingled

account pending resolution of the audit was unreasonable, and provides no basis for the Commission to use the funds at this time.

The Commission presented no evidence that it had, in fact, frozen the TQEA funds identified in 1990. The Commission's business administrator testified that the $90,709 was never isolated in a named or dedicated account. It was comingled with Chapter 192-193 funds. Also, the Department's audit for the period July 1, 1988 - June 30, 1995 did not identify any money as TQEA funds. It is thus reasonable to presume that the $90,709 was exhausted, perhaps even prior to Kent's June 15, 1990 letter.

Importantly, the facts in this matter are virtually indistinguishable from the facts presented to Judge Tylutki in the first Commission appeal. *Middlesex County Educational Services Commission v. State Department of Education*, 94 *N.J.A.R.* 2d (EDU) 234, aff'd, 95 *N.J.A.R.* 2d (EDU) 302 (App. Div. 1995). Under Judge Tylutki's holding, which was affirmed by the Commissioner, TQEA funds must be used first when funding teachers' salary differential payments. To the extent that the Commission made teachers' salary differential payments in the period following June 30, 1988, that money had to be drawn from TQEA accounts. "If any Chapters 192/193 funds were used by the MCESC for the . . . teachers' salary differential payments, those funds were borrowed for this purpose and the Chapters 192/193 account had to be reimbursed once the TQEA funds were received by the MCESC." *Id.* at 237. Thus, even if the $90,709 was identified as TQEA money, it would have had to be used to reimburse Chapter 192-193 funds expended after June 30, 1988. In short, TQEA funds are drawn first for the purpose of making teachers' salary differential payments and any funds remaining in a comingled account must be Chapter 192-193 money.

As to whether the Commission could retain any unused TQEA funds, Judge Tylutki held that "[i]f the MCESC had presented proof that it had received more TQEA funds that it needed to make the January 1988 payments, it would be entitled to retain such excess funds in a special account for future teachers' salary payments." *Ibid.* But, in the present case the Commission has not shown that it placed the TQEA funds in a special account dedicated to teachers' salary payments. Rather, it concedes that the monies were never isolated. If the funds had been dedicated to making teachers' salary payments, they would have been exhausted during the 1988-

1989 school year. In simplest terms, the $90,709 can no longer be TQEA money. All of the excess reserve currently in the Commission's account is Chapter 192-193 money that must be refunded to the Department pursuant to *N.J.S.A.* 18A:46A-14.

Finally, the Department notes that the type of retroactive funding that the Commission proposes is contrary to the purposes and provisions of the TQEA. Although an educational services commission may charge tuition to sending districts for pupil services, *N.J.S.A.* 18A:6-62.1, which was in effect at the relevant time, provides that an educational services commission cannot charge money to the sending district to the extent that it has utilized TQEA funds. Collecting money from the sending districts for TQEA funded salaries would be double billing. Thus, to the extent the Commission accumulated TQEA funds without applying them to salaries, it overcharged the sending districts. Further, it is impossible for the Commission to use TQEA funds for their original purpose because the minimum for Commission teachers is now approximately $30,000 and TQEA funds were to be used for teachers' salaries less than $18,500. For that reason, the money should be refunded to the Department so that it can be placed in a general Chapter 192-193 fund and be used to provide services to the State's school children.

DETERMINATION

Chapter 321 of the Laws of 1985 went into effect on September 9, 1985. The Act is known as the Teacher Quality Employment Act. The Act established a minimum salary of $18,500 for teachers. It did not include teachers employed by educational services commissions. Chapter 9 of the Laws of 1986 amended the statute, effective March 28, 1986 to include full-time teachers employed by educational services commissions. Shortly after the amendment, educational services commissions were advised that hourly teachers would not be eligible to receive the minimum salary. However, an opinion of the Attorney General advised the educational services commissions that full-time hourly teachers were entitled to the minimum salary established by the TQEA. Obviously, these things occurred during the period covered by the July 1, 1982 - June 30, 1988 audit.

Careful reading of *Middlesex County Educational Services Commission v. State Department of Education*, 94 *N.J.A.R.* 2d (EDU) 234, aff'd, 95 *N.J.A.R.* 2d (EDU) 302 (App.

Div. 1995), reveals that TQEA funds must be used first when funding teachers' salary differential payments. To the extent that a Commission or any LEA makes teacher salary differential payments in the period following June 30, 1988, that money had to come from TQEA accounts. Obviously, if any Chapter 192-193 funds were used by a Commission for teachers' salary differential payments, those funds were, in effect, borrowed for the purpose and the Chapter 192-193 account would have had to be reimbursed once the Commission received TQEA funds from the State.

N.J.S.A. 18A:6-62.1, enacted at the same time as the TQEA, provides

> Tuition rates for the 1985-1986 school year and subsequent years for Educational Services Commissions shall be determined after excluding the applicable salaries funded by Section 7 of *P.L.* 1985, c. 321 (C. 18A:29-5.6) and shall be certified by the Commissioner of Education.

This provision was repealed by *L.* 1990, c. 254, §18, effective July 1, 1990. However, it is applicable here because the rights and obligations of the parties are determined by the law in effect at the relevant time.

The Commission insists that the only unresolved issue is the propriety from an accounting prospective of the identification and retention of the $90,709 during dependency of the first audit appeal. The Department says that because these monies no longer can be expended as TQEA funds, they must be returned (R-1). The Commission insists it is inappropriately penalized for acting properly with respect to these funds. The Commission had a letter from Kent specifically identifying the funds as TQEA funds available for expenditure in future years. The Commission's auditor testified that the Commission should and could have relied on Kent's comments.

The present audit has identified the subject funds as TQEA funds. The Commission's auditor insists that the salaries for which the monies were authorized were for teaching positions in the remedial Chapter 192-193 program. Thus, if these funds were expended as TQEA funds that would have resulted in a surplus in the Chapter 192-193 account. However, Chapter 192-193 expenditures are not limited to teachers' salaries. The question then seems to be whether the

Commission can use funds that it concedes were never isolated and that were dedicated to making teachers' salary payments, but were not used for that purpose at the appropriate time.

The Department's auditor's testimony is the more compelling. I agree with the Department's argument that receipt of TQEA monies limited the amount of money placed in the reserve account to any funds left over after the teachers' salary differentials were made. The law does not provide any authority for a school district, including an educational services commission, to make the teachers' salary differential payments using other available funds and move TQEA funds to a reserve account. Thus, I accept the Department's testimony that if any Chapter 192-193 funds were used by the Commission for teachers' salary differential payments, the funds were borrowed for this purpose and the Chapter 192-193 account had to be repaid once TQEA funds were received from the State. This would constitute as the Department correctly points out, the receipt of funds from two different sources for teachers' salary differential payments. This is consistent with the holding in *Essex County Educational Services Commission v. State Department of Education*, 93 *N.J.A.R.* 2d (EDU) 522, adopted, Comm'r of Educ. (June 8, 1993).

The Commission's argument that it had a right to depend on Kent's representation that the funds were TQEA monies available for expenditure in future years is correct as far as it goes, but overlooks the obvious fact that TQEA monies in future years (if there were any for which the Commission qualified) would necessarily be reduced by the $90,709 amount held. There can be no estoppel where the complaining party has not changed position to its detriment.

In consideration of the foregoing, I **CONCLUDE** that the $90,709 in controversy is Chapter 192-193 unused funds and that the Commission is to return $90,709 to the Department. The Commission also shall return to the Department any interest earned on this amount.

I expressly **FIND** no violation by the Office of Compliance of the Teacher Quality Employment Act.

There being no other relief to which the Commission is entitled, I **ORDER** the Petition of Appeal **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

26 FEBRUARY 1999
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

3/3/99
DATE

Debbie Antanaitis/bp
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 4 1999
DATE

Barbara A Harnak
OFFICE OF ADMINISTRATIVE LAW

ph

WITNESSES

For Petitioner:

Patrick M. Moran
Scott A. Clelland

For Respondent:

Robert W. Ortley

EXHIBITS

For Petitioner:

P-1 Letter, Division of Compliance to Board's counsel, September 5, 1990, 2 pp. with letter, Division of Compliance to superintendent, June 15, 1990, 4 pp. and portion of audit and report for July 1, 1982 through June 30, 1988, 23 pp.

P-2 Notice of Determination, second-level appeal, Office of Compliance to Board president, April 8, 1998, 6 pp.

For Respondent:

R-1 Letter, Office of Compliance to Board president, June 27, 1997, 2 pp. with Investigative Report, June 1997, 9 pp.

OAL DKT. NO. EDU 6565-98
AGENCY DKT. NO. 189-6/98

MIDDLESEX COUNTY EDUCATIONAL SERVICES COMMISSION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner agrees with the findings and conclusion of the Administrative Law Judge that petitioner must refund $90,709 in unused Chapter 192-193 funds, along with any interest earned on these moneys, to the State Department of Education.

Accordingly, the initial decision of the OAL is affirmed for the reasons expressed therein. Petitioner is directed to reimburse the State Department of Education $90,709, along with any interest earned on such funds, and the instant Petition of Appeal is hereby dismissed.*

IT IS SO ORDERED.

April 16, 1999
Date of Mailing, April 16, 1999

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

117-99

IN THE MATTER OF THE TENURE	:	
HEARING OF CYNTHIA PULLEN,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
CITY OF CAMDEN, CAMDEN	:	DECISION
COUNTY.	:	
	:	

April 19, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6660-98

AGENCY DKT. NO. 208-6/98

IN THE MATTER OF THE TENURE HEARING OF CYNTHIA PULLEN, BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY

Karen Murray, Esq., for petitioner (Murray, Murray & Corrigan, attorneys)

Keith Waldman, Esq., for respondent (Selikoff and Cohen, attorneys)

Record Closed: March 2, 1999 Decided: March 3, 1999

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

This matter concerns the charges of abandonment of position and incapacity filed against the respondent, Cynthia Pullen. The petitioner, the Board of Education of the City of Camden, seeks to remove the respondent from her tenure position as a teacher. The respondent requested a hearing and the matter was transmitted to the Office of Administrative Law (OAL) on August 10, 1998, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

On the date scheduled for hearing, March 2, 1999, the parties appeared and presented a signed stipulation of settlement, which is attached and fully incorporated herein.

The respondent testified that her problems at school, which resulted in the filing of the tenure charges, were due to her addiction to crack and cocaine. Ms. Pullen has participated in an eight-month drug rehabilitation program and she has remained drug-free since she completed the program in November 1998. Presently, Ms. Pullen goes twice a month for additional counseling. In addition, she works with new patients at the rehabilitation center. Ms. Pullen has a positive attitude towards avoiding any future use of narcotics and she is looking forward to a career change. She has taken several civil service tests and is optimistic that she will get a non-teaching position shortly. Ms. Pullen may want to teach again sometime in the future.

Ms. Pullen recognized that by signing the stipulation of settlement that she is resigning her tenured teaching position and giving up her right to a hearing in this matter. Further, she understands that this settlement does not restrict the State Board of Examiners from taking action as to her teaching certificate.

I **FIND** that Ms. Pullen candidly admitted her prior drug addiction and made an impressive presentation of her commitment to avoid drugs and to seek new career opportunities.

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

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

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

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1, and that the settlement should be approved. I approve the settlement, and **ORDER** that the parties

comply with the settlement terms and that these proceedings be concluded. I further note that the parties have agreed to waive the right to file exceptions and cross-exceptions.

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

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

March 3, 1999
DATE

BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

3/4/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 4 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

ml

Murray, Murray & Corrigan
25 Sycamore Avenue
Little Silver, New Jersey 07739
Attorneys for the Petitioner
Camden Board of Education
(732) 747-2300

IN THE MATTER OF THE TENURE HEARING OF CYNTHIA PULLIN, BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDUOTH 06660-98S AGENCY REF. NO. 208-6/98 **STIPULATION OF SETTLEMENT**

THIS STIPULATION OF SETTLEMENT is entered into by and between the Petitioner, Board of Education of the City of Camden (hereinafter "BOARD") and Respondent, CYNTHIA PULLIN (hereinafter referred as "PULLIN") (the BOARD and PULLIN are hereinafter referred to jointly as the "Parties" and each may be referred to severally as a "Party");

WHEREAS, PULLIN has been continuously employed by the Board as a teaching staff member since September 1, 1985;

WHEREAS, on or about June 22, 1998, the BOARD certified to the Commissioner of Education charges against PULLIN which it felt under the circumstances, if true, were sufficient to warrant her dismissal;

WHEREAS, on or about July 30, 1998, PULLIN filed an Answer to the charges denying the allegations as stated;

WHEREAS, this matter was listed for hearing before the Honorable Jeff Masin, ALJ, on February 23, 1999 and March 2, 1999 and the Parties having agreed to a means of resolving this dispute in a manner consonant with the public interest; and

WHEREAS PULLIN and the BOARD have entered into this stipulation with a full understanding of their rights, recognizing that this stipulation and their agreement is subject to the review and approval of the Commissioner of Education, and with PULLIN's further understanding that pursuant to N.J.A.C. 6:11-3.6(a)1 any determination made by the Commissioner resulting in a loss of tenure or dismissal may be referred to the State Board of Examiners for determination of possible revocation or suspension of teaching certificate;

NOW, THEREFORE, the matter in difference having been amicably adjusted by and between the parties,

IT IS HEREBY STIPULATED AND AGREED AS FOLLOWS:

1. PULLIN tenders her resignation effective the date that this agreement is fully executed. A copy of the letter of resignation is attached as Exhibit A to this stipulation. The BOARD accepts PULLIN's resignation effective on the resignation date and hereby agrees that all of its official records shall reflect that the reason for PULLIN's leaving the BOARD's employ was that she resigned "in good standing." The BOARD will pay PULLIN her salary and all customary benefits and emoluments of employment from November 19, 1998 until the resignation date. The BOARD hereby withdraws with prejudice the tenure charges that it has filed against PULLIN.

2. The BOARD will immediately provide PULLIN with a neutral letter of reference setting forth her dates of employment, the job titles held by her and noting that PULLIN resigned from the Camden schools in good standing. The letter will be in the form attached hereto as Exhibit B. The Board agrees that all inquiries it receives regarding PULLIN will be

directed to the Department of Human Resources and parties with such inquiries will be informed that PULLIN resigned as an employee in good standing.

3. The BOARD will provide PULLIN with all salary, benefits and emoluments to which she would otherwise be entitled under the collectively negotiated agreement, federal law and/or state law from November 19, 1998 to the resignation date.

4. The Parties enter into this agreement with the mutual understanding that a formal record will be made of PULLIN's acceptance of the terms of this settlement at the Office of Administrative Law and that, as part of that record, she will have an opportunity to present proofs as to: (a) the knowing and voluntary waiver of her tenure rights; (b) her capacity to make such a waiver and (c) the efforts she has made to rehabilitate herself.

5. The Order adopting this Stipulation: (a) may, in the Administrative Law Judge's discretion, make findings with respect to those proofs and (b) will provide that the BOARD will not refer this matter to the State Board of Examiners for revocation of PULLIN's teaching certificate. The Parties further agree that this agreement is contingent upon approval by the Office of Administrative Law and the Commissioner of Education. Neither party will take any legal action whatsoever that is inconsistent with this Agreement before the Office of Administrative Law or any other forum. Provided, however, that nothing in this agreement is intended to restrict the State Board of Examiners from taking any action it deems appropriate.

6. In consideration of the savings of time, effort and legal expense that this settlement will create, the BOARD agrees to immediately take all steps necessary to convert PULLIN's suspension from June 19, 1998 to November 19, 1998 to an approved leave of

absence without pay. The Board will not be responsible for making any contribution to the Teachers' Pension and Annuity Fund ("TPAF") for this leave period, but Pullin is free to do so should TPAF permit her to.

7. PULLIN agrees that she will not hereafter apply to the BOARD for employment.

8. The BOARD will allow PULLIN to remove personal items from the Cream Elementary School and will not interfere with or impede her from doing so.

9. The Parties agree that they and their officers, agents, and administrators will be bound by a covenant of good faith and fair dealing with respect to performance under this Stipulation.

10. This Stipulation constitutes a full release of any and all claims of either Party against the other. Specifically, PULLIN forever releases the BOARD from any and all complaints, charges, liabilities, demands, debts, accounts, obligations, promises, suits, actions, causes of action, demands in law or equity, including claims for damages (including but not limited to back pay and front pay), equitable relief, and attorney fees or costs, which PULLIN now has, or claims to have, or which PULLIN at any time hereafter may have, or claim to have, whether presently known or unknown, arising at any time, up to and including the date on which she signs the document. PULLIN specifically releases the BOARD from any claims she has or may have had under New Jersey Law Against Discrimination or the federal Americans with Disabilities Act. Nothing in this paragraph is intended to operate as a release, waiver, or forfeiture of PULLIN's rights, and the BOARD's

obligations under: (a) any state worker's compensation act or statute, or (b) any State of New Jersey retirement, pension, savings, or 401(k) plan in which PULLIN is a participant;

11. The PARTIES forever releases each other from any and all complaints, charges, liabilities, demands, debts, accounts, obligations, promises, suits, actions, causes of action, demands in law or equity, including, but not limited to, claims for damages, equitable relief, attorney fees or costs, which the BOARD now has, or claims to have, or which the BOARD at any time may have had or claimed to have had, or which the BOARD at any time hereafter may have, or claim to have, whether presently known or unknown, arising at any time, up to and including the date on which this document is signed on its behalf.

13. The Parties agree to waive exceptions.

14. The Parties agree that this document constitutes their full understanding. It is agreed that there are no other understandings or agreements (either written or oral) which would have any impact upon the present action.

15. By signing this agreement, the Parties certify that they have had the opportunity to discuss this Stipulation with counsel. They are fully satisfied with the services of their counsel with respect to both this Stipulation and all other aspects of this case and they enter into this Stipulation knowingly, willingly and without any coercion or improper inducements.

16. The Parties further agree that this agreement is contingent upon approval by the Office of Administrative Law and the Commissioner. Neither Party will take any legal action whatsoever that is inconsistent with this agreement before the Office of Administrative Law or any other forum.

-3a-

17. By signing this agreement, each signatory represents that she or he is a Party or has been duly authorized by a Party to sign on that Party's behalf.

18. The Parties agree that this Stipulation may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

FOR THE CITY OF CAMDEN BOARD OF EDUCATION

DATED: 2/17/99

By: _____
KAREN A. MURRAY, ESQ.

DATED: 2/17/99

By: Cynthia Y. Pullin
CYNTHIA PULLIN

CYNTHIA PULLIN
2922 Carman Street
Camden, New Jersey 08105

March 1, 1999

Leon Freeman, Board Secretary
CITY OF CAMDEN BOARD OF EDUCATION
201 North Front Street
Camden, NJ 08102-1935

re: Resignation Effective March 1, 1999

Dear Mr. Freeman:

Please be advised that I will be resigning from my position as an elementary school teacher at the Cream Elementary School effective March 1, 1999.

I will take with me many fond memories of the children I have taught.

Very truly yours,

Cynthia J. Pullin

CYNTHIA PULLIN

EXH A -39

BOARD OF EDUCATION
Camden, New Jersey 08102
(609) 966-2000
FAX (609) 966-2138

OFFICE OF THE SUPERINTENDENT
201 N. FRONT ST.

ROY J. DAWSON, JR. Ed.D.
SUPERINTENDENT OF SCHOOLS

March 2, 1999

Re: Cynthia Pullin

To Whom it May Concern:

Please be advised that Cynthia Pullin was employed by the Camden Board of Education as an elementary school teacher from September 1, 1985 until her resignation in good standing on March 1,1999. Pursuant to Board policy, we can give no further information.

Thank you.

Sincerely,

CITY OF CAMDEN BOARD OF EDUCATION

Linnell Wright, Director of Personnel

EXH B -3-h-

OAL DKT. NO. EDU 6660-98
AGENCY DKT. NO. 208-6/98

IN THE MATTER OF THE TENURE	:	
HEARING OF CYNTHIA PULLEN,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
CITY OF CAMDEN, CAMDEN	:	DECISION
COUNTY.	:	
	:	

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

Upon thorough and independent review of the record of this matter, and in full consideration of the circumstances surrounding respondent's admitted absence from her position as a second grade classroom teacher as a result of her undisputed addiction to crack and cocaine, as well as her subsequent enrollment, and apparent re-enrollment, in a drug rehabilitation program, the Commissioner is compelled to reject the proposed agreement as it is currently structured. In so doing, the Commissioner is mindful of his exclusive authority to decide tenure matters, which authority necessarily entails his scrutiny, evaluation and approval of proposed settlements (*In re Cardonick*, decided by the Commissioner April 7, 1982, affirmed State Board of Education April 6, 1983, 1990 *S.L.D.* 842, 849)

Here, the agreement provides that, upon respondent's resignation from the Board's employ, all of the Board's official records shall reflect that she resigned "in good

standing," (paragraph one) and the Board will further provide respondent with a letter of reference indicating that she resigned "in good standing." (paragraph two) A copy of that letter is appended to, and made a part of, the agreement. (Exhibit B) However, based on the total record before him, and recognizing that respondent indicates she may want to return to teaching in the future (initial decision at p. 2), the Commissioner cannot sanction the *characterization of respondent's resignation* that the parties so propose, as such terms do not "***adequately protect the public interest and in no way jeopardize the interests of New Jersey's public school students***." *Barbara Holder v. Board of Education of the Township of Piscataway, Middlesex County*, State Board of Education, decided April 7, 1993.[1] (See also, *In the Matter of the Tenure Hearing of John H. Wagner, Office of Employee Relations, Department of Human Services, Woodbine Developmental Center*, Commissioner Decision, November 13, 1991; Commissioner Decision on Remand, January 15, 1993, aff'd State Board of Education, October 5, 1994, where the Commissioner rejected and remanded for plenary hearing a tenure settlement which provided for respondent's resignation "in good standing," notwithstanding that respondent promised not to apply for any position with any institution operated by the Department of Human Services. Although respondent denied engaging in behavior which formed the basis of the charge of conduct unbecoming a teaching staff member, such resignation terms were determined inadequate to carry out

[1] Distinguish, *Barbara Holder v. Board of Education of the Township of Piscataway, Middlesex County,* State Board of Education April 7, 1993, where, in a dispute which did not involve tenure charges brought against a teacher, and where allegations as to the teacher's underlying conduct were not as serious as those in the instant matter, the terms of the settlement agreement were found to be consistent with law, and the parties' agreement to alter petitioner's evaluation documents, upon her resignation, were nevertheless found to adequately protect the public interest.

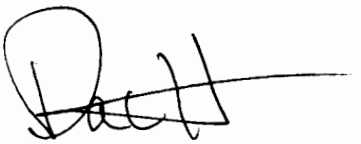
the Commissioner's responsibility to all children in New Jersey, not merely to those in the district from which the charged teacher resigned.)

Additionally, the Commissioner underscores that it is his duty, upon rendering a final decision, to refer tenure determinations to the State Board of Examiners for possible revocation of respondent's certificate pursuant to *N.J.A.C.* 6:11-3.6. To the extent paragraph five of the proposed settlement may be otherwise interpreted, although the Board will not *make* such referral, it may not exonerate itself from its duty to cooperate in any proceedings or action which the Board of Examiners may undertake.

While the Commissioner does not preclude the possibility of settlement in this matter, he stresses that in order for him to meet his own obligation to the schools and children of this state, he must be assured that any settlement is consistent with appropriate standards for setting aside tenure matters as expressed in *Cardonick, supra.* Accordingly, the proposed settlement is rejected for the reasons expressed herein.

Accordingly, the Commissioner hereby remands this matter to the Office of Administrative Law for revision of the documents consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to a hearing on the merits.[2]

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

April 19, 1999
Date of Mailing, April 19, 1999

118-99

RAYMOND HILDEBRANDT,	:	
PETITITONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 19, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9211-98

AGENCY DKT. NO. 382-8/98

RAYMOND HILDEBRANDT,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,

Respondent.

Randi Doner April, Esq., for petitioner (Balk, Oxfeld, Mandell & Cohen, attorneys)

David A. Rapuano, Esq., for respondent (Murray, Murray & Corrigan, attorneys)

Record Closed: February 1, 1999 Decided: February 26, 1999

BEFORE **DIANA C. SUKOVICH**, ALJ:

On September 25, 1998, this matter was transmitted to the Office of Administrative Law for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13. A telephone prehearing conference was scheduled and held on January 27, 1999.

During the telephone conference, the parties advised that they were attempting to resolve this matter. On February 1, 1999, the parties submitted the attached Settlement Agreement Between the Elizabeth Board of Education and Raymond Hildebrandt indicating the terms of agreement incorporated herein by reference.

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

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

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

I **CONCLUDE** that the agreement meets the safeguard requirements of *N.J.A.C.* 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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

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

Feb 26, 1999
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

3/5/99
DATE

D Vantanaitis/jc
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 9 1999
DATE

Barbara A Hannah
OFFICE OF ADMINISTRATIVE LAW

md

SETTLEMENT AGREEMENT
BETWEEN
THE ELIZABETH BOARD OF EDUCATION
AND
RAYMOND HILDEBRANDT

This agreement is between Raymond Hildebrandt and the Board of Education and the City of Elizabeth, Union County, New Jersey.

1. Mr. Hildebrandt agrees to withdraw, with prejudice, all claims pending and future in the matter entitled Hildebrandt v. Elizabeth Board of Education, Agency Docket No. 123-4/97, OAL Docket No. EDUOA 05471-97N or based on the same operative facts as this matter.

2. Mr. Hildebrandt agrees to forgo all claims to back pay related to this matter or based on the operative facts of Hildebrandt v. Elizabeth Board of Education, Agency Docket No. 123-4/97, OAL Docket No. EDUOA 05471-97N.

3. Mr. Hildebrandt shall be given a comprehensive examination, at Board expense, by a physician specializing in back injuries, to be mutually agreed upon by the parties.

4. The physician shall be asked to render a written opinion as to whether Mr. Hildebrandt is capable of performing all the duties of custodian for the Elizabeth Board of Education, and shall be provided with the custodian's job description. Mr. Hildebrandt or the Board may also provide any other relevant medical documentation for review by the physician.

5. This opinion shall be binding on the parties, with Mr. Hildebrandt being reinstated, with seniority but no back pay to the position of the custodian, if the physician renders a written opinion that Mr. Hildebrandt is capable of performing his job duties without any significant limitations. If the physician renders an opinion that Mr. Hildebrandt is not capable of performing the job duties of a custodian without significant limitation or accommodation, Mr. Hildebrandt shall not be reinstated and shall forgo all claims to reinstatement or back pay.

6. In the case that Mr. Hildebrandt is reinstated, he shall be given credit for his period of leave for the purposes of benefits, seniority and salary guide placement, but in no event shall Mr. Hildebrandt be entitled to back pay.

7. Mr. Hildebrandt agrees to file a stipulation of dismissal dismissing the above referenced Commissioner of Education action with prejudice within 5 business days of the execution of this agreement.

8. The parties agree that the terms of this agreement and settlement bind the parties to this agreement, their heirs, executors, administrators, successors in interest, and assigns.

Raymond Hildebrandt — Date: 3/12/98
Raymond Hildebrandt

Randi Doner April — Date: 3/23/98
Randi ~~April~~ Doner April
Attorney for Mr. Hildebrandt

David A. Rapuano — Date: 3/23/98
David A. Rapuano
Attorney for the Elizabeth
Board of Education

OAL DKT. NO. EDU 9211-98
AGENCY DKT. NO. 382-8/98

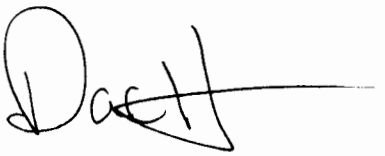
RAYMOND HILDEBRANDT,	:	
PETITITONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter, along with an initial decision and a copy of a settlement agreement, was returned by the Office of Administrative Law (OAL) on March 5, 1999. Although the initial decision indicates that the parties were attempting to resolve this matter, and "***[o]n February 1, 1999, [they] submitted the attached Settlement Agreement [b]etween the Elizabeth Board of Education and Raymond Hildebrandt ***" (initial decision at p. 1), the document appended to the initial decision could not represent the settlement agreement reached in the within matter, since the appended agreement was signed by the parties in *March 1998*. Rather, the Commissioner notes that the agreement appended to the initial decision appears to resolve a prior matter, *Hildebrandt v. Board of Education of the City of Elizabeth*, OAL Dkt. No. EDU 05471-97,[1] and further appears to be the very subject of the within Petition of Appeal.

[1] The within matter is docketed as *Hildebrandt v. Board of Education of the City of Elizabeth, Union County*, OAL Dkt. No. 9211-98.

Inasmuch as neither party submitted exceptions to the initial decision, the record is devoid of explanation with respect to the proceedings in this matter, and neither party responded to calls seeking clarification, despite repeated attempts, this matter is hereby returned to the OAL for further proceedings, as necessary, and appropriate disposition.[2]

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

April 19, 1999
Date of Mailing, April 19, 1999

VENITA BARNETTE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

April 19, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8830-98

AGENCY DKT. NO. 424-9/98

VENITA BARNETTE,

Petitioner,

v.

MANALPAN-ENGLISHTOWN
REGIONAL SCHOOL DISTRICT
BOARD OF EDUCATION,

Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Zazzili, Fagella & Nowak, attorneys)

Sanford D. Brown, Esq., for respondent (Cerrato, Dawes, Collins, Saker & Brown, attorneys)

Record Closed: March 1, 1999 Decided: March 1, 1999

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

Respondent Manalpan-Englishtown Regional School District Board of Education (BOE) declined to renew the contract of employment of petitioner, formerly a teacher in the BOE's school system. Petitioner filed a petition alleging that the BOE's action was wrongful and

demanding that the BOE offer her a contract for the next school year, etc. As shown in the attached "Stipulation of Dismissal with Prejudice," the case has been settled.

PROCEDURAL HISTORY

On September 15, 1998, the petition was filed with the Department of Education. N.J.S.A. 18A:6-9. On October 5 and 15, 1998, the BOE's answer and amended answer to the petition were filed with the Department. The Department transmitted the matter to the Office of Administrative Law (OAL) where, on October 16, 1998, it was filed as a contested case. N.J.S.A. 18A:6-11, N.J.S.A. 52:14B-2(b). By letter dated October 27, 1998, the petitioner's present attorney entered his appearance, submitting a substitution of attorney form. The case was assigned to me and, on November 4, 1998, I sent a letter to the attorneys scheduling discovery, etc. The attorneys advised me that they were negotiating a settlement and, on the record closed date, the "Stipulation of Dismissal with Prejudice" was filed in the OAL.

FINDINGS OF FACT

In her petition, petitioner made allegations, including the following: From September 1, 1996 to June 30, 1998, the BOE employed her as a 10 month employee teaching in the BOE's elementary school. The BOE notified her that it would offer her another 10 month contract. Thereafter, the BOE notified her that her principal recommended that the BOE not offer to her another 10 month contract. Thereafter, the BOE notified her that its administration would like to discuss with her job performance. Thereafter, such a meeting was held and the BOE set up a program to monitor and support her. Thereafter, the BOE notified her that, despite some improvement, her principal recommended that the BOE not offer to her another 10 month contract. Thereafter, the BOE provided to her a statement of reasons why she would not receive another 10 month contract, the BOE afforded her a hearing, and the BOE decided it would not offer her another contract. The BOE's actions were based on her "Southern View" of the world and her African-American race.

In the BOE's answer, it denied allegations of wrongdoing, alleged that it acted lawfully and demanded dismissal of the petition.

The attorneys represent and I find that the parties have intelligently, voluntarily and lawfully agreed to the following settlement terms: The BOE will pay to petitioner 30 days' pay. The petitioner agrees to the dismissal of all charges against the BOE. The petitioner has executed a release of all claims, etc., against the BOE and her attorney is holding it in escrow. Upon approval of this settlement, petitioner's attorney will convey the executed release to the BOE's attorney.

CONCLUSIONS OF LAW

Settlement will avoid time and expense for both parties which would be incurred in fully litigating complicated factual and legal issues.

The parties have intelligently and voluntarily entered into the settlement which is consistent with law and which disposes of all issues in controversy. N.J.A.C.1:1-19.1.

ORDER

I **ORDER** the parties to comply with the settlement agreement and I **ORDER** the petition withdrawn.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is

otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

March 1, 1999
DATE

John A. Tassini
JOHN R. TASSINI, ALJ

Receipt Acknowledged:

3/4/99
DATE

Debbie Antanitis/ss
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 4 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

CERRATO, DAWES, COLLINS,
SAKER & BROWN, P.A.
509 STILLWELLS CORNER ROAD
P.O. BOX 6009
FREEHOLD, NEW JERSEY 07728
(732) 431-5000
Attorneys for Respondent

1999 MAR -1 A 10:45

VENITA BARNETTE Petitioner,	:	**BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY**
v.	:	**OAL DOCKET NO. EDUOR 08830-98S** **AGENCY REF. NO. 424-9/98**
THE MANALAPAN-ENGLISHTOWN REGIONAL BOARD OF EDUCATION	:	Civil Action
Respondent.	:	**STIPULATION OF DISMISSAL WITH PREJUDICE**

The within matter having been amicably resolved between the parties, and all matters disposed of, it is hereby stipulated and agreed that upon payment of the settlement amount of $4,566.66 by the Respondent to the Petitioner, and upon execution of the Release by Petitioner, a copy of which is attached hereto as Exhibit "A", the Petitioner, Venita Barnette, hereby agrees to dismiss all charges against the Respondent, The Manalapan-Englishtown Regional Board of Education, with prejudice, and without costs to either party.

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
Attorneys for Petitioner

By:_____
RICHARD A. FRIEDMAN, ESQUIRE

Dated: February 19, 1999

CERRATO, DAWES, COLLINS, SAKER
& BROWN, P.A.
Attorneys for Respondent, Manalapan-Englishtown Regional Board of Education

By:_____
SANFORD D. BROWN, ESQUIRE

Dated: February 18, 1999

RELEASE

This Release, dated , 19 99 , is given

BY the Releasor(s) VENITA BARNETTE

referred to as "I".

TO MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT,

referred to as "You".

If more than one person signs this Release, "I" shall mean each person who signs this Release.

1. **Release.** I release and give up any and all claims and rights which I may have against you. This releases all claims, including those of which I am not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now. I specifically release the following claims: any and all claims arising out of an action filed by the Releasor in the Office of Administrative Law under OAL Docket No. EDUOR 08830-98S, Agency Dkt. No. 424-9/98, including any and all claims or potential claims which the Releasor may have under Civil Rights Law, or any other applicable statute, rule and/or governmental regulation.

2. **Payment.** I have been paid a total of $ 4,566.66----------, in full payment for making this Release. I agree that I will not seek anything further including any other payment from you.

3. **Who is Bound.** I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities, such as your heirs or the executor of your estate.

4. **Signatures.** I understand and agree to the terms of this Release. If this Release is made by a corporation its proper corporate officers sign and its corporate seal is affixed.

Witnessed or Attested by:

.... (Seal)
VENITA BARNETTE

..... (Seal)

STATE OF NEW JERSEY, COUNTY OF SS.:

I CERTIFY that on , 19 99 ,

VENITA BARNETTE

personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) is named in and personally signed this document; and

(b) signed, sealed and delivered this document as his or her act and deed.

Prepared by: (Print signer's name below signature)

SANFORD D. BROWN, ESQUIRE

..... (Print name and title below signature)

EXHIBIT A

Copyright© 1982 By ALL-STATE LEGAL SUPPLY CO.

OAL DKT. NO. EDU 8830-98
AGENCY DKT. NO. 424-9/98

VENITA BARNETTE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

April 19,1999
Date of Mailing, April 19,1999

121-99

IN THE MATTTER OF THE TENURE	:	
HEARING OF TIMOTHY KASONY,	:	COMMISSIONER OF EDUCATION
LAWRENCE TOWNSHIP SCHOOL	:	DECISION
DISTRICT, MERCER COUNTY.	:	
	:	

April 22, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10490-98
AGENCY DKT. NO. 462-11/98

IN THE MATTER OF THE TENURE HEARING OF TIMOTHY KASONY, LAWRENCE TOWNSHIP SCHOOL DISTRICT

James F. Schwerin, Esq., for petitioner (Carroll, Weiss & Josephson, attorneys)

Michael T. Barrett, Esq., for respondent (Bergman & Barrett, attorneys)

Record Closed: March 4, 1999 Decided: March 5, 1999

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

STATEMENT OF CASE

The Lawrence Township Board of Education certified tenure charges of excessive absenteeism and incapacity against Timothy Kasony, a custodian, to the Commissioner of Education.

This matter was transmitted to the Office of Administrative Law on December 1, 1998 for a hearing pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13.

After notice, a prehearing conference was held and prehearing and hearing schedules were established in accordance with the Tenure Employees Hearing Law, as amended, *N.J.S.A.* 18A:6-10 through -18.1

Opening arguments were heard on February 4, 1999. The time for discovery was lawfully enlarged and a second day of hearing was set down for March 4, 1999. Upon reopening of the record, counsel presented and read into the record a stipulation of dismissal without prejudice premised on Kasony's successful application for disability retirement to the Public Employees Retirement System.

The parties have agreed to this and have prepared the attached stipulation.

I have reviewed the record and the stipulation and I **FIND**:

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

2. The agreement fully disposes of all issues in controversy and is consistent with the law. The respondent is not charged with wrongdoing or any act of moral turpitude. The Board's right to refile the charges should disability retirement be denied is preserved.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded. I further note that the parties have agreed to waive the right to file exceptions and cross-exceptions.

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

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

MAR 0 5 1999
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

3/5/99
DATE

Debbie Mantanilla/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 10 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

ph

Carroll, Weiss & Josephson, L.L.P.
3131 Princeton Pike, Bldg. 1B
Lawrenceville, NJ 08648
(609) 896-4222

IN THE MATTER OF THE TENURE HEARING TIMOTHY KASONY	**OFFICE OF ADMINISTRATIVE LAW STATE OF NEW JERSEY**
	DOCKET NO. EDU 10490-98
School District of Lawrence Township, Mercer County.	**AGENCY REF. NO. 462-11/98**
	STIPULATION OF DISMISSAL WITHOUT PREJUDICE

IT IS HEREBY AGREED by and between the undersigned counsel for the parties hereto as follows:

1. Timothy Kasony ("respondent") has agreed to apply for disability retirement in lieu of continuing his opposition to these tenure charges of excessive absenteeism and incapacity.

2. The Lawrence Township Board of Education ("Board") agrees that it will dismiss the tenure charges against respondent, without prejudice, on the following conditions:

a. Respondent will submit a completed application for disability retirement to the Public Employees Retirement System ("PERS") not later than March 31, 1999. Failure to do so may result in the Board having the right to reinstate the charges as per ¶2(b) below.

b. From the date of the applications to PERS, a grace period of four (4) months will be allowed, subject to extension by written agreement of the parties, during which the Board shall take no action to revive the tenure charges. If at the end of the grace period disability retirement has not been approved, the Board may re-file the tenure charges without the need to follow all the procedural steps set forth in the school laws, N.J.S.A. 18A:6-10 et. seq. Respondent hereby acknowledges that as part of this agreement he waives the right to require the Board to reconsider these charges, which may be reinstated by the Board on notice to respondent pursuant to the schedule set forth above.

3. As part of this agreement, the Board acknowledges that it will pay to respondent all benefits to which ~~they are~~ he is entitled by law including, but not limited to, unused leave days.

BERGMAN & BARRETT
Attorneys for respondent

by: Michael T. Barrett, Esq.

CARROLL, WEISS & JOSEPHSON, L.L.P.
Attorneys for the Lawrence Twp.
Board of Education

by: James F. Schwerin, Esq.

OAL DKT. NO. EDU 10490-98
AGENCY DKT. NO. 462-11/98

IN THE MATTTER OF THE TENURE	:	
HEARING OF TIMOTHY KASONY,	:	COMMISSIONER OF EDUCATION
LAWRENCE TOWNSHIP SCHOOL	:	DECISION
DISTRICT, MERCER COUNTY.	:	
	:	

The record and initial decision by the Office of Administrative Law (OAL) in the form of a settlement, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner rejects the proposed settlement in its present form, in that he cannot accept a term of a settlement which explicitly provides for the parties to waive the statutory requirements of *N.J.S.A.* 18A:6-10 *et seq.* Further, to the extent the parties can agree to adjourn proceedings in this matter pending a review of respondent's application for disability retirement to the Public Employees Retirement System (PERS), they may mutually consent to such an abeyance of proceedings before the OAL.

Accordingly, the proposed settlement is rejected. The Commissioner hereby remands this matter to the OAL for revision of the documents consistent with the concerns set forth above or, if the parties concur, for an abeyance of proceedings pending a determination by PERS on respondent's disability retirement application. If the parties are unwilling or unable to reach accord on a revised agreement or an abeyance, the matter shall proceed to a hearing on the merits.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

April 22, 1999
Date of Mailing, April 22, 1999

122-99

E.S.H., on behalf of minor child, P.A.I.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BUENA REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the Board's placement of her son in Honors IV English, and asserts that the Board improperly denied his graduation privileges in June of 1998 because he failed the class.

Inasmuch as P.A.I. completed a summer school course on August 4, 1998 which permitted him to receive his diploma, the ALJ determined that the within matter is moot.

Commissioner adopted the initial decision.

April 22, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION ON MOTION
FOR SUMMARY JUDGMENT
OAL DKT. NO. EDU 6950-98
AGENCY REF. NO. 333-7/98

E.S.H. on behalf of minor child, P.A.I.
Petitioner,
v.
BOARD OF EDUCATION OF BUENA REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,
Respondent.

E.S.H., petitioner, *pro se*

Michael D. Capizola, Esq., for respondent (Capizola, Fineman & Lapman, attorneys)

Record Closed: March 8, 1999 Decided: March 8, 1999

BEFORE **EDGAR R. HOLMES,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioner filed her request for relief challenging the respondent Buena Board of Education's (BOE) decisions regarding her son's placement and grades and the BOE's denial of her son's privilege to graduate. The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15, *N.J.S.A.* 52:14F-1 to -13 and *N.J.S.A.* 18A:6-9 which grants to the Commissioner of Education (Commissioner) the jurisdiction over controversies and disputes arising under school law.

FACTS

Petitioner filed her complaint with the Commissioner on July 7, 1998. On August 4, 1998, the petitioner's son was given his cap and gown and diploma after he completed a summer school course in English. This fact is not in dispute.

It is well established that the Commissioner does not decide moot issues. *R.G. v. BOE Caldwell,* 1976, *S.L.D.* 582; *G.G. and L.G. vs. BOE Boro New Providence,* 1975 *S.L.D.*, 502; *Pinkham v. BOE Boro of South River,* 1974, *S.L.D.* 1103.

Because petitioner's son has graduated from the High School the within matter is moot.

Petitioner's request for relief is **DENIED.**

Since the relief claimed relates to a student who has graduated the matter is moot and is **DISMISSED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

3/8/99
DATE

Edgar R Holmes
EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

3-11-99
DATE

DNH
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 12 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

lmh

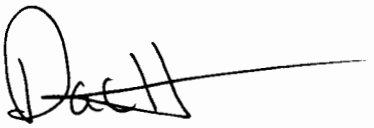
OAL DKT. NO. EDU 6950-98
AGENCY DKT. NO. 333-7/98

E.S.H., on behalf of minor child, P.A.I.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BUENA REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon careful and independent review, the Commissioner concurs that the within matter is moot. Accordingly, the initial decision of the Administrative Law Judge dismissing the Petition of Appeal is adopted for the reasons expressed therein.*

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

April 22, 1999
Date of Mailing, April 22, 1999

123-99

IN THE MATTER OF THE TENURE	:	
HEARING OF ANTHONY JOHNSON,	:	
SCHOOL DISTRICT OF ATLANTIC CITY,	:	COMMISSIONER OF EDUCATION
ATLANTIC COUNTY.	:	DECISION
	:	

April 22, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4792-98

AGENCY DKT. 103-4/98

ATLANTIC CITY BOARD OF EDUCATION,

Petitioner,

v.

ANTHONY JOHNSON,

Respondent.

George Frino, Esq., for petitioner

Ned Rogovoy, Esq., for respondent (Waltman, Reilly & Rogovoy, attorneys)

Record Closed: March 9, 1999 Decided: March 10, 1999

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

This matter was transmitted to the Office of Administrative Law on June 17, 1998, for a hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14-F-1 to -13.

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

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

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

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

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

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

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

10 March 1999
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

3/12/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 15 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

lmh

FILED

MAR 9 10 07 AM '99

STATE OF NEW JERSEY
ADMIN...

GEORGE G. FRINO, P.A.
33 Clinton Road; Suite 200
West Caldwell, NJ 07006
(973) 882-8708
Attorney for the Petitioner
Atlantic City Board of Education

BEFORE THE COMMISSIONER OF EDUCATION
STATE OF NEW JERSEY

ATLANTIC CITY BOARD OF EDUCATION, Petitioner, **v.** **ANTHONY JOHNSON,** Respondent.	Civil Action **OAL Dkt. No. EDUTH 04792-98S** Agency Ref. No. 103-4/98 **CONSENT ORDER OF SETTLEMENT AND DISMISSAL**

THIS MATTER having been brought before the Court by all counsel on the record at a Hearing that took place on February 25, 1999 before the Honorable Lillard Law, A.L.J. by virtue of an amicable resolution of all claims by and between all parties, and the Court for good cause shown, it is

on this 11th day of MARCH, 1999

HEREBY ORDERED that:

(a) the Respondent shall resign with the effective date of resignation of March 16, 1999;

BA

(b) the Respondent, Anthony Johnson, shall receive fifteen hundred dollars ($1,500.00) no later than April 1, 1999 plus any accrued vacation pay;

(c) the Board will dismiss the tenure charges against the Respondent, Anthony Johnson with prejudice; and

(e) this Consent Order is a full and final release of all claims.

Consented to as to form and entry:

GEORGE G. FRINO, ESQUIRE
Attorney for the Petitioner
Atlantic City Board of Education
Dated: March 2, 1999

Lillard E. Law

HONORABLE LILLARD LAW, A.L.J.

NED P. ROGOVOY, ESQUIRE
Attorney for the Respondent
Anthony Johnson
Dated:

OAL DKT. NO. EDU 4792-98
AGENCY DKT. NO. 103-4/98

IN THE MATTER OF THE TENURE	:	
HEARING OF ANTHONY JOHNSON,	:	
SCHOOL DISTRICT OF ATLANTIC CITY,	:	COMMISSIONER OF EDUCATION
ATLANTIC COUNTY.	:	DECISION
	:	

The record and initial decision issued by the Office of Administrative Law in the form of a settlement between the charging Board and respondent custodian, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

April 22, 1999
Date of Mailing, April 22, 1999

EDUCATION ASSOCIATION OF PASSAIC,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

In this consolidated matter, petitioning Education Association of Passaic alleged certain practices of Board of Education regarding the development of Professional Improvement Plans (PIPs), topics and forms for teaching staff members are in violation of *N.J.A.C.* 6:3-4.3(f)3 and (h)3 because staff must choose PIP topics from a predetermined list of seven to eight topics and the plans do not include a statement of the school district's responsibilities in regard to the implementation of the PIPs.

ALJ concluded contested Professional Improvement Plan practices are not in compliance with *N.J.A.C.* 6:3-4.3(f)3 because they unduly circumscribe the role of the teaching staff member in the development of an individual PIP. ALJ further concluded that the PIP forms are not in compliance with *N.J.A.C.* 6:3-4.3(h)3 because the PIP forms do not include space for a written statement of the district's responsibilities for implementing the PIP as required by that regulation. ALJ ordered Board (1) to cease providing a predetermined list of topics for PIPs, (2) to develop PIPs based upon the individual teaching staff member's areas of performance strengths and needs for improvement, and (3) to include in all PIPs the responsibilities of the school district for implementing the PIPs.

Commissioner adopted initial decision as the final decision in the matter.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. EDU 1081-98
and EDU 1517-98
AGENCY DKT. NOS. 456-11/97
and 493-12/97

EDUCATION ASSOCIATION OF PASSAIC,
Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,
Respondent.

Nancy I. Oxfeld, Esq., for petitioner
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Matthew J. Michaelis, Esq., for respondent

Record Closed: February 2, 1999 Decided: March 12, 1999

BEFORE **RICHARD McGILL**, ALJ:

The Education Association of Passaic (petitioner) challenges certain practices of the Board of Education of the City of Passaic (respondent) in regard to individual professional improvement plans for teaching staff members. Specifically, petitioner contends that respondent's practices are inconsistent with *N.J.A.C.* 6:3-4.3(f)3, which requires that an individual professional improvement plan be developed by the supervisor and the teaching staff member, and with *N.J.A.C.* 6:3-4.3(h)3, which defines the individual professional

improvement plan as a written statement which includes, *inter alia*, the responsibilities of the school district for implementing the plan. Respondent maintains that its practices are in compliance with the pertinent regulations.

PROCEDURAL HISTORY

Petitioner filed two petitions with the Commissioner of Education pursuant to the authority conferred by *N.J.S.A.* 18A:6-9 to hear and determine controversies and disputes arising under the school laws. The first petition was filed on November 24, 1997, and pertained to respondent's practices in regard to individual professional improvement plans at the Lincoln Middle School and William B. Cruise Memorial School No. 11. This matter was transmitted to the Office of Administrative Law on January 13, 1998, for determination as a contested case.

The second petition was filed with the Commissioner of Education on December 30, 1997, and pertained to respondent's practices in regard to individualized professional improvement plans at School No. 7. This matter was transmitted to the Office of Administrative Law on February 3, 1998, for determination as a contested case.

Subsequent to transmittal, the two petitions were consolidated, and the matter was scheduled for hearing on January 5, 1999. On January 4, 1999, the parties submitted a stipulation of facts, and the record closed on February 2, 1999, upon receipt of briefs.

ISSUE

The issue in this proceeding is whether respondent's directive setting forth a list of topics for individual professional improvement plans and a related form violate pertinent regulations including *N.J.A.C.* 6:3-4.3(f)3 and (h)3.

FACTS

The parties stipulated that the facts in this matter are as follows:

1. Petitioner is the certified collective negotiations representative of all certificated teaching staff members employed by the respondent.

2. In September, 1977, Lawrence Everett, principal of the respondent's Lincoln Middle School, issued to the professional staff members at Lincoln Middle School a memorandum (Exhibit A) with regard to the development of a professional improvement plan (hereinafter "PIP"). He also issued to each professional staff member the attached form (Exhibit B) which was required to be filled in with regard to the PIP.

3. In September or October 1997, Doris A. Spivey, principal of the respondent's William B. Cruise Memorial School No. 11, issued to all professional staff members the attached PIP worksheet (Exhibit C) as well as the attached PIP form (Exhibit D) to be completed.

4. In November, 1997, Rafael J. Fraguela, principal of the respondent's School No. 7, issued the attached PIP form (Exhibit E) to all teaching staff members to be completed.

5. In October, 1998, Dr. Jose Tirado, principal of the respondent's School No. 14, issued the attached PIP form (Exhibit F) to all teaching staff members to be completed.

Exhibit A states as follows: "All Professional Improvement Plans (PIPS) must be geared toward improving a teacher's ability to implement the State CORE Curriculum. All teachers must choose a Professional Improvement Plan topic from the following list [of seven items]." Exhibit B asks the teacher to answer three questions in regard to professional

improvement plans but does not call for a statement of the school district's responsibilities in regard to the development of a professional improvement plan.

Exhibit C contains the following language: "PIP TOPICS - All teachers must choose a Professional Improvement Plan (PIP) from the list [of eight items] below. (Other topics must first be approved by Mrs. Spivey.)" Exhibit E contains almost identical language. Exhibits D and F are almost identical to Exhibit B.

LAW AND ANALYSIS

The applicable regulation is *N.J.A.C.* 6:3-4.3, which provides in pertinent part as follows:

> (a) Every district board of education shall adopt policies and procedures requiring the annual evaluation of all tenured teaching staff members by appropriately certified personnel (see *N.J.S.A.* 18A:1-1; *N.J.A.C.* 6:11-9.3).
>
> (b) The purpose of the annual evaluation shall be to:
>
> 1. Promote professional excellence and improve the skills of teaching staff members.
>
> 2. Improve pupil learning and growth; and
>
> 3. Provide a basis for the review of performance of tenured teaching staff members.
>
> (c) The policies and procedures shall be developed under the direction of the district's chief school administrator in consultation with tenured teaching staff members and shall include, but not be limited to:
>
> 1. Roles and responsibilities for implementation of the policies and procedures;
>
> 2. Development of job descriptions and evaluation criteria based upon district goals, program objectives and instructional priorities;
>
> 3. Methods of data collection and reporting appropriate to the job description including, but not limited to, observation of classroom instruction;

4. Observation conference(s) between the supervisor and the teaching staff member;

5. Provision for the use of additional appropriately certified personnel where it is deemed advisable;

6. Preparation of individual professional improvement plans; and

7. Preparation of an annual written performance report by the supervisor and an annual summary conference between the supervisor and the teaching staff member.

(d) These policies shall be distributed to reach tenured teaching staff members no later than October 1. Amendments to the policy shall be distributed within 10 working days after adoption.

(e) The annual summary conference between supervisors and teaching staff members shall be held before the written performance report is filed. The conference shall include, but not be limited to:

1. Review of the performance of the teaching staff member based upon the job description;

2. Review of the teaching staff member's progress toward the objectives of the individual professional improvement plan developed at the previous annual conference;

3. Review of available indicators of pupil progress and growth toward the program objectives; and

4. Review of the annual written performance report and the signing of said report within five working days of the review.

(f) The annual written performance report shall be prepared by a certified supervisor who has participated in the evaluation of the teaching staff member and shall include, but not be limited to:

1. Performance areas of strength;

2. Performance areas needing improvement based upon the job description;

3. An individual professional improvement plan developed by the supervisor and the teaching staff member;

4. A summary of available indicators of pupil progress and growth, and in statement of how these indicators relate to the effectiveness of the overall program and the performance of the individual teaching staff member; and

5. Provisions for performance data which have not been included in the report prepared by the supervisor to be entered into the record by the evaluatee within 10 working days after the signing of the report.

(g) These provisions are the minimum requirements for the evaluation of tenured teaching staff members.

(h) For the purposes of this section:

. . . .

3. "Individual professional improvement plan" is a written statement of actions developed by the supervisor and the teaching staff member to correct deficiencies or to continue professional growth, timelines for their implementation, and the responsibilities of the individual teaching staff member and the district for implementing the plan;

. . . .

Petitioner argues that respondent's practices are not in compliance with *N.J.A.C.* 6:3-4.3(f)3. Petitioner notes that this regulation requires that the supervisor and the teaching staff member develop the professional improvement plan. Additionally, the professional improvement plan is supposed to be individualized to the particular teacher to enable him to correct deficiencies or continue professional growth. In contrast to these requirements, respondent's practices limit the teacher to a choice from a list of items selected by the principal. According to petitioner, this practice unduly limits the role of the teacher in the selection of topics for the professional improvement plan and does not provide an opportunity to address deficiencies on an individualized basis.

Petitioner also contends that respondent's practices are not in compliance with *N.J.A.C.* 6:3-4.3(h)3. In accordance with this regulation, the individual professional improvement plan should include a statement of the responsibilities of the school district for implementing the

plan. However, the form utilized by respondent does not provide for a statement of the responsibilities of the school district.

Respondent maintains that it is in full compliance with the pertinent regulations. Preliminarily, respondent points out that the supervisor and the building principal are one and the same in the schools relative to this matter.

Respondent argues that the listed topics have been taken from evaluations of teaching staff members as areas for improvement or are otherwise relevant and pertinent items which need to be addressed. According to respondent, the teaching staff members know their deficiencies and therefore the topics that should be included in their individual professional improvement plans. Respondent reasons that therefore the listed topics enable the teaching staff members to choose items relevant to their particular needs. Thus, both the teaching staff members and the supervisor/principal have input in the development of the individual professional improvement plan. At the same time, teaching staff members are prevented from choosing irrelevant topics for their professional improvement plans.

Respondent's argument in regard to compliance with *N.J.A.C.* 6:3-4.3(f)3 is unpersuasive. Respondent asserts that the listed topics are derived from areas of improvement contained in the evaluations of teaching staff members. One difficulty with this argument is that it is essentially a factual assertion that is not included in the stipulation of facts. Additionally, the list of topics does not necessarily include all deficiencies of every teacher. Respondent also points to language in the pertinent memorandum stating that the teaching staff member may choose a different topic with the approval of the principal. One difficulty with this argument is that this language is not contained in the memorandum for the Lincoln Middle School. Further, the use of word "must" in regard to choosing a topic from the list plainly discourages a teaching staff member from selecting another topic. Thus, respondent's practices unduly circumscribe the role of the teaching staff member in regard to the development of an individual professional improvement plan. Therefore, I **CONCLUDE** that respondent's practices are not in compliance with *N.J.A.C.* 6:3-4.3(f)3.

In accordance with *N.J.A.C.* 6:3-4.3(h)3, the individual professional improvement plan is a written statement which includes the responsibilities of the school district for implementing the plan. The forms utilized by respondent do not have a space corresponding to this aspect of the professional improvement plan, and there is no indication in the facts stipulated by the parties that respondent's practices would otherwise satisfy this requirement. Therefore, I **CONCLUDE** that the forms utilized by respondent in regard to professional improvement plans are not in compliance with *N.J.A.C.* 6:3-4.3(h)3.

Accordingly, it is **ORDERED** that:

1. Respondent cease to provide a predetermined list of topics for professional improvement plans.

2. All professional improvement plans shall be determined based upon the individual teaching staff member's performance areas of strength and performance areas needing improvement based upon the job description.

3. All professional improvement plans shall contain the responsibilities of the school district for the implementation thereof.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Dec. 12, 1999
DATE

RICHARD McGILL, ALJ

Receipt Acknowledged:

3/16/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 18 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NOS. EDU 1081-98 and EDU 1517-98
AGENCY DKT. NOS. 456-11/97 and 493-12/97

EDUCATION ASSOCIATION OF PASSAIC,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon review of the record and initial decision issued by the Office of Administrative Law, the Commissioner adopts as his own the recommended order of the Administrative Law Judge as set forth in the initial decision. *

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

April 26, 1999
Date of Mailing, April 26,1999

127-99

IN THE MATTER OF RICHARD	:	
TULLO, BOARD OF EDUCATION	:	
OF THE PINELANDS REGIONAL	:	COMMISSSIONER OF EDUCATION
SCHOOL DISTRICT, OCEAN	:	DECISION
COUNTY.	:	
	:	

SYNOPSIS

Petitioning Board claimed Board member had an inconsistent interest, pursuant to *N.J.S.A.* 18A:12-2, necessitating his removal as a Board member, as a result of pending claims in a workers' compensation matter.

ALJ determined, after reviewing applicable workers' compensation statutes, that as the Board member made a claim against the Board which will accrue to the Board member's personal benefit as opposed to vindicating the public's interest, such a claim disqualified the individual from membership on the Board. Thus, the ALJ found that based on the pendency of workers' compensation claims made by Mr. Tullo, he was disqualified from membership on the Board. ALJ ordered his immediate removal.

Commissioner adopted findings and determination in initial decision as his own and ordered Mr. Tullo disqualified from continued membership on the Board as of the date of this decision.

April 26, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6526-98
AGENCY DKT. NO. 197-6/98

IN THE MATTER OF RICHARD TULLO, BOARD OF EDUCATION OF THE PINELANDS REGIONAL SCHOOL DISTRICT, OCEAN COUNTY.

Terry F. Brady, Esq., for petitioner, Pinelands Regional School District (Mulvaney, Coronato & Brady, attorneys)

Richard Tullo, respondent, *pro se*

Record Closed: February 1, 1999 Decided: March 16, 1999

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Pinelands Regional Board of Education, seeks a determination whether respondent, Richard Tullo, a member of the Board, has an inconsistent interest pursuant to *N.J.S.A.* 18A:12-2, necessitating his removal as a Board member, as a result of pending claims in a worker's compensation matter. The matter was submitted to the Commissioner of the Department of Education as a motion for declaratory judgment seeking that the Commissioner determine whether Board member Richard Tullo is eligible to retain his seat on the Board. The

Commissioner, by a determination dated July 28, 1998, decided not to consider the matter as one for declaratory ruling pursuant to his discretionary authority under *N.J.A.C.* 6:24-2.1 and found that the matter should proceed as a Petition of Appeal. The matter was then transmitted to the Office of Administrative Law (OAL) on August 3, 1998, for hearing as a contested case. The matter was scheduled for a telephone prehearing conference to be held on September 28, 1998, but this was adjourned at the request of attorney for petitioner. The matter was rescheduled for a telephone prehearing conference on October 20, 1998. On that date, it was agreed that the parties would make an effort to stipulate to the facts and would submit the matter to the Administrative Law Judge (ALJ) for a decision on the Merits. This was accomplished and at the conclusion of submissions the record was closed on February 1, 1999.

FACTUAL DISCUSSION

The following is a statement of the facts relative to this proceeding. This statement of facts was prepared by the undersigned based upon the pleadings and was provided to both parties on October 26, 1998. Both parties were given the opportunity to make any additions, changes, or corrections thereto, but neither party did so. Accordingly this is adopted as the Factual Findings in this matter.

1. Petitioner in this matter is the Pinelands Regional Board of Education (Board). The Board, through James Pine, its President, requested that the Commissioner render a declaratory judgment concerning the application of *N.J.S.A.* 18A:12-2 to a controversy which has arisen by the Board member Richard Tullo.
2. By Resolution adopted by the Board on May 27, 1997, a petition for declaratory judgment was authorized to be filed.
3. Richard Tullo was elected as a member of the board on April 21, 1998, and was duly sworn in by the board secretary Geraldine Townsend.
4. By letter dated April 23, 1998, New Jersey Manufacturers Insurance Company provided copies of pleadings in two pending formal workers compensation claims being pursued by Richard Tullo. (P-5, P-6, and P-8).
5. The first of these claims, having case number 97-033818, is set forth in Claim Petition filed on October 1, 1997 (P-6). The petitioner is Richard J. Tullo and

the respondent is the Pinelands Regional Board of Education. In that matter, petitioner alleges that he sustained a leg injury by an accident arising out of an in the course of his employment with the Board. It is alleged that the accident occurred in May 1996, that petitioner stopped work on June 30, 1996, ad that the accident occurred when petitioner was favoring his left knee following surgery in March 1996.

6. Respondent's answer to this claim petition admits that Mr. Tullo was in employment on the date alleged in the petition, but denies that the injury arose out of and in the course of employment.
7. The second claim filed by Richard J. Tullo as petitioner is an application for review or modification of a formal award against the Board as respondent, having case number 96-025879. In that matter, petitioner alleges that he sustained an injury by an accident arising out of and in the course of his employment with respondent. The date of the accident is alleged to be January 16, 1996, and it is alleged that petitioner slipped and fell at the Pinelands Middle School while he was employed as a teacher. He stopped working on that same date.
8. In its answer to the second claim, the respondent states that temporary disability was paid to petitioner from January 17, 1996, through January 31, 1996, and from February 12, 1996, until June 3, 1996, and that permanent disability was paid from January 31, 1996, to February 12, 1996, and from June 3, 1996, to December 6, 1997, the last payment having been made on October 28, 1997. The respondent denies that petitioner's incapacity has increased as defined by *N.J.S.A.* 34:15-27.
9. In a statement of his position which is attached to the transmittal from the Commissioner's office, Mr. Tullo quotes a New Jersey School Board's Association attorney as indicating that workers compensation is medical-social legislation enacted to protect workers, and that the insurance company involved, previously First Trenton Indemnity Insurance Company and now New Jersey Manufacturers Insurance Company, does not allow the Board to vote, but it makes its own judgments and awards. He asserts that workers compensation is not a law suit against anyone but rather is an administrative

proceeding of the Department of Labor which protects individuals. No Board action is ever needed or ever taken on his workers compensation case or in any other workers compensation matter. He also indicates that the issue in the present proceeding would not go to the Ethics Commission because it is not an ethics issue.

LEGAL DISCUSSION AND ANALYSIS

This dispute arises as a result of the provisions of *N.J.S.A.* 18A:12-2 which provides:

> No member of any Board of Education shall be interested directly or indirectly in any contract with or claim against the Board, ...

By operation of the aforesaid provision, an individual involved directly or indirectly in any contract with or claim against the Board is precluded from further service as a Board member. *Board of Education of the Township of Jackson, Ocean County v. Acevedo,* 92 *N.J.A.R* 2d (EDU) 163. The sole issue before me is whether two pending workers compensation claims filed by respondent who is a former employer of the school district, against the school district, are such claims which disqualify the claimant from membership on the Board of Education.

No case has been located which decides this issue as it relates to workers' compensation claims. There are cases which hold that where a Board member makes a claim against the Board which will accrue to the Board member's personal benefit as opposed to vindicating the public's interest, such a claim would disqualify the individual from membership on the Board. See, *Board of Education of the Township of Jackson, Ocean County v. Acevedo, supra,* citing *Tp. of Holmdel Bd. of Ed., Monmouth County v. O'Connell,* Comm'r. Decision (May 10, 1990), wherein a Board member was a named plaintiff in a suit seeking compensatory and punitive damages for alleged negligence and intentional torts committed by agents and employees of the Board against the member's son and also seeking compensation for tuition and transportation expenses incurred while the son enrolled in another school. It was held that by operation of the aforesaid provisions, the individual involved was precluded from further service as a Board member.

Respondent argues that workers' compensation is medical-social legislation enacted to protect workers, and that the insurance company involved with a claim does not allow the Board to vote, but it makes its own judgments and awards. He asserts that workers compensation is not a law suit against anyone but rather is an administrative proceeding of the Department of Labor which protects individuals. No Board action is ever needed or ever taken in any other workers compensation matter. (R-2)

In order to properly assess respondent's arguments and to determine the exact nature of the claim respondent has asserted against petitioner Board of Education, it is necessary to investigate the nature of workers' compensation. Workers' compensation is actually one of the first developed forms of "no fault" insurance. The workers' compensation system began in New Jersey in 1911, although it is was not until 1917 that private employers were required to purchase insurance to cover their liability for industrial accidents. Compensation insurance for all private entities became compulsory under a State-prescribed formula. *N.J.S.A.* 34:15-71. In certain situations, employers are permitted to obtain and carry their own insurance and become a self-insured entity upon making application to the Commissioner of Insurance and showing financial ability to pay compensation. *N.J.S.A.* 34:15-77. Employers are given the incentive to obtain workers' compensation insurance by the fact that if they do not they are subject to common-law liability. If an employer fails to obtain insurance, it is possible that a judgment may be obtained against an uninsured employer. See *N.J.S.A.* 34:15-120.1 *et seq.*

A claim for workers compensation benefits is commenced by the filing of a claim petition setting forth the facts relating to employment at the time of injury, the injury and its extent and character, and other necessary facts. *N.J.S.A.* 34:15-51. A copy of the petition is required to be served on the employer and an answer is required to be filed admitting or denying the averments of the petition. *N.J.S.A.* 34:15-51 and -52. Thereafter, an adversarial hearing is scheduled with respect to the claim and such a hearing is held before a judge of compensation. If the matter is not settled, a decision is issued ordering the payment of compensation or approving the settlement. *N.J.S.A.* 34:15-58. Hearings take place with testimony under oath, *N.J.S.A.* 34:15-61, and in all respect the proceedings are adversarial in nature.

N.J.S.A. 34:15-71 and -72 impose upon every employer, except the State or a municipality, county or school district, the requirement to make sufficient provisions for the complete payment of any obligation which may be incurred to an injured employee, or his dependents by one of the methods set forth in *N.J.S.A.* 34:15-77 and -78. These provisions require that the employer either obtain insurance, or be self-insured. By providing workers' compensation insurance an employer gains immunity from common law negligence actions. *Boehm v. Witte*, 95 *N.J. Super.* 359 (Law Div. 1967).

N.J.S.A. 34:15-71 and -72 provide that the State, counties, municipalities, or school districts are exempt from the requirement to purchase an insurance policy. They also have the option of becoming self-insured or they may elect to have no insurance. However, these provisions only exempt these entities from the requirement of obtaining compulsory insurance. They are nevertheless fully responsible to make sufficient provisions for the complete payment of any obligation which may be incurred to an injured employee, or his dependents. See, *N.J.S.A.* 34:15-43.

Based upon the foregoing, it may be seen that the argument that that a worker's employer has no connection with an employee's claim for workers' compensation benefits is incorrect. Such a claim is clearly a claim against the employer. It is only where the employer obtains compulsory insurance that the employer is protected against liability. In the case of a school district as the employer, the employee's claim is against the school district, and the school district is fully responsible to make sufficient provisions for the complete payment of any obligation which may be incurred to an injured employee, or his dependents by *N.J.S.A.* 34:15-43. As such, a workers compensation claim is something more than a claim against some third-party insurance entity. Even if there is insurance coverage, the premium paid by an employer such a school district is subject to review and audit, and excessive claims will result in increases in premiums.

In any event, a workers' compensation claim, if successful, clearly results in substantial and material benefit to the claimant and therefore results in disqualification if the claim is being pursued by a Board member. In such a case, a workers compensation claim clearly accrues to the board members personal benefit. Where a Board member makes a claim against the Board which

will accrue to the Board member's personal benefit as opposed to vindicating the public's interest, such a claim disqualifies the individual from membership on the Board. *See, Board of Education of the Township of Jackson, Ocean County v. Acevedo, supra.*

Accordingly, under these circumstances, I **FIND** that based upon the pendency of workers' compensation claims made by Richard Tullo while a member of the Board of Education of the Pinelands Regional School District, Richard Tullo is disqualified from membership on the Board of Education.

DECISION AND ORDER

Based upon the foregoing, it is hereby **ORDERED** that Richard Tullo is hereby disqualified from continued membership on the Board of Education of the Pinelands Regional School District, Ocean County, and he is hereby immediately removed as a member of the Board of Education by operation of law.

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

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

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

March 16, 1999
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

March 18, 1999
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 19 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

APPENDIX

LIST OF WITNESSES

None

LIST OF EXHIBITS

For petitioner:

P-1 Attorney for petitioner letter dated December 2, 1998

P-2 Attorney for petitioner letter to Commissioner, dated May 5, 1998

P-3 Superintendent Memo dated April 23, 1998

P-4 Board Secretary Memo, dated April 23, 1998

P-5 Correspondence from Insurance Company

P-6 Employee's Claim Petition, filed October 1, 1997

P-7 Respondent's Answer, dated November 5, 1997

P-8 Application for Review or Modification, dated October 1, 1997

R-9 Respondent's Answer to Application for Review or Modification, dated November 6, 1997

P-10 Respondent's Notes (undated)

For respondent:

R-1 Respondent's letter to ALJ received November 4, 1998

R-2 Respondent's Notes and Positions responding to petitioner herein.

OAL DKT. NO. EDU 6526-98
AGENCY DKT. NO. 197-6/98

IN THE MATTER OF RICHARD	:	
TULLO, BOARD OF EDUCATION	:	
OF THE PINELANDS REGIONAL	:	COMMISSSIONER OF EDUCATION
SCHOOL DISTRICT, OCEAN	:	DECISION
COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions were untimely filed pursuant to *N.J.A.C.* 1:1-18.4(a), in that the initial decision was mailed to the parties on March 19, 1999 and the exceptions were filed on April 6, 1999. Accordingly, neither the exceptions nor the reply thereto is considered in the Commissioner's determination of this matter.

Upon careful and independent review of the record in this matter, the Commissioner determines to affirm the initial decision of the Administrative Law Judge, for the reasons set forth therein. Accordingly, Mr. Tullo is deemed disqualified from continued membership on the Board as of the date of this decision.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

April 26, 1999
Date of Mailing, April 26, 1999

128-99

IN THE MATTER OF THE TENURE	:	
HEARING OF DANIEL MYSKO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
GARFIELD, BERGEN COUNTY.	:	
_____	:	

April 26, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9133-98

AGENCY DKT. NO. 372-8/98

SCHOOL DISTRICT OF GARFIELD, BERGEN COUNTY,

Petitioner,

v.

DANIEL MYSKO,

Respondent.

Scott Bocker, Esq., for petitioner (Toni Belford Damiano, attorney)

Kevin P. McGovern, Esq., for respondent (Schneider, Goldberger, Cohen, Finn, Solomon, Leder & Montalbano, attorneys)

Record Closed: March 17, 1999 Decided: March 17, 1999

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

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on September 23, 1998, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B -1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

Prior to the date of the hearing, the parties settled the matter and on March 17, 1999, they submitted the attached Stipulation of Settlement and Dismissal With Prejudice. Having reviewed the record and the settlement terms, I **FIND**:

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

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

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

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

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

March 17, 1999
DATE

Marylouise Lucchi McCloud
MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 2 4 1999

DATE

OFFICE OF ADMINISTRATIVE LAW

pb

SCHNEIDER, GOLDBERGER, COHEN, FINN, SOLOMON, LEDER & MONTALBANO P.C.
1700 Galloping Hill Road
Kenilworth, New Jersey 07033
(908) 298-8800
Attorneys for Respondent, Daniel Mysko

OFFICE OF ADMINISTRATIVE LAW

IN THE MATTER OF	:	OAL Docket No. EDUTH 09133-98N
SCHOOL DISTRICT OF GARFIELD BERGEN COUNTY,	:	
Petitioner,	:	
-and-	:	**STIPULATION OF SETTLEMENT AND DISMISSAL WITH PREJUDICE**
DANIEL MYSKO,	:	
Respondent	:	

WHEREAS, Respondent Daniel Mysko ("Respondent") is employed by Petitioner, School District of Garfield, Bergen County ("Petitioner") as a tenured custodian; and

WHEREAS, Respondent was served with Tenure Charges by Petitioner pursuant to N.J.A.C. 6:24-5.3 seeking his removal from the position of custodian for reasons specified therein; and

WHEREAS, Respondent was suspended from the position of custodian in or about May 1998, pending a hearing of the Tenure Charges before the Office of Administrative Law; and

WHEREAS, Respondent has contested his suspension from employment and the substance of the tenure charges filed against him by Petitioner; and

WHEREAS, this matter is presently pending before the Office of Administrative Law as OAL Docket No. EDUTH 09133-98N; and

WHEREAS, at the time of his removal, Respondent had a total of twenty-three (23) accrued but unused vacation days; and

WHEREAS, during the course of his employment, Respondent was a member of the Public Employees Retirement System; and

WHEREAS, Respondent, by and through his union, International Brotherhood of Teamsters Local 560, and the School District of Garfield, Bergen County, wish to resolve all outstanding issues with respect to the matters set forth above;

IT IS ON THIS 17th DAY OF March HEREBY AGREED THAT

1. Petitioner, School District of Garfield, Bergen County, hereby agrees to pay to Respondent, Daniel Mysko, an amount equivalent to twenty-three (23) accrued but unused vacation days. Petitioner shall deduct applicable taxes and pension from contributions from said amount.

2. The parties agree to discuss and attempt to resolve all outstanding issues, if any, relating to contributions alleged to be due and owing to Respondent to his pension. The parties acknowledge that as of the date of this agreement, no determination has been made as to whether any such contributions are due and owing to respondent's pension.

3. Petitioner further agrees that it will take all necessary and appropriate steps, including the payment of premiums pursuant to the Consolidated Omnibus Budget and Reconciliation Act ("COBRA"), to continue Respondent's health care coverage up to and including February 28, 1999.

4. In consideration for the foregoing, Respondent hereby agrees to resign from employment with Petitioner effective January 22, 1999, and to dismiss, with prejudice, the Tenure Charge Appeal

presently pending with the Office of Administrative Law.

5. In consideration for the terms and conditions set forth herein, Respondent agrees to waive any claim, suit or cause of action, known or unknown, relating to his suspension from employment by Petitioner, including any claim for back pay and counsel fees, except as provided herein.

6. This Settlement Agreement fully and finally disposes of all issues in controversy between Respondent, Daniel Mysko, and Petitioner, School District of Garfield, Bergen County. This Settlement Agreement shall not be relied upon as precedent, for any reason.

7. All parties agree that the terms and conditions set forth herein represent the full and complete agreement of the parties; any terms and conditions of settlement proposed and/or offered which are not contained in this agreement are hereby deemed rejected; this agreement shall not be modified orally or in writing unless agreed to by all of the parties.

8. Respondent acknowledges representation by his union, International Brotherhood of Teamsters, Local 560, and their counsel throughout this process. Respondent further acknowledges that the terms of this Agreement have been fully explained to him, that he understands the terms of this Agreement, and that he agrees to enter into this Agreement willfully, knowingly, and voluntarily.

WHEREFORE, the parties affix their signatures to this document so as to demonstrate their agreement to the terms and conditions set forth herein;

For Petitioner, School District

SCOTT BOCKER, ESQ.
Attorney, Garfield School Dist.

Dated:

EDWARD F. IZBICKI
Business Administrator

Dated:

For Respondent, Dan Mysko

KEVIN P. MCGOVERN, ESQ.
Attorney, IBT Local 560

Dated:

KEN BOHAN, Business Rep.
IBT Local 560

Dated:

x Daniel Mysko 3/17/99
DANIEL MYSKO, Respondent

Dated:

OAL DKT. NO. EDU 9133-98
AGENCY DKT. NO. 372-8/98

IN THE MATTER OF THE TENURE	:	
HEARING OF DANIEL MYSKO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
GARFIELD, BERGEN COUNTY.	:	
	:	

The record, joint stipulation of settlement, and initial decision of the Office of Administrative Law have been reviewed.

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

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

April 26, 1999
Date of Mailing, April 26, 1999

129-99

IN THE MATTER OF THE TENURE	:	
HEARING OF CONNIE MOSLEY,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWN-	:	DECISION
SHIP OF LOGAN, GLOUCESTER	:	
COUNTY.	:	
_____	:	

April 27, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8538-98

AGENCY DKT. NO. 146-5/98

BOARD OF EDUCATION OF THE TOWNSHIP OF LOGAN, GLOUCESTER COUNTY,

Petitioner,

v.

CONNIE MOSLEY,

Respondent.

Susan S. Hodges, Esq., for petitioner (Capehart & Scatchard, attorneys)

Ned P. Rogovoy, Esq., for respondent (Waltman, Reilly & Rogovoy, attorneys)

Record Closed: February 25, 1999 Decided: March 18, 1999

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter commenced on May 21, 1998, when the Board of Education of the Township of Logan, Gloucester County (hereinafter petitioner) filed tenure charges in accordance with the requirements of N.J.S.A. 18A:6-11 against Connie Mosley (hereinafter respondent), a tenured teacher. Petitioner certified charges alleging incapacity on a psychiatric basis. An answer on respondent's behalf was filed on September 10, 1998. The answer set forth the following affirmative defense:

> The respondent is unable, medically, to perform her function and is currently housed at the Camden County Health Services Center. She is medically not able to function and has applied for a medical disability retirement.

On September 30, 1998, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15. A prehearing conference was scheduled for November 19, 1998. On that date the parties advised that the case had been resolved based upon respondent's receipt of ordinary disability retirement benefits. On January 7, 1999, the undersigned wrote to both counsel as follows:

> When we spoke in November you advised me that the above-captioned matter has been settled between the parties. As I indicated at the time, because these are tenure charges, any settlement agreement must be approved by the Commissioner. I am still waiting for your signed settlement agreement addressing the Cardonick concerns so that I may forward the agreement to the Commissioner for his approval. Please have your signed agreement on my desk no later than January 29, 1999. Thank you for your attention to this matter.

A telephone conference call took place on February 10, 1999 wherein the undersigned and both counsel discussed whether respondent was capable of entering into a voluntary settlement agreement. During the conference call it was determined that counsel for petitioner would file a motion for summary decision based upon respondent's receipt from the Teachers Pension and Annuity Fund of an award of ordinary disability retirement benefits; however, by letter dated February 19, 1999, counsel for petitioner advised as follows:

> After consultation with our client, the Board had decided to withdraw it's tenure charges against Ms. Mosley, in light of her disability retirement. Since the Board's withdrawal of the tenure charges effectively ends this dispute, the Board will not be filing a motion for summary decision as was discussed during our telephone conference on February 10, 1999. Thank you for your kind consideration and attention to this matter.

Based upon the foregoing, I **CONCLUDE** that the within matter should be dismissed without prejudice to the rights of petitioner to file additional charges against respondent in the event that the Board of Trustees of the Teachers Pension and Annuity Fund should at some time in the future determine that respondent should return to duty, pursuant to N.J.S.A. 18A:66-40, because the disability which existed at the time respondent was retired has vanished or materially diminished.

For the foregoing reasons, it is hereby **ORDERED** that the within matter is **DISMISSED WITHOUT PREJUDICE.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P. O. Box 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 18, 1999
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

March 23, 1999
DATE

Valentanaitis
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 23 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cc

OAL DKT. NO. EDU 8538-98
AGENCY DKT. NO. 146-5/98

IN THE MATTER OF THE TENURE	:	
HEARING OF CONNIE MOSLEY,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWN-	:	DECISION
SHIP OF LOGAN, GLOUCESTER	:	
COUNTY.	:	
	:	

The record and initial decision advising withdrawal of this matter transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed. By copy of this decision, the State Board of Examiners is notified of the within matter and the circumstances underlying the withdrawal.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

April 27,1999
Date of Mailing, April 27,1999

130-99

IN THE MATTER OF THE TENURE	:	
HEARING OF BARBARA LLOYD,	:	
SCHOOL DISTRICT OF THE HUDSON	:	COMMISSIONER OF EDUCATION
COUNTY SCHOOLS OF TECHNOLOGY,	:	DECISION
HUDSON COUNTY.	:	
_____	:	

April 29,1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9385-98

AGENCY DKT. NO. 421-9/98

IN THE MATTER OF THE TENURE HEARING OF BARBARA LLOYD, SCHOOL DISTRICT OF THE HUDSON COUNTY SCHOOLS OF TECHNOLOGY, HUDSON COUNTY

Alexander W. Booth, Jr., Esq., for petitioner
(Brownstein, Booth & Barry, attorneys)

Michael A. Hardy, Esq., for respondent
(Scheurer, Wiggin & Hardy, attorneys)

Record Closed: March 9, 1999 Decided: March 22, 1999

BEFORE **MARGARET M. HAYDEN**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on October 6, 1998, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

After discovery was completed, the OAL held a hearing commencing on January 6 1999. At the hearing, settlement discussion were held and a settlement was reached on January 8, 1999. On January 8, 1999, the OAL held a hearing on the issue whether

the proposed settlement should be accepted. Barbara Lloyd (Lloyd) testified that she fully understood and voluntarily agreed to the terms of the settlement. In addition the parties prepared a stipulation of settlement which is attached and fully incorporated into this decision. The Board subsequently approved the terms of the settlement.

Based on my review of the record and the testimony of the hearing I **FIND** that the proposed settlement is consistent with the public interest for the following reasons:

1. Lloyd has been employed by the Board since September 1, 1980. She has been properly certified and has acquired tenure.

2. During the 1996-97 and 1997-98 school years, Lloyd worked at the Earl Byrd Center of the Hudson County Schools of Technology in Jersey City. While teaching classes there she was accused of using derogatory and offensive language in reference to the principal of the school and some students. The school Board charged her with conduct unbecoming a teacher as the term is used in *N.J.S.A.* 18A:6-10 and charged that this conduct merited her dismissal.

3. After two days of hearing, the parties became convinced that it was in the public's interest to cease the ongoing hearing and settle the matter. The hearing was scheduled to proceed for several more days and to have more teachers and students testifying against their former teacher. Under the terms of the proposed settlement as well as at the hearing, Lloyd acknowledge that she had made inappropriate personal statements concerning the principal during class for which she accepted a 120-day suspension. Lloyd stated that at times she had made statements to students which may have been interpreted as disrespectful but that disrespect was not intended. The Board will give Lloyd a reorientation training program upon her return to work and the parties will exchange Releases satisfactory to their counsel.

4. At the hearing, Lloyd responded appropriately to questions and was not under any emotional stress or duress. Before entering into the agreement, Lloyd fully understood her rights and had an adequate opportunity to consult with her able legal counsel.

I **CONCLUDE** that the terms of the settlement are in the public interest.

ORDER

It is **ORDERED** that the parties comply with the settlement terms and that these proceedings are hereby concluded.

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

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

Mar 22, 1999
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

3/26/99
DATE

V.M. Cintamaitis/lc
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 29 1999
DATE

Barbara A Harnek
OFFICE OF ADMINISTRATIVE LAW

jb

OFFICE OF
ADMINISTRATIVE LAW
FILED

MAR 24 9 52 AM '99

BROWNSTEIN, BOOTH & BARRY
512 42nd Street
Union City, New Jersey 07087
(201) 866-4949
Attorneys for Hudson County Schools of Technology

BEFORE THE COMMISSIONER
OF EDUCATION/OFFICE OF
ADMINISTRATIVE LAW

IN THE MATTER OF THE TENURE HEARING OF BARBARA LLOYD SCHOOL DISTRICT OF THE HUDSON COUNTY SCHOOLS OF TECHNOLOGY, HUDSON COUNTY	:	Agency Ref. No. 421-9/98 Docket No. EDU 9385-98N **STIPULATION OF SETTLEMENT**

WHEREAS, this Stipulation of Settlement is made between **BARBARA LLOYD** and **HUDSON COUNTY SCHOOLS OF TECHNOLOGY** this 29th day of January, 1999;

(1) BARBARA LLOYD made inappropriate personal statements concerning the Principal during class for which she accepts a One Hundred Twenty (120) Day suspension;

(2) At times Lloyd made statements to students which may have been interpreted as disrespectful; that was never intended.

(3) Lloyd will be given a reorientation training program by the Board upon her

return to work; and,

(4) Parties will exchange Releases satisfactory to counsel.

SCHEURER, WIGGIN & HARDY

By: _____
MICHAEL A. HARDY, ESQ.

BROWNSTEIN, BOOTH & BARRY

By: _____
ALEXANDER W. BOOTH, JR.

OAL DKT. NO. EDU 9385-98
AGENCY DKT. NO. 421-9/98

IN THE MATTER OF THE TENURE	:	
HEARING OF BARBARA LLOYD,	:	
SCHOOL DISTRICT OF THE HUDSON	:	COMMISSIONER OF EDUCATION
COUNTY SCHOOLS OF TECHNOLOGY,	:	DECISION
HUDSON COUNTY.	:	
	:	

The record, joint stipulation, and initial decision issued by the Office of Administrative Law representing a settlement of the within matter, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

April 29, 1999
Date of Mailing, April 29, 1999

134-99

IN THE MATTER OF THE TENURE	:	
HEARING OF SALVATORE FERRUGIA,	:	
STATE-OPERATED SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
THE CITY OF NEWARK, ESSEX COUNTY.	:	DECISION
	:	

May 3, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11350-97

AGENCY DKT. NO. 395-10/97

STATE-OPERATED SCHOOL DISTRICT

OF THE CITY OF NEWARK, ESSEX COUNTY,

Petitioner,

v.

SALVATORE FERRUGIA,

Respondent.

Cheri L. Maxwell, Esq., for Petitioner
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross)

Eugene G. Liss, Esq., for Respondent

Record Closed: March 12, 1999 Decided: March 16, 1999

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on November 26, 1997, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

Settlement discussions were held and a settlement was reached.

The parties have agreed to a settlement and have prepared a Voluntary Settlement Agreement, Waiver and Release indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

March 16, 1999
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

March 19 1999
DATE

N. J. Catanzaro Jr.
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 24 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

jb

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VINCENT R. LODATO
STEVEN MAGER
BRIGETTE N. SHRANK

PLEASE REPLY TO NEWARK

March 11, 1999

The Honorable Maria M. LaFiandra, ALJ
Office of Administrative Law
185 Washington Avenue
Newark, New Jersey 07102

Re: In the Matter of the Tenure Hearing of Salvatore Ferrugia
State-Operated School District of the City of Newark
Agency Docket No. 395-10/97
OAL Docket No. EDU-11350-97N

Dear Judge LaFiandra:

Enclosed please find a duly executed Settlement Agreement in connection with the above matter.

Please do not hesitate to contact me if you should have any questions regarding the enclosed Agreement. Thank you for your cooperation in this matter.

Respectfully yours,

Cherie L. Maxwell

Cherie L. Maxwell

CLM:khr:encl.
cc: Eugene G. Liss, Esq.
Margaret Murphy, Esq., General Counsel

SILLS CUMMIS ZUCKERMAN RADIN
TISCHMAN EPSTEIN & GROSS, P.A.
One Riverfront Plaza
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Attorneys for State Operated
School District of the City of Newark

COMMISSIONER OF EDUCATION
OAL Docket No. EDUTH 11350-97N
Agency Ref. No. 395-10/97

In the Matter of the
Tenure Hearing of

SALVATORE FERRUGIA

VOLUNTARY SETTLEMENT AGREEMENT, WAIVER AND RELEASE

The State-Operated School District of the City of Newark ("Newark" or "District") and Salvatore Ferrugia ("Ferrugia"), agree to the following terms in full resolution of this matter:

WHEREAS, Ferrugia disputes the allegations of the tenure charges, and

WHEREAS, investigation of the charges does not support a claim of fraudulent conduct by rrugia, as he was performing those duties assigned by his building principal, and

WHEREAS, the parties agree that it is in the public interest to enter into this agreement in tion of said charges in order to avoid the uncertainty and expense of litigation, and

WHEREAS, the parties further agree that the terms of this agreement will not present any risk o students and/or the safe operation of the school district,

W, THEREFORE, the parties agree as follows:

1. Ferrugia agrees to submit to the District, in writing and upon approval of 's Agreement, a resignation from his employment effective December 31, 1999.

2. Ferrugia shall be placed on paid administrative leave for the period from the present through December 31, 1999. Ferrugia shall exhaust all accrued leave during this administrative leave. Upon approval of this agreement, Ferrugia shall submit a resignation from his employment as of 12/31/99.

3. The District shall make a pension contribution for Ferrugia for the 120 day period for which he was suspended from the District's payroll.

4. To the extent Ferrugia wishes to file an application for retirement with the Division on Pensions, the District shall assist in completing the necessary paperwork to process said application. However, the District makes no representations with respect to how Ferrugia's pension shall be handled by the Division on Pensions and action on said pension shall not affect the resigna n referenced in paragraph 2. In addition, the District shall not be liable to Ferrugia and Ferrugia holds the District harmless with respect to any pension benefits which Ferrugia does or does not receive at any time in the future.

5. Ferrugia acknowledges that the payments reflected in this agreement constitute the full financial obligation of the District and that he shall receive no additional payments. In exchange for the above consideration, Ferrugia, on behalf of himself, his heirs, successors and assigns, hereby fully releases and forever discharges the District, its representatives, agents, officers and employees, for any and all actions, claims and liabilities of whatsoever kind in character, that he has had or may now have against any of them, including without limitation, any and all claims related to his employment with the District or the termination of that employment.

6. Ferrugia acknowledges, as required under *In re Cardonick*, that, despite the approval of this agreement, the issue of possible revocation of his teaching certificate may be considered by the State Board of Examiners.

7. This agreement is subject to the approval of the State District Superintendent and the Commissioner of Education. Upon approval of this agreement, the District agrees that the tenure charges against Ferrugia shall be withdrawn.

8. The parties enter this agreement voluntarily and without coercion, after consultation with their respective counsel.

State-Operated School District of the City of Newark

Salvatore Ferrugia

Salvatore Ferrugia

By:

Dated: February 18, 1999

Dated: March 2nd, 1999

Dated: ~~January~~ February 18, 1999

2

OAL DKT. NO EDU 11350-97
AGENCY DKT. NO. 395-10/97

IN THE MATTER OF THE TENURE	:	
HEARING OF SALVATORE FERRUGIA,	:	
STATE-OPERATED SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
THE CITY OF NEWARK, ESSEX COUNTY.	:	DECISION
	:	

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

Upon thorough review of the record, the Commissioner is compelled to express his strong reservations about accepting a settlement of this tenure matter, given the serious allegations set forth in the tenure charges certified by the State Superintendent and the statement of evidence in support of those charges which accuses respondent of engaging in conduct which defrauded the District and "was intended to and resulted in the theft of federally received Title I public monies." (Statement of Charges at p. 3) However, given the terms of the settlement, the Commissioner has no choice but to give due consideration to the third statement of the settlement agreement which indicates that "investigation of the charges does not support a claim of fraudulent conduct [since respondent] was performing those duties assigned by his building principal***."

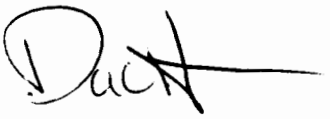
Upon consideration of this disturbing fact stipulated by the District, together with the record of this matter, the Commissioner is at a loss to understand why the District did not engage in a *full* investigation of the relevant facts *prior* to the certification of the tenure charges.

Respondent's response to the tenure charges and statement of evidence was submitted to the District *prior* to the certification of the tenure charges to the Commissioner. The response unequivocally states over and over that any failure on respondent's part to instruct his students was due to the assignment of other duties or cancellation of basic skills classes by the principal. Notwithstanding this, there was apparently no further investigation conducted by the District to ascertain what validity, if any, respondent's statements had and what impact there may have been on the extremely serious tenure charges filed against this teaching staff member. Had this been done, certification of the tenure charges to the Commissioner may not have occurred. Given this unfortunate circumstance, the Commissioner admonishes this District and all others that a failure to investigate *fully* alleged serious misconduct of an employee *before* the certification of tenure charges to him can result, as is apparently the case herein, in a Board/District's inability to prosecute fully the charges it certifies to the Commissioner. As stated by the Commissioner in *In the Matter of the Tenure Hearing of Sandra Connors, Board of Education of the City of Camden*, decided April 8, 1999, "[s]uch a failure, of course, carries the major consequence of needless expenditure of large amounts of taxpayer money, to say nothing of the potential impact on the personal and professional reputation of the person who has been charged with serious misconduct." (*Connors*, *supra* at p. 5)

Nonetheless, in light of the factual circumstances as set forth in the record of this matter, the Commissioner is at this point in the adjudication of the instant matter compelled to conclude, that it is in the public interest to approve the settlement (*In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846).

Accordingly, the matter is hereby dismissed, subject to the parties' compliance with the terms of the settlement.* A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

May 3, 1999
Date of Mailing, May 3, 1999

IN THE MATTER OF THE TENURE	:	
HEARING OF ALAN P. TIGHE,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWN-	:	DECISION
SHIP OF OLD BRIDGE,	:	
MIDDLESEX COUNTY.	:	
	:	

SYNOPSIS

Board certified tenure charges of unbecoming conduct against respondent custodian for alleged theft of money from the school activities fund.

ALJ concluded that respondent's behavior constituted behavior unbecoming a school employee warranting removal from his position. Moreover, the ALJ determined that the stealing of money from the school was clearly an offense which involved and touched on respondent's position. Therefore, the ALJ ordered that respondent forfeited his position pursuant to *N.J.S.A.* 2C:51-2.

Commissioner affirmed in part, reversed in part the initial decision. Commissioner concurred with the ALJ that the matter was properly determined upon summary judgment, that respondent's action constituted conduct unbecoming a tenured employee and that dismissal was the appropriate penalty. Commissioner, however, determined that, contrary to the ALJ's finding, he is without jurisdiction to enter an order of forfeiture of public employment pursuant to *N.J.S.A.* 2C:51-2, as amended by *P.L.* 1995, *c.* 250. Commissioner ordered respondent dismissed from his employment as of the date of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 6704-98

AGENCY DKT. NO. 214-6/98

IN THE MATTER OF THE TENURE HEARING OF ALAN P. TIGHE, BOARD OF EDUCATION OF OLD BRIDGE TOWNSHIP, MIDDLESEX COUNTY

Beth Ann Stemmler, Esq., for Old Bridge Township Board of Education, Middlesex County, petitioner (Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

Michael T. Barrett, Esq., for Alan P. Tighe, respondent (Bergman & Barrett, attorneys)

Record Closed: March 5, 1999 Decided: March 17, 1999

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

This matter concerns the tenure charge of unbecoming conduct which was filed against Alan P. Tighe, a custodian employed by the Old Bridge Township Board of Education (Board). The tenure charge was filed against Mr. Tight after he admitted that he took money from the student activities fund which is kept in a locked cabinet in the guidance office at the Jonas Salk Middle School, and criminal charges had been filed against Mr. Tighe. The case was transmitted to the Office of Administrative Law (OAL) on August 12, 1998, for hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

I had a telephone conference with the attorneys for the parties on September 15, 1998, at which time we discussed the Board's motion for summary decision. The Board argued that Mr. Tighe should be removed from his position since the theft of school funds clearly constitutes conduct unbecoming a school employee.

Also discussed during the September 15, 1998 conference was the issue of whether Mr. Tighe had forfeited his position pursuant to *N.J.A.C.* 2C:52-2. Mr. Tighe pled guilty to a disorderly persons offense on July 1, 1998. During the conference, Beth Ann Stemmler, Esq., who represents the Board, agreed to find out if the municipal court had made a ruling as to forfeiture, and it was agreed that both parties would submit briefs.

Ms. Stemmler submitted a letter from the municipal court and briefs were filed by the parties. I had a telephone conference with the parties on February 17, 1999, and March 5, 1999, regarding the submission of a stipulation of facts as to the respondent's work record. I received the stipulation on March 5, 1999, and the record closed on that date.

FINDINGS OF FACT

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

The parties stipulated to the following facts:

1. Respondent, Alan P. Tighe, was hired by the Old Bridge Township Board of Education as a custodian/groundsman on August 21, 1978, effective November 16, 1978 to June 30, 1979. Respondent was thereafter rehired on an annual basis through the 1997-98 school year where he served as a custodian at the Jonas Salk Middle School.

2. Respondent achieved tenure status in 1981.

3. In his initial Evaluation Report dated March 1979, Respondent's overall performance was rated as slightly below average ("C-").

4. In his Evaluation Report dated March 1980, Respondent's overall performance was rated as below average ("D"). The Evaluation Report states, ". . . the needs of this building demand that each custodian strive for a minimum overall rating of "B", which is above average. One should not set their standards on average or below average, but rather on above average."

5. Although Respondent was recommended for reappointment and an increment given at this time, the Evaluator recommends that Respondent be transferred to a smaller school and notes that, "[Respondent] has a tendency to sit down when the other custodians do. He is generally a follower and needs constant supervision and checking regarding his duties."

6. The Evaluation Report dated March 1980 further states that "[i]f [Respondent's] quality of work does not significantly improve, an increment would not be recommended for the following year."

7. On October 28, 1980, Respondent was observed by Mr. Edward Ballo, the Department Chairman at Madison Central High School, in the department office at approximately 6:00 p.m. Mr. Ballo also observed that there was a container with beer bottles and an open beer bottle on his desk. In addition, Mr. Ballo noticed that a projector was set up and Respondent was preparing to view a film. Respondent was reminded that the presence of alcoholic beverages is a serious matter and that offices in the school building are not intended for recreational use. On October 29, 1980, Respondent was suspended with pay.

8. In his Evaluation Report dated March 1981, Respondent's overall performance was rated as average ("C"). The Evaluation Report states that Respondent's overall improvement was "slight," and the Evaluator emphasizes that Respondent must, "strive hard to continually improve and work to the best of his ability in seeking an above average evaluation."

9. In his Evaluation Report dated March 1982, Respondent's overall performance was rated as slightly above average ("B-").

10. In his Evaluation Report dated March 1983, Respondent's overall performance was rated as slightly above average ("C+").

11. In his Evaluation Report dated March 1984, Respondent's overall performance was rated as slightly above average ("B-").

12. At this time, Respondent's father served as his supervisor and was responsible for evaluating Respondent's work performance on a daily and annual basis. In January 1985, this responsibility became too difficult and it was recommended that Respondent be transferred to another District school.

13. In his Evaluation Report dated March 1986, Respondent's overall performance was rated as average ("C").

14. During the period May 1986 through June 1986, Respondent was paid wages for sick days in excess of his yearly allotment. In September 1986, the District was obligated to recover these unearned wages.

15. In his Evaluation Report dated March 1987, Respondent's overall performance was rated as average ("C").

16. During the 1987-88 school year, Respondent exhausted all remaining sick, personal, vacation, comp., and bank days from the previous year. In October 1988, the District was obligated to recover these wages from Respondent's paycheck.

17. During the 1988-89 school year, Respondent again exceeded his allotted time and, in August 1989, the District instructed that the excess time be taken off the allotted time for the 1989-90 school year.

18. As of March 14, 1991, Respondent exhausted all remaining sick, personal, vacation, comp., and bank days. The District was obligated to recover these wages from Respondent's March 30, 1991 paycheck and Respondent was informed that any further absences would be deducted from subsequent paychecks.

19. In March 1991, Respondent was directed to cease his practice of giving out the office number of the custodial/maintenance department for personal calls. The

night supervisor, Mr. Michael Melfa, informed Respondent that, "[t]his office, within the past several months, has been besieged with personal telephone calls for you. . . . These personal phone calls have also continued into the night throughout my shift. . . . In light of the most recent situation in which *you* told the caller that Alan Tighe had already left for the day, the practice of your giving out this office number to receive your personal telephone calls *must* cease immediately."

20. On March 21, 1991, Respondent was instructed to meet with the Custodial/Maintenance Supervisor, Mr. Jeremiah O'Connell, to discuss excessive absence from work.

21. As of April 17, 1991, Respondent exhausted all remaining sick, personal, vacation, comp., and bank days. The District was obligated to recover these wages from Respondent's April 30, 1991 paycheck and Respondent was informed that any further absences would be deducted from subsequent paychecks.

22. On November 6, 1991, Respondent suffered an on-the-job injury, but was instructed by a physician, Dr. Allen, that he was authorized to return to work as of November 18, 1991. Respite this medical clearance, Respondent remained out of work from November 18 through November 25, 1991 and on December 18, 1991. Respondent returned to work on December 19, 1991, but as of January 17, 1992, Respondent had not reported to work since January 6, 1992. On January 17, 1992, the Supervisor of Buildings and Grounds instructed Respondent to apprise the District of his medical status and informed Respondent that his time out of work would be deducted from his allotted sick days.

23. As of January 16, 1992, Respondent exhausted all remaining sick, personal, vacation, comp., and bank days. The District was obligated to recover these wages from Respondent's March 15, 1992 paycheck and Respondent was informed that any further absences would be deducted from subsequent paychecks.

24. As of February 19, 1992, Respondent exhausted all remaining sick, personal, vacation, comp., and bank days. The District was obligated to recover these wages from Respondent's March 30, 1992 paycheck and Respondent was informed that any further absences would be deducted from subsequent paychecks.

25. As of April 24, 1992, Respondent exhausted all remaining sick, personal, vacation, comp., and bank days. The District was obligated to recover these wages from Respondent's May 30, 1992 paycheck and Respondent was informed that any further absences would be deducted from subsequent paychecks.

26. As of May 7, 1992, Respondent exhausted all remaining sick, personal, vacation, comp. and bank days. The District was obligated to recover these wages from Respondent's June 15, 1992 paycheck and Respondent was informed that any further absences would be deducted from subsequent paychecks.

27. As of June 30, 1992, Respondent exhausted all remaining sick, personal, vacation, comp., and bank days. The District was obligated to recover these wages from Respondent's September 30, 1992 paycheck and Respondent was informed that any further absences would be deducted from subsequent paychecks.

28. As of January 31, 1993, Respondent was more than eight (8) sick days from the 1992-93 school year and was required to meet with the Building Principal to determine the reason behind these absences. At the meeting held on March 19, 1993, medical verification was provided for the absences, but the need to maintain good attendance was discussed with Respondent.

29. In his Evaluation Report dated March 1993, Respondent's overall performance was rated as above average ("B").

30. As of April 28, 1993, Respondent exhausted all remaining sick, personal, vacation, comp., and bank days. The District was obligated to recover these wages from Respondent's May 30, 1993 paycheck and Respondent was informed that any further absences would be deducted from subsequent paychecks.

31. As of June 7, 1993, Respondent exhausted all remaining sick, personal, vacation, comp., and bank days. The District was obligated to recover these wages from Respondent's June 30, 1993 paycheck and Respondent was informed that any further absences would be deducted from subsequent paychecks.

32. As of April 8, 1994, Respondent exhausted all remaining sick, personal, vacation, comp., and bank days. The District was obligated to recover these wages from Respondent's April 30, 1994 paycheck and Respondent was informed that any further absences would be deducted from subsequent paychecks.

33. In his Evaluation Report dated April 1994, Respondent's overall performance was rated as average ("C").

34. As of March 22, 1995, Respondent used more than eight (8) sick days for the 1994-95 school year and was required to meet with the Building Principal, Mr. Joseph Alvarez, to determine the reason behind these absences. At the meeting held on March 29, 1995, medical documentation was provided and included in Respondent's attendance record.

35. As of April 5, 1995, Respondent exhausted all remaining sick, personal, vacation, comp., and bank days. The District was obligated to recover these wages from Respondent's April 30, 1995 paycheck and Respondent was informed that any further absences would be deducted from subsequent paychecks.

36. In his Evaluation Report dated March 1995, Respondent's overall performance was rated as average ("C").

37. As of May 23, 1995, Respondent exhausted all remaining sick, personal, vacation, comp., and bank days. The District was obligated to recover these wages from Respondent's June 15, 1995 paycheck and Respondent was informed that any further absences would be deducted from subsequent paychecks.

38. In his Evaluation Report dated March 1996, Respondent's overall performance was rated as above average ("B").

39. In his Evaluation Report dated May 1997, Respondent's overall performance was rated as above average ("B"), although the Evaluator reminded Respondent that he is required to wear his complete uniform daily.

40. On July 1, 1998, Respondent entered a plea of guilty to a disorderly persons offense committed during the course of his employment, and was sentenced by Municipal Court Judge Emory Z. Toth to the maximum allowable fine under the law.

41. Respondent has never before been convicted of a crime or disorderly persons offense, related to his employment or otherwise.

42. Respondent has never before been the subject of tenure charges, an increment withholding or other disciplinary sanctions resulting in a withholding of pay.

43. Respondent was suspended from his duties, effective March 20, 1998.

44. Notwithstanding his suspension, as of March 3, 1998, Respondent had already used more than eight (8) sick days fro the 1997-98 school year and was required to meet with the Building Principal, Dr. Nicole Okun, to determine the reason behind these absences. [Stipulation submitted on March 5, 1999]

Also, it is not disputed that there were several thefts of school funds from the locked cabinet in the guidance office at the Jonas Salk Middle School during the summer of 1997 and in February 1998. As part of its investigation, the Old Bridge Township Police Department dusted some rolled coins kept in the locked cabinet with fluorescent powder and marked the coin wrappers. On March 19, 1998, the police were informed that money was missing from the locked cabinet. The money stolen was collected by students and was to be donated to various causes. The police checked the employees for evidence of powder. Mr. Tighe tested positive and the rolled coins were found in his possession.

In his sworn statement to the police, Mr. Tighe stated that he did not know there was money in the cabinet and that on March 19, 1998, he opened the cabinet because he was looking for a pencil. Mr. Tighe admitted that he took the coins valued at $20 but denied any involvement in the prior thefts (sworn statement of Mr. Tighe, attached to the Board's motion for summary decision). Mr. Tighe was arrested and charged with burglary, a violation of *N.J.S.A.* 2C:18-2, and theft, a violation of *N.J.A.C.* 2C:20-3.

On May 19, 1997, the Board voted to certify the tenure charge against Mr. Tighe to the Commissioner of Education (Commissioner).

On July 1, 1998, Mr. Tighe pled guilty to a downgraded disorderly persons offense (transcript of the municipal court proceedings before Judge Emery Z. Toth, attached to the Board's motion for summary judgment). During the court procedure, Mr. Tighe described his action as "very stupid" and denied he had a drinking or drug problem.

Prior to sentencing Mr. Tighe, Judge Toth considered several mitigating factors offered by the attorney for Mr. Tighe, namely, his long-term employment with the Board, the absence of any prior criminal conviction, the amount of money involved, and the fact that he supports his two minor children. Judge Toth held that Mr. Tighe had violated his position of trust and stated that he would fine Mr. Tighe rather than place him in jail since "he's now in a position where he'll be not only removed from his job" but also possibly lose his pension (transcript of the municipal court procedure, attached to the Board's motion for summary judgment).

At my request, the Board checked with Judge Toth to see if he made a decision as to forfeiture pursuant to *N.J.S.A.* 2C:51-2. By letter dated October 14, 1998, Judge Toth voiced his opinion that the municipal court does not have the power to compel forfeiture and that Mr. Tighe can only be removed from his position by decision of the Superior Court or by administrative action.

The respondent stated his action on Mach 19, 1998 has embarrassed him and his family and guarantees that if he is returned to work, he will be a good employee and will never repeat his illegal act (certification of Alan P. Tighe, attached to respondent's brief).

CONCLUSION OF LAW

The Board argued that summary decision is appropriate since there are no issues of any material fact. *N.J.A.C.* 1:1-12.5; *Brille v. Guardian Life Ins. Co. of Amer.*, 142 *N.J.* 520 (1995). The Board noted that the courts have held that the bare allegation of factual disputes without factual support cannot defeat a motion for summary decision. *Baron v. Clause Trucking, Inc.*, 225 *N.J. Super.* 230, 234 (App. Div.), certif. denied, 113 *N.J.* 353 (1988); *Brille*, 142 *N.J.* at 529.

The respondent argued that summary decision is not appropriate since the Board's statement of facts implies that he was also responsible for the thefts prior to Mach 19, 1998.

I disagree and I **FIND** that the facts clearly establish that the respondent admitted he took the $20 on March 19, 1998, that he denied being involved in the prior thefts, and that there was no evidence to show his involvement in the prior thefts. The issue here, as recognized by the Board in its briefs, is whether the sole incident on March 19, 1998 sustains the tenure charge and warrants the respondent's removal or discipline.

The respondent also argued that summary decision is not appropriate since the respondent should be afforded a hearing to demonstrate his years of service, his level of remorse and his absolute determination that no act like this will again occur, and cited the decisions in *In the Matter of Tenure Hearing of Kathleen Starling, School District of the City of Linden, Union County*, OAL Dkt. No. EDU 11679-96 (Comm. decision June 1998); *In re Tenure Hearing of Ostergren*, 1966 *S.L.D.* 185. The respondent argued that since the respondent's livelihood is at stake, he should be afforded every opportunity to protect his job and that a submission of the papers does not afford him that opportunity.

I **CONCLUDE** that the matter can be decided on the briefs and exhibits filed by the parties. The respondent's mitigating factors were presented in the record of the municipal court procedure, in his certification and in the stipulation of facts, and all these documents are part of the record in this matter. There is no dispute that the respondent is a long-term employee of the Board with an average work history, that he has had no prior criminal conviction and that he supports his two children. In light of the possible consequences of his action, I have no doubt that Mr. Tighe is full of remorse and determined not to repeat his illegal action.

Pursuant to the tenure statute, *N.J.S.A.* 18A:17-3, the Board argued that a single theft of school property, regardless of its value, constitutes conduct unbecoming a school employee and that the respondent should be dismissed. The Board stated that custodians have access to school property, with limited or no supervision and the Board can no longer trust Mr. Tighe, and cited the decision in *In the Matter of the Tenure Hearing of DePasquale*, 92 *N.J.A.R.*2d (EDU) 537,

aff'd. by Commissioner, 92 *N.J.A.R.*2d (EDU) 590, aff'd by Appellate Division, Dkt. No. A-4326-92 (March 31, 1994). The Board argued that unfitness to hold a position can be shown by one incident, if sufficiently flagrant. *Irvington Twp. School District v. Smith*, 93 *N.J.A.R.* (EDU) 526, aff'd., 93 *N.J.A.R.*2d (EDU) 526; *Redcay v. State Bd. of Educ.*, 131 *N.J.L.* 326 (E&A 1944).

The respondent does not dispute that a theft of school property constitutes conduct unbecoming an employee, but argues that the respondent should not be dismissed from his position. The respondent argued that based on all the facts, there is no likelihood of the improper behavior recurring and that he should not lose his job for the single incident involving a theft of $20.

Having considered the arguments of the parties, I agree with the Board and I **CONCLUDE** that Mr. Tighe's action on Mach 19, 1998 constitutes behavior unbecoming a school employee and, further, that he should be removed from his position. As custodian, Mr. Tighe is not closely supervised and the Board must trust its custodians to do their jobs and not to take school property. Mr. Tighe has shown by his action that he is not worthy of such trust.

Therefore, I **CONCLUDE** that Mr. Tighe should be removed from his position as custodian pursuant to *N.J.S.A.* 18A:17-3.

Also, the Board argued that Mr. Tighe's conviction involves dishonesty and touches upon his custodial position and that he forfeited his public employment pursuant to *N.J.S.A.* 2C:51-2. The Board argued that when Judge Toth sentenced Mr. Tighe, he clearly anticipated that Mr. Tighe would be terminated, and that the courts have recognized that tenured employees can forfeit their positions pursuant to *N.J.S.A.* 2C:51-2. *Moore v. Youth Correctional Inst.*, 119 *N.J.* 256 (1990). In the *Moore* case, the court recognized that in some cases a fact finding hearing regarding the nexus between the offense and the employment is appropriate in order to determine whether the offense involves or touches on the person's employment. In this matter, the Board argued that a hearing is not necessary and that the respondent's illegal act clearly is an offense which involves and touches on his school position.

The respondent noted that in *In the Matter of the Tenure Hearing of Neal A. Ercolano, Board of Education of the Township of Branchburg*, EDU 8422-97 and EDU 8598-97, initial decision (April 7, 1998), http://lawlibrary.rutgers.edu/oal/html/initial/edu8422-97.html, that the administrative law judge held that the school employee had forfeited his position and that the Commissioner reversed the forfeiture order, remanded the matter to OAL, and stated that he does not have jurisdiction to enter orders of forfeiture of public employment and that such orders are now issued only by the sentencing court. Commission decision (June 25, 1998) <http://www-camlaw.rutgers.edu/library/oal/>. Since Judge Toth did not order forfeiture, the respondent argued that the Commissioner, and therefore the administrative law judge, is without legal authority to determine the issue of forfeiture.

Pursuant to *N.J.S.A.* 2C:51-2, a person forfeits his public position if:

> (1) He is convicted under the laws of this State of an offense involving dishonesty or of a crime of the third degree or above or under the laws of another state or of the United States of an offense or a crime which, if committed in this State, would be such an offense or crime;
>
> (2) He is convicted of an offense involving or touching such office, position or employment; or
>
> (3) The Constitution or a statute other than the code so provides.

This statute was amended in 1995 to require the court to enter an order of forfeiture after conviction unless the court decides to waive said forfeiture. Also in 1995, the following subsection was added to *N.J.S.A.* 2C:51-2:

> g. In any case in which the issue of forfeiture is not raised in a court of this State at the time of a finding of guilt, entry of guilty plea or sentencing, a forfeiture of public office, position or employment required by this section may be ordered by a court of this State upon application of the county prosecutor or the Attorney General or upon application of the public officer or public entity having

> authority to remove the person convicted from his public office, position or employment. The fact that a court has declined to order forfeiture shall not preclude the public officer or public entity having authority to remove the person convicted from seeking to remove or suspend the person from his office, position or employment on the ground that the conduct giving rise to the conviction demonstrates that the person is unfit to hold the office, position or employment.

I disagree with the Commissioner's interpretation that *N.J.S.A.* 2C:51-2g does not allow him to made a decision as to forfeiture. I agree with the interpretation of *N.J.S.A.* 2C:51-2g presented by Administrative Law Judge Ken Springer in his initial decision, *In the Matter of the Tenure Hearing of Robert R. Utacco*, 97 *N.J.A.R.*2d (EDU) 449. Judge Springer decided that a school employee had forfeited his position and stated:

> Although an administrative agency is not a "court" in a technical sense, *In re Tyler*, 236 *N.J. Super.* 478 (App. Div. 1989), *certif. den.* 121 *N.J.* 615 (1990), it performs an adjudicatory function termed "quasi-judicial" in nature. *City of Hackensack v. Winner*, 82 *N.J.* 1, 28 (1980). Jurisdiction over tenure charges brought by a school board seeking dismissal of a tenured employee is vested exclusively with the Commissioner. *N.J.S.A.* 18A:6-10 to -18.1. *In re Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967). In seeking to "strengthen" the forfeiture law, it is doubtful that the Legislature wanted to make it more difficult to remove criminally-culpable teaching staff members. Instead, the more reasonable reading of subsection (g) is that where, for whatever reason, the issue of forfeiture is not ordered by any court, a school district having authority to initiate the removal of a teaching staff member may litigate the forfeiture issue as part of a pending tenure proceeding. *Cf. Sukin v. Northfield Bd. of Educ.*, 171 *N.J. Super.* 184 (App. Div. 1989) (Commissioner possesses incidental jurisdiction to determine issues arising under the Open Public Meetings Act as they relate to controversies under the school laws). Indeed, the New Jersey Supreme Court has acknowledged that, under some circumstances, it may be "far more efficient" to have the employer and administrative agency decide whether a particular offense should lead to forfeiture. *Moore*, at 267. Surely it would not make much sense to require a school board to bear the heavy cost of prosecuting complex charges at a plenary tenure hearing when a court of competent jurisdiction has already found respondent guilty of a forfeitable offense. [*Id.* at 453]

I recognize that Judge Springer's initial decision was reversed by the Commissioner, who disagreed as to the interpretation to be given to *N.J.S.A.* 2C:51-2g (97 *N.J.A.R.*2d (EDU) 454, matter now on appeal before the State Board of Education).

Also, I recognize that the language in *N.J.S.A.* 2C:51-2g is not clear as whether it is intended to acknowledge that public employees who have engaged in criminal activities can be removed from their positions pursuant to statutes other than the forfeiture statute or is intended to give the public employers the right to decide the matter of forfeiture in the absence of a court decision on forfeiture. I **CONCLUDE** that the Legislature intended the latter.

In this matter, I **CONCLUDE** that the stealing of money from the school is clearly an offense which involves and touches on the respondent's position.

Therefore, I **ORDER** that the tenure charge be upheld and that the respondent be removed from his position. Further, I **ORDER** that the respondent forfeited his position.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 17, 1999
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

March 18, 1999
DATE

N. N. Contaxis/pe
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 19 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

ml

OAL DKT. NO. EDU 6704-98
AGENCY DKT. NO. 214-6/98

IN THE MATTER OF THE TENURE	:	
HEARING OF ALAN P. TIGHE,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWN-	:	DECISION
SHIP OF OLD BRIDGE,	:	
MIDDLESEX COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Respondent's exceptions and the Board's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in rendering the within decision.

Upon careful and independent review of the record in this matter, the Commissioner affirms in part, and reverses in part, the initial decision of the Administrative Law Judge (ALJ). Initially, notwithstanding respondent's assertion that he has "a right to be heard and seen by the Court and a right to personally confront the witnesses against him," (Respondent's Exceptions at p. 1), the Commissioner finds that this matter was properly determined upon summary judgment. In this regard, the Commissioner recognizes

> ***that while he has a duty to conduct a hearing and render a decision in all tenure matters, such hearings will necessarily be in accordance with the Uniform Administrative Procedure Rules of Practice, *N.J.A.C.* 1:1. Contrary to respondent's view, these rules contemplate motions for summary decision, and decisions on said

> motions, before the ALJ. See *N.J.A.C.* 6:24-1.10(b) and *N.J.A.C.* 1:1-12.5. ***
>
> *** "It is well-established that where no disputed issues of material fact exist, an administrative agency need not hold an evidential hearing in a contested case." *Frank v. Ivy Club*, 120 *N.J.* 73, 98, citing *Cunningham v. Dept. of Civil Service*, 69 *N.J.* 13, 24-25 (1975). "Moreover, disputes as to the *conclusions to be drawn from the facts, as opposed to the facts themselves, will not defeat a motion for summary judgment.*" *Contini v. Board of Education of Newark*, 96 *N.J.A.R.* 2d (EDU) 196, 215, citing *Lima & Sons, Inc. v. Borough of Ramsey*, 269 *N.J. Super.* 469, 478 (App. Div. 1994) (emphasis added). ****In the Matter of the Tenure Hearing of Andrew Phillips, School District of the Borough of Roselle, Union County*, Commissioner's Decision No. #129-97, decided March 20, 1997, Slip Opinion at pp. 9-11.

In the instant matter, respondent admits to having stolen the $20, notwithstanding that he denies that his action constitutes conduct unbecoming a tenured employee. (Respondent's Exceptions at p. 1) However, like the circumstances in *Phillips*, summary disposition in favor of the Board is appropriate herein, inasmuch as respondent has failed to show "that there is a genuine issue which can only be determined in an evidentiary hearing." *N.J.A.C.* 1:1-12.5(b).

The Commissioner further concurs with the ALJ that respondent's action constitutes conduct unbecoming a tenured employee, and that dismissal is the appropriate penalty. In this regard, the Commissioner notes that respondent does not dispute the Board's contention that

> [a]lthough Respondent claims to have cooperated with investigators and admitted his wrongdoing, he did not readily confess to the offense, but waited until the police department performed powder testing on each employee with access to the office from which the student funds were stolen. *** Only *after* testing positive for the transfer of the powder and *after* the missing funds were recovered *on*

> *his person,* did Respondent confess to the theft.*** (Board's Brief, December 9, 1998 at pp. 5, 6) (emphasis in text)

The Commissioner, therefore, concurs that respondent's actions are "inherently incompatible with public employment ***." *DePasquale, supra* at 540.

Finally, contrary to the ALJ's finding, the Commissioner maintains that, pursuant to *N.J.S.A.* 2C:51-2, as amended by *P.L.* 1995, *c.* 250, he is without jurisdiction to enter an order of forfeiture of public employment. *In re Ercolano, supra.* Thus, the ALJ's order that respondent has forfeited his employment is hereby set aside.

Accordingly, the initial decision of the ALJ is affirmed in part, for the reasons expressed therein, and reversed in part, as set forth above. Respondent's tenured employment with the Board is terminated as of the date of this decision.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.
May 3, 1999
Date of Mailing, May 3, 1999

136-99

SUSAN FOX,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

May 3,1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 10067-98
AGENCY DKT. NO. 447-9/98

SUSAN FOX,
Petitioner,
v.
BOARD OF EDUCATION,
TOWNSHIP OF EAST BRUNSWICK,
Respondent.

Christopher Kellar, Esq., for petitioner (Rothbard, Rothbard, Kohn & Kellar, attorneys)
Martin R. Pachman, Esq., for respondent

Record Closed: March 16, 1999 Decided: March 19, 1999

BEFORE **ROBERT S. MILLER,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Susan Fox (petitioner) filed a verified petition contesting a determination of the Board of Education of the Township of East Brunswick (respondent or Board of Education) placing her son, J.F., an eighth grade student and an unemancipated minor, into a "Math 8" class, rather than the Algebra class which she desires.

On October 30, 1998, the instant matter was filed in the Office of Administrative Law for determination as a contested case, pursuant to the New Jersey Administrative Procedure Act. A telephone prehearing conference was held on January 13, 1999. The hearing was scheduled to held on March 15 and March 26, 1999. Prior to the first day of hearing, respondent filed and served a motion for summary decision. By letter dated March 12, 1999, petitioner's attorney replied to the motion, acknowledging that there were no disputed issues of fact but opposing the motion because petitioner "would like her day in court to challenge the school board's system so as to prevent future injustice to other students."

As indicated, the facts in this case are simple and undisputed.

FACTS

On September 29, 1998, the date on which the petition was filed with the Department of Education, petitioner and her son J.F. lived in the Township of East Brunswick. J.F. attended eighth grade at the Churchill School in the Township. On or about February 1, 1999, however, J.F. transferred from the East Brunswick School District to the West Windsor-Plainsboro Regional School District and continues to be a student there to the present time. He has not attended the East Brunswick Public School system since February 1999.

Prior to the transfer, and in accordance with the Board of Education's selection system, J.F. had been placed in the regular academic "Math-8" class. In this action, petitioner challenges the validity and fairness of that system, particularly as it applies to J.F., who, she contends, should have been placed in the more advanced eighth grade Algebra class.

ISSUE AND ANALYSIS

The sole issue presented by respondent's motion is whether petitioner's action should be dismissed because of mootness. For the reasons that follow, I **CONCLUDE** that it should.

Questions that have become moot or academic prior to judicial scrutiny generally have been held to be an improper subject for judicial review. Oxfeld v. N.J. State Board of Ed., 68 N.J. 301 (1975); Sente v. Clifton Mayor and Municipal Council, 66 N.J. 204, 206 (1974). There are two basic reasons for this doctrine. First, for reasons of economy and restraint, courts will not decide cases in which the issue is hypothetical, a judgment cannot grant effective relief, or the parties do not have concrete adversity of interest. Second, it is a premise of the Anglo-American judicial system that a contest engendered by genuinely conflicting self-interests of the parties is best suited to developing all relevant material before the court. Therefore, where, because of a change in circumstances, a doubt is created concerning the immediacy of the controversy, courts will ordinarily dismiss the case as moot, regardless of the state to which the litigation has progressed. Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. 1976).

Generally, an action is considered "moot" when it no longer presents a justiciable controversy because the issues involved have become academic. A case is moot when a determination is sought on a matter which when rendered cannot have any practical effect on the existing controversy. I.M.O. Victoria v. Board of Education of Woodbridge, 1982 SLD 1, 5. That case involved allegations by a teacher that he had been assigned classes which were over-enrolled. During the pendency of the matter and prior to hearing, the petitioner had been transferred to a different school, wherein the alleged over-enrollment issue did not exist. The Administrative Law Judge, in a decision confirmed by the Commissioner, dismissed the Petition of Appeal as moot.

To similar effect is the decision in J.B. v. Board of Education, 1988 SLD 2303. That case involved the selection system used by the Belmar Board of Education to assign students to either Asbury Park High School or Manasquan High School. The petitioner therein had been assigned to Asbury Park and claimed a right to attend the Manasquan High School. During the pendency of the action, the student on whose behalf the petition was brought transferred to a different private school. The Administrative Law Judge and the Commissioner determined that as a result of the pupil's transfer, the matter should be dismissed based upon mootness. See, also, Weehawkin Education Association v. Bd. of Ed. Township of Weehawkin, 78 SLD 924, 925, and cases cited therein.

As noted above, the relief petitioner seeks is to have her son placed in the Algebra course in lieu of the regular eighth grade Math course. Clearly, given the transfer of J.F. to a different school district, the relief sought cannot be granted, the action itself has become moot, and the motion for summary decision should be **GRANTED**.

ORDER

For the reasons expressed above I **CONCLUDE** that respondent's motion for summary decision to dismiss the petition should be **GRANTED.** It is so **ORDERED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 19 1999
DATE

ROBERT S. MILLER, ALJ

Receipt Acknowledged:

3/23/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 24 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

tmp

OAL DKT. NO. EDU 10067-98
AGENCY DKT. NO. 447-9/98

SUSAN FOX,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon review of the record, the Commissioner concurs with and adopts as his own the recommended decision of the Administrative Law Judge dismissing the petition as moot.

Accordingly, for the reasons expressed in the initial decision, the Petition of Appeal is hereby dismissed with prejudice.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.
May 3, 1999
Date of Mailing, May 3, 1999

144-99

OLD BRIDGE EDUCATION ASSOCIATION *ET AL.*,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Education Association and certified school nurses alleged that the Board retained unqualified, uncertified nurses in violation of statute and in violation of their rights.

ALJ found that there was no genuine issue as to any material fact as the parties and facts in this case were essentially the same as in two prior cases that were already litigated. ALJ determined that the fundamental principles of *res judicata* and collateral estoppel precluded petitioners from further litigating this matter. ALJ granted respondent's motion for summary decision. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

May 6, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 10243-97

AGENCY DKT. NO. 411-10/97

OLD BRIDGE EDUCATION ASSOCIATION, et als.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,

Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Francis X. Journick, Jr., Esq., for respondent (Wilentz Goldman & Spitzer, attorneys)

Record Closed: February 13, 1999 Decided: March 18, 1999

BEFORE **ROBERT S. MILLER,** ALJ:

STATEMENT OF THE CASE, PROCEDURAL HISTORY AND UNDISPUTED FACTS

Alleging that the Board of Education of the Township of Old Bridge, Middlesex County ("Board" or "respondent") has retained unqualified and uncertified nurses in violation of statute

and regulation, the Old Bridge Education Association ("petitioner") seeks to restrain respondent from using uncertified personnel to perform the duties of School Nurse, to require respondent to employ "a sufficient number of certified school nurses in each of its schools," and to restrain respondent from "maintaining the position of registered or any other type of nurse in any of its schools. . . ."

On March 22, 1996, petitioners filed a petition of appeal (the "First Petition") with the Commissioner of Education (the "Commissioner") challenging the Board's creation and filling of a Registered Nurse position in the Board's McDivitt School to assist the Board's existing certified school nurse assigned to that school.

The First Petition sought relief in the form of an order restraining the Board from using uncertified personnel to perform school nurse duties and requiring the Board to employ certified school nurses in each of its schools. The Board timely filed an answer to the First Petition and the matter was assigned OAL Docket No. EDU 04459-96S, Agency Ref. No. 114-3/96.

On or about May 23, 1996, petitioners filed a second petition of appeal (the "Second Petition") with the Commissioner containing substantially the same allegations and demands contained in the First Petition, this time directed to the Board's creation and filling of the Registered Nurse position at its Cooper School.

The Board timely filed an answer to the Second Petition and the matter was assigned OAL Docket No. EDU 04981-96S, Agency Ref. No. 186-5/96.

By order dated August 12, 1996, the Honorable Bruce R. Campbell, ALJ directed that the matters involving the First and Second Petitions be consolidated.

On June 20, 1997, the Board filed a motion seeking summary decision dismissing the First and Second Petitions. On or about July 24, 1997, petitioners filed a cross-motion seeking summary decision in their favor on the First and Second Petitions. On August 25, 1997, Judge Campbell rendered an Initial Decision on the motion and cross-motion, rejecting petitioners' claims and granting the Board summary decision dismissing the First and Second Petitions.

On or about October 27, 1997, petitioners filed a third petition of appeal (the "Third Petition") with the Commissioner containing essentially the same allegations and demands for relief contained in the First and Second Petitions, this time directed to the Board's creation and filling of two additional Registered Nurse positions. It is the Third Petition which commenced the instant matter. The Board timely filed an answer to the Third Petition, and on November 26, 1997 the matter was filed in the Office of Administrative Law for determination as a contested case pursuant to the New Jersey Administrative Procedure Act.

Also on November 26, 1997, the Commissioner issued a Final Decision affirming the Initial Decision of Judge Campbell. On December 23, 1997, petitioners filed a notice of appeal of the Final Decision to the State Board of Education ("State Board").

On April 1, 1998, the State Board affirmed the Commissioner's Final Decision dismissing the First and Second Petitions.

By letter dated January 4, 1999, respondent filed a motion for summary decision seeking to dismiss the instant petition with prejudice. No responsive papers have been filed by petitioner.

ISSUE AND ANALYSIS

In administrative law cases summary decision "may be rendered if the papers and discovery which have been filed, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a matter of law." See also Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 529 (1995); Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954); Wyckoff Educ. Ass'n v. Wyckoff Bd. Of Educ., unreported, OAL Dkt. No. EDU-5174-80, Agency Ref. No. 321-7/80A (August 21, 1981), aff'd (Comm'r Ed. Oct. 5, 1981), aff'd (St. Bd. Ed. May 5, 1982).

This case is ripe for summary decision. The legal and factual issues in this matter have been fully litigated in the earlier proceedings involving the First and Second Petitions. The Third Petition contains allegations virtually identical to those raised in the First and Second. The Third

Petition raises no new issues of either fact or law which have not already been addressed and resolved in the Board's favor by the Commissioner and the State Board in considering the First and Second Petitions.

Here, as in the case of the First and Second Petitions, petitioners again challenge the Board's use of registered nurses in its schools, reiterating the same allegations and demands for relief previously considered and resolved in the Board's favor by the Commissioner and the State Board. The Commissioner and the State Board made findings of fact and law which are binding upon the parties in this matter. There are no remaining material issues of fact or law precluding summary decision dismissing the Third Petition.

The summary decision procedure is intended "to avoid trials which would serve no useful purpose and to afford deserving litigants immediate relief." See Warthen v. Toms River Community Memorial Hospital, 199 N.J. Super. 18, 23 (App. Div. 1985). Accordingly, New Jersey courts have recognized that

> [t]he right to summary judgment is a substantial one where circumstances warrant, and is more than a token procedural remedy under our rules, for it not only affords protection against groundless claims and frivolous defenses, saving the antagonists the time and expense of protracted litigation, but it also reserves judicial manpower and facilities to cases which meritoriously command attention. [State v. South Amboy Trust Co., 46 N.J. Super. 497, 501 (Law Div. 1957).]

As indicated above, there is no genuine issue as to any material fact. The facts recited above are undisputed. The parties and the facts in this case are essentially the same as in the 2 prior cases. The issues are also the same, and have already been litigated. Fundamental principles of res judicata and collateral estoppel preclude petitioner from further litigating this matter. Summary decision in favor of respondent is clearly warranted.

CONCLUSION AND ORDER

For the reasons expressed above, I **CONCLUDE** that respondent's motion for summary decision should be **GRANTED** and that the petition of appeal should be **DISMISSED** with prejudice. It is so **ORDERED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 18, 1999
DATE

Robert S. Miller
ROBERT S. MILLER, ALJ

Receipt Acknowledged:

March 22, 99
DATE

D N Antonatus/jk
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 23 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

tmp

OAL DKT. NO. EDU 10243-97
AGENCY DKT. NO. 411-10/97

OLD BRIDGE EDUCATION ASSOCIATION *ET AL.*,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board's exceptions in support of the findings and determination of the Administrative Law Judge were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Upon review of the record and respondent's exceptions, the Commissioner agrees with the conclusions of law reached by the Administrative Law Judge that the fundamental principled of *res judicata* and collateral estoppel preclude further litigation of this matter because the issues and facts presented herein are essentially the same as those litigated in two prior cases involving the same parties. Consequently, the Commissioner adopts as his own the recommended order of the Administrative Law Judge granting the Old Bridge Board of Education's Motion for Summary Decision and dismissing the Petition of Appeal.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

May 6, 1999
Date of Mailing, May 6, 1999

147-99

IN THE MATTER OF THE TENURE	:	
HEARING OF RONALD HOWARD,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9839-97

AGENCY DKT. NO. 339-9/97

NEWARK PUBLIC SCHOOLS,

Petitioner,

v.

RONALD HOWARD,

Respondent.

Cherie L. Maxwell, Esq., for petitioner (Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Charles I. Auffant, Esq., for respondent

Record Closed: March 23, 1999 Decided: March 23, 1999

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

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on October 21, 1997, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B -1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

Prior to the date of the hearing, the parties settled the matter and on March 15, 1999, they submitted the attached Voluntary Settlement Agreement, Waiver and Release. Having reviewed the record and the settlement terms, I **FIND**:

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

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

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

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

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

March 23, 1999
DATE

Marylouise Lucchi-McCloud
MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

3/26/99

DATE

N.N. Contaxakis/jp

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 29 1999

DATE

Barbara A. Harned

OFFICE OF ADMINISTRATIVE LAW

pb

CHARLES I. AUFFANT
Attorney at Law
661 Franklin Avenue
Nutley, New Jersey 07110
973-661-4545
Attorney for Respondent

NEWARK PUBLIC SCHOOLS **Petitioner,** **vs.** **RONALD HOWARD** **Respondent,**	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DOCKET NO.** ~~EDOR-11501-97N~~ EDU 9839-97 BB/MXL **AGENCY REFERENCE NO.** ~~410-10/97~~ 339-9/97 BB/MXL **VOLUNTARY SETTLEMENT AGREEMENT, WAIVER AND RELEASE**

The State Operated School District of the City of Newark ("Newark" or "District") and Ronald Howard ("Howard"), hereby agree to the following terms and conditions in full and final resolution of the above matter:

WHEREAS, the parties recognize that the tenure charges contain allegations that Howard has made inappropriate remarks to students, but further recognize that the allegations do not involve physical contact with students or risk to the safety of the students; and

WHEREAS, Howard has acknowledged that at the time of the conduct giving rise to the charges, Howard was engaged in substance abuse; and

WHEREAS, Howard has participated in an inpatient substance abuse rehabilitation

program and continues to participate in a substance abuse recovery program on an outpatient basis; and

WHEREAS, in recognition of Howard's efforts to address this substance abuse problem, the District is willing to afford Howard an opportunity to overcome his prior disability:

NOW THEREFORE, the parties agree as follows:

1. Upon approval of this Agreement by the Commissioner of Education, and expressly conditioned upon a negative drug/alcohol screening and a satisfactory psychiatric examination conducted of Howard by the District, Howard shall be returned to work in the District as a tenured teaching staff member and shall be assigned by the District to an appropriate teaching assignment.

2. Prior to returning to work, and as a condition of said return, Howard consents and agrees to submit to drug/alcohol testing and to a psychiatric examination at a place and time established by the District. Howard agrees that he shall return to work only upon a satisfactory psychiatric examination and a negative drug/alcohol screening.

3. Once returned to a teaching assignment, Howard agrees to submit to random drug/alcohol testing for a period through June 30, 2000 at such times established by the District. The District agrees that if any such test result is positive, additional testing utilizing a more refined process will be immediately conducted at Howard's request. Howard agrees that if the subsequent test result is also positive for controlled dangerous substances, his resignation from his employment with the District shall be effective immediately unless at the time he is

an in patient in a program to treat drug and/or alcohol abuse.

4. The parties agree to treat all reports from psychiatric exams and drug/alcohol screenings as Howard's medical records.

5. Howard waives all other claims he may have in connection with the charges against him and/or his suspension from employment, and specifically waives any claim for backpay lost during his suspension from employment. Howard further, on behalf of himself, his heirs, successors and assigns, fully releases and forever discharges the District, its representatives, agents, officers and employees, from any and all actions, claims and liabilities of whatsoever kind and/or character, including any claim for discrimination, that he has had or may have against any of them, including, without limitation, any and all claims related to his employment with the District and arising from his suspension in this matter.

6. Howard acknowledges, as required by *In re Cardonick,* that despite the approval of this agreement, the issue of possible revocation of his teaching certificate may be considered by the State Board of Examiners.

7. The parties enter into this agreement voluntarily and after receiving the advice of legal counsel.

This Agreement is subject to the approval of the State District Superintendent and the Commissioner of Education. Upon approval of said Agreement, the tenure charges shall be deemed withdrawn.

Ronald Howard

Ronald Howard
Dated: 12/23/98

State-Operated School District of the City of Newark

By:
Dated: 1/27/99

HCM 1/27/99

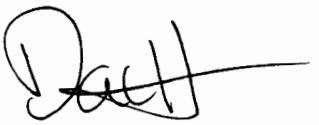
OAL DKT. NO. EDU 9839-97
AGENCY DKT. NO. 339-9/97

IN THE MATTER OF THE TENURE	:	
HEARING OF RONALD HOWARD,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

The record, joint stipulation, and initial decision issued by the Office of Administrative Law representing a settlement of the within matter, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement.* The Commissioner notes, however, that should respondent fail to comply with the terms of the settlement, or if his employment with the District should cease in accordance with the agreement therein, the District must immediately notify the State Board of Examiners, pursuant to *N.J.A.C.* 6:11-3.5, and cooperate with the Board of Examiners in any action it may determine to undertake as a result of such notification.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

May 10, 1999
Date of Mailing, May 10, 1999

S.P., on behalf of himself and his minor children, K.P. AND L.P.,

PETITIONER,

V.

BOARD OF EDUCATION OF SOUTH ORANGE AND MAPLEWOOD, ESSEX COUNTY,

RESPONDENT/COUNTERCLAIMANT.

BOARD OF EDUCATION OF SOUTH ORANGE AND MAPLEWOOD, ESSEX COUNTY,

PETITIONER,

V.

JONAS JEAN-BAPTISTE AND RACHEL JEAN-BAPTISTE,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

S.P. ON BEHALF OF HIMSELF AND HIS MINOR CHILDREN, K.P. AND L.P.,

Petitioners,

v.

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD,

Respondent/Counterclaimant.

OAL DKT. NO. EDU 3497-98

AGENCY DKT. NO. 30-2/98

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD,

Petitioner,

v.

JONAS JEAN-BAPTISTE AND RACHEL JEAN-BAPTISTE,

Respondents.

OAL DKT. NO. EDU 3678-98

AGENCY DKT. NO. 58-3/98

Ellen M. Boylan, Esq., for S.P., Jonas Jean-Baptiste and Rachel Jean-Baptiste

Joanne L. Butler, Esq., for the Board of Education for the School District of South Orange and Maplewood (Schenck, Price, Smith & Kings, attorneys)

Record Closed: March 16, 1999

Decided: March 18, 1999

BEFORE **RICHARD McGILL,** ALJ:

This consolidated proceeding concerns a residency dispute in regard to minor children, K.P. and L.P., who attend school in the School District of South Orange and Maplewood. The two petitions in this matter were transmitted to the Office of Administrative Law for determination as contested cases.

Prior to hearing, the parties agreed to amicable resolution of the matter and submitted a written Stipulation of Settlement and Mutual Dismissal of Petition and Counterclaim. Having reviewed the record and the settlement terms, I **FIND:**

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

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

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Jan. 18, 1999
DATE

Richard McGill
RICHARD MCGILL, ALJ

Receipt Acknowledged:

3/29/99
DATE

Kathi Antonaitis/bp
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 25 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cml

SCHENCK, PRICE, SMITH & KING
10 Washington Street
P. O. Box 905
Morristown, New Jersey 07963-0905
(201) 539-1000
Attorneys for South Orange and
Maplewood Board of Education

S.P. ON BEHALF OF HIMSELF AND HIS MINOR CHILDREN, K.P. AND L.P., Petitioner, v. SOUTH ORANGE/ MAPLEWOOD BOARD OF EDUCATION, Respondent/Counterclaimant.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DKT NO. EDU 3497-98N Agency Ref. No. 30-2/98 STIPULATION OF SETTLEMENT AND MUTUAL DISMISSAL OF PETITION AND COUNTERCLAIM
SOUTH ORANGE/ MAPLEWOOD BOARD OF EDUCATION, Petitioner, v. JONAS JEAN-BAPTISTE AND RACHEL JEAN-BAPTISTE, Respondents.	OAL DKT NO. EDU 3678-98N Agency Ref. No. 58-3/98

Petitioner Saint-Jean Previlon and Respondent/Counterclaimant Board of Education of the School District of South Orange and Maplewood, and Petitioner Board of Education of the School District of South Orange and Maplewood and Respondents/Counterclaimants Jonas Jean-Baptiste and Rachel Jean-Baptiste, herein stipulate as follows:

1. This settlement is being made without any admission of liability or wrongdoing on the part of any party and is for the purpose of amicably resolving this dispute. The parties specifically deny any wrongdoing or liability relating to any other party's claim.

2. The pupils K.P. and L.P. will continue in District schools until such time as they are no longer domiciled in the District or do not qualify as affidavit students. In the event that the Board of Education has reason to believe that either the domicile or affidavit pupils requirements are no longer satisfied, counsel for Saint-Jean Previlon and Jonas Jean-Baptiste and Rachel Jean-Baptiste will be notified, and the hearing procedures of N.J.S.A. 18A:38-1 will be invoked.

3. The parties waive any and all claims which were or could have been asserted in the within action, and any and all claims arising out of or related to these claims, including attorneys fees and damages pursuant to any federal or State constitutional or civil rights claims, including 42 U.S.C. 1983, and specifically release the other parties from any and all claims which were or could have been asserted in the within action and any claims arising out of or related to these claims.

4. As a result of the foregoing, Petitioner Previlon hereby withdraws the Petition filed pursuant to N.J.S.A. 18A:38-1, with prejudice, and Respondent/Counterclaimant Board hereby withdraws its Counterclaim pursuant to N.J.S.A. 18A:38-1, with prejudice, and Petitioner Board hereby withdraws the Petition filed pursuant to N.J.S.A. 18A:38-1, with prejudice, and Respondents/Counterclaimants Jean Baptiste hereby withdraw their Counterclaim pursuant to N.J.S.A. 18A:38-1, with prejudice.

St. Jean Previlon
SAINT-JEAN PREVILON

Nancy A. Jorgensen
BOARD OF EDUCATION OF SOUTH ORANGE AND MAPLEWOOD
Director of HR

Jonas Jean-Baptiste
JONAS JEAN-BAPTISTE

Rachel Jean-Baptiste
RACHEL JEAN-BAPTISTE

Document #: 352283/JLB

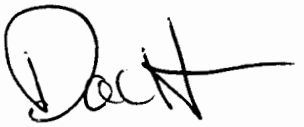
OAL DKT. NOS. EDU 3497-98 AND 3678-98 (CONSOLIDATED)
AGENCY DKT. NOS. 30-2/98 AND 58-3/98

S.P., on behalf of himself and his minor children, K.P. AND L.P.,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF SOUTH ORANGE AND MAPLEWOOD, ESSEX COUNTY,	:	
RESPONDENT/COUNTERCLAIMANT.	:	COMMISSIONER OF EDUCATION
----------		DECISION
BOARD OF EDUCATION OF SOUTH ORANGE AND MAPLEWOOD, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	
JONAS JEAN-BAPTISTE AND RACHEL JEAN-BAPTISTE,	:	
RESPONDENTS.	:	

The record, stipulation of settlement and mutual dismissal, and initial decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, in this consolidated matter have been reviewed.

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

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

May 10, 1999
Date of Mailing, May 10, 1999

150-99

IN THE MATTER OF THE TENURE	:	
HEARING OF ROGELIO HERNANDEZ,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

SYNOPSIS

District certified tenure charges of unbecoming conduct against respondent teacher, alleging physical abuse of students.

ALJ found that respondent's employment records showed that the administration from 1994 provided recommendations to respondent on improving his dealing with student disciplinary problems. Respondent, however, was inflexible in his lack of interest in improving his performance. ALJ concluded that respondent in his rough handling of students was guilty of two incidents of corporal punishment constituting unbecoming conduct. *(Redcay)* ALJ determined removal was warranted. Thus, the ALJ ordered respondent removed from his position.

Having reviewed the record, including transcripts of the hearing, the Commissioner determined to affirm the initial decision with one modification to the ALJ's findings of fact, which did not materially affect the outcome of the proceeding. Commissioner found that the record supported the conclusion that the District proved by a preponderance of credible evidence that respondent's actions with respect to students, A.F. and R.R., constituted corporal punishment, and that his conduct was unbecoming a teaching staff member. Commissioner found no basis in the record before him to challenge the credibility determinations made by the ALJ. Citing *In re Dusel*; *In re Courtney*; and *In re Sammons*, the Commissioner affirmed the ALJ's conclusion and ordered respondent dismissed from his position as of the date of this decision. Matter was referred to State Board of Examiners for action, as it deems appropriate.

May 10, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9830-98

AGENCY DKT. NO. 474-10/98

IN THE MATTER OF THE TENURE HEARING OF ROGELIO HERNANDEZ, STATE OPERATED SCHOOL DISTRICT OF NEWARK, ESSEX COUNTY,

---

Joseph Verga, Associate Counsel, for petitioner, State Operated School District of Newark (Margaret C. Murphy, General Counsel)

Eugene G. Liss, Esq., for respondent, Rogelio Hernandez

Christina Remolina, Deputy Attorney General, for intervenor, Department of Youth and Family Services (Peter Verniero, Attorney General of New Jersey, attorney)

Record Closed: February 10, 1999 Decided: March 23, 1999

BEFORE **EDITH KLINGER**, ALJ:

On October 15, 1998, petitioner, the State Operated School District of Newark (District), certified tenure charges against respondent, Rogelio Hernandez, to the Commissioner of Education. Respondent filed his answer and, on October 29, 1998,

the matter was transmitted to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to - 15 and *N.J.S.A.* 52:14F-1 to -13.

Hernandez was charged with three counts of conduct unbecoming a teacher based upon three incidents involving three students, J.G., A.F. and R.R. Each of the three incidents led to investigations by the Division of Youth and Family Services (DYFS) into allegations of physical abuse against Hernandez.

The first two incidents, those involving J.G. and A.F., were found by DYFS to be unsubstantiated, but DYFS expressed concern regarding respondent's conduct on each occasion. DYFS found the third allegation of physical abuse to be substantiated, and Hernandez's name was placed into DYFS's Central Registry of child abusers.

Pursuant to the recommendation of the Appellate Division of the Superior Court in *In the Matter of Allegations of Sexual Abuse at East Park High School,* 314. *N.J. Super.* 149, 168 (App. Div. 1998), DYFS was permitted to intervene in this matter solely in support of the factual allegations underlying the tenure charge brought with respect to R.R.

The hearing was scheduled to take place on January 15, 19 and 20, 1999. Unfortunately, the student, J.G., who was involved in the first tenure charge was seriously injured in an automobile accident during December 1998, and there was a serious question as to whether he would be able to testify at hearing. The parties, with the consent of J.G.'s mother, agreed to depose him at Kessler Institute for Rehabilitation if his health permitted and two additional days of hearing, February 10 and 11, 1999, were added to allow for this. It was subsequently determined that J.G.'s head injury impaired his memory and rendered him unable to testify as a witness for the District under any circumstances.

With respect to the tenure charge involving J.G., the District presented only the testimony and report of the DYFS investigator. Her testimony and report were

permitted subject to the residuum rule since she had no firsthand knowledge of the events contained in her report. When it was determined that the District could not produce any competent evidence to support the tenure charge against respondent involving J.G., the first charge was dismissed and the DYFS report was removed from evidence.

The hearing was completed on February 10, 1999 and the record closed on that date. Posthearing submissions from the parties were accepted but only if they were received in time to be considered. Only petitioner submitted a posthearing brief.

THE REMAINING TENURE CHARGES

Hernandez has been a teacher at the E. Alma Flagg School in Newark since September 1992. During the 1992-93 school year, he taught the fourth grade. Between September 1993 and the end of the 1996 school year, he was a seventh grade teacher. He taught the fourth grade again during the 1996-97 school year.

The Charge With Respect To A.F.

On October 31, 1996 at approximately 3:00 p.m., Sarah Jennings, who has been a security guard in the Newark public school system for seventeen or eighteen years, was at her post at the first floor entrance desk of the Flagg School.

She heard a disturbance and looked up to see Hernandez coming through the door leading to the second floor stairway with a student, A.F., right behind him. She testified that they were arguing and cursing at each other. A.F. tripped and fell to the floor. He lay on the floor yelling at Hernandez that he was going to "f--- him up." Jennings understood this to mean that A.F. wanted to hurt Hernandez. As she watched, Hernandez leaned over and pressed down on A.F.'s neck to hold his head against the floor for about five seconds while A.F. continued to scream at him. As

Jennings came up, she saw Hernandez unbuttoning his shirt as though he were getting ready to fight with the boy.

Jennings took A.F. into the office. She saw a bruise on his face but she could not say if it was present before he fell. While they waited in the office, A.F. was very angry and Jennings had to hold him down in the chair because he was still trying to fight with Hernandez.

She testified that Hernandez should not have touched A.F. because she was present, about ten feet away, and it was her job to physically control A.F. if it became necessary. Hernandez stated that he knew that a security guard sat at the front desk at all times unless called away for some reason. He claims that he did not see Jennings there at the time of the incident.

Allegations of child abuse were filed against Hernandez and an investigator from DYFS, Donna Sparks , was sent to the Flagg School. On November 6, 1996, Jennings gave a statement to the investigator which is consistent with her testimony at hearing. Sparks attempted to interview Hernandez that day but he would not meet with her until November 20, 1996, in the presence of a union representative, Pietro Pettino. Hernandez denied that he had held A.F.'s head to the floor and told the investigator that he could not remember offering to fight the boy.

Hernandez testified that he saw A.F. and other boys coming out of a bathroom on the second floor of the Flagg School after the close of the school day when they should not have been in the building. He never taught A.F. and was not sure that the student could specifically identify him as a teacher in the building. He did think that A.F. was aware that he held some sort of position of authority because the boys ran away when they saw him.

He found A.F. hiding in the stairwell on the first floor and told him to leave the building. A.F. began to curse at him and said he was going to "f--- him up."

Hernandez testified that he spoke firmly to A.F. and tried to guide him to the principal's office. When asked what method he used to guide the student, A.F. explained that he employed one that was taught to him by Pettino, his union representative. The guidance consisted of placing the palm of his hand on the student's back between the shoulder blades and shepherding him in the direction of the office.

A.F. resisted. As they walked through the doorway from the stairs with Hernandez slightly ahead, A.F. landed on the floor. He claims that he did not see how A.F. fell because A.F. was behind him when it happened. Respondent thinks A.F. threw himself on the ground to "put on a show for the people in the hallway" in an effort to make trouble for Hernandez. Hernandez could not explain why he thought A.F. was trying to get him into trouble since he had never met the boy before this incident.

Hernandez stated that he immediately stepped about five feet away from A.F., who was belligerent, cursing and making threats, and made no further contact with him whatsoever. Respondent claims that he was standing in that position when Jennings came up. He said that she did not tell the truth when she testified that he held A.F.'s head to the floor.

A.F., who did not testify, told the DYFS investigator that he fell because Hernandez jerked his arm and he struck his face against respondent's leg. His statement is not corroborated by competent evidence and is given no weight in this proceeding. He also stated, however, that Hernandez repeatedly offered to fight with him. This statement is corroborated by Jennings who was an independent eyewitness to the incident.

Based upon the eyewitness testimony of Jennings, and the statements of A.F. in the record as corroborated by the testimony of Jennings, I **FIND** that, on October 31, 1996, Hernandez did place his hand on A.F. and hold his head to the floor. I **FIND** that Hernandez did offer to fight with A.F. while A.F. was lying on the floor. I **FIND** that,

even though he knew that there was a security guard stationed in the immediate area, he made no attempt to look for her since he did not even notice that she was there. I further **FIND** that Hernandez was in no danger from A.F. who may have continued to shout threats but remained on the floor; from Jennings's description, A.F. apparently did not even resist when respondent pressed his head to the ground.

The Charge With Respect To R.R.

R.R., the student involved in the third charge against Hernandez, testified as a witness at hearing. He is now twelve years old. At the time of the alleged incident, he was eleven years old in respondent's fourth grade class. Hernandez attempted to introduce evidence concerning the general conduct of this child at other times and with other teachers. The evidence was not admitted because it was irrelevant to the present hearing. However, for the record, it was assumed that R.R. is disruptive, uncooperative, defiant, combative, a bully and has other behavioral problems as well. Nevertheless, the only testimony concerning his behavior that was accepted into evidence was his conduct immediately before, during and after the incident of December 8, 1997, which is the subject of the third tenure charge.

R.R. testified that at 9:40 a.m. on the morning of December 8, 1997, he was present in Hernandez's classroom. R.R. had stickers in his desk and was playing with them while respondent was teaching the class. Hernandez started to yell at R.R. and R.R. told him not to. Hernandez came over and took the stickers away.

R.R. stated that Hernandez then grabbed him by the back of the neck and took him to the door of the classroom. Respondent opened the door and shoved R.R. out into the hall with such force that the child struck his head against the opposite wall of the hall and bounced off, landing on the floor. According to R.R., the hall is approximately ten feet wide at this point. Hernandez closed the door to the classroom without saying anything to R.R.

The building principal, Muriel Lovell, who was not available to testify, was standing in the doorway of a nearby classroom talking to a teacher. She had her back turned and did not witness the incident. When she heard the noise, she turned around and saw R.R. shouting and crying. There was a bump on the middle left of his forehead where he struck his head on the wall. Lovell sent R.R. down to the nurse who put ice on the bump and called his grandmother with whom he lives. The grandmother could not be located and R.R. remained in school for the rest of the day in another teacher's classroom. R.R. returned to school the next day but he was transferred from respondent's class to another one.

The matter was referred to DYFS for investigation. Dwight Bostic was the investigator assigned to the case. Bostic interviewed R.R. on December 11, 1997. His statement to Bostic at the time is contained in the DYFS report and is consistent with his testimony at hearing.

There were other eyewitnesses to this incident. JoAnn Bradshaw, a parent who volunteers to work in the school bookstore, was standing in the second floor hallway waiting for someone to open the bookstore and talking to Donna Thomas, a security guard stationed on the second floor, at Thomas's desk. Another parent, Wadoo Johnson, was with them. Thomas's desk is located in the same hallway where the incident occurred.

Bradshaw heard a loud bang that startled her and caused her to look back in the direction of respondent's classroom. Hernandez's door flew open and she saw him scuffling with a young man, R.R., whom he was trying to remove from the classroom. The boy was resisting and leaning backward into respondent. Hernandez had one hand on the student's shirt collar and the other hand on his waist. Hernandez pitched the child forward so that he slid across the hall into the opposite wall and then fell back screaming. She heard Hernandez say, "Stay out," then go back into his room and close the door. Lovell came into the hall from the classroom she was visiting, picked the child up from the floor, comforted him and asked him what happened. Bradshaw

said that Hernandez came out of his classroom and told Lovell that R.R. had slipped and fallen. Bradshaw gave a statement to Bostic on December 11, 1997 which is contained in the DYFS report and is consistent with her testimony at hearing.

Hernandez testified that Bradshaw had a grudge against him because he was her daughter's teacher the prior year and her daughter was having problems in his class.

Donna Thomas recalled that she was at her desk on the morning of December 8, 1997 talking to two parents, Bradshaw and Wadoo Johnson. She saw Hernandez's door fly open and he was standing there holding R.R. by the back of the neck. She thinks that R.R. was trying to get away from respondent. She then saw respondent push the child so that R.R. slid across the floor and hit his head on the opposite wall. R.R. got up crying. He had a lump on his head. Lovell came out and told Thomas to take him to the nurse's office. After Thomas delivered R.R. to the nurse, she wrote out an incident report. Thomas was also interviewed by Bostic on December 11, 1997. Both the incident report and the interview are contained in the DYFS report and are consistent with Thomas's testimony at hearing.

The other parent who witnessed the incident, Wadoo Johnson, did not testify as a witness but gave a statement to Bostic. In his statement he describes the incident in much the same way as described by Bradshaw, Thomas and R.R. This statement is considered because there is a residuum of competent evidence to support it.

After R.R. went to the nurse, Lovell went to Hernandez's classroom to speak with him. At her request, he wrote out his version of the incident. This says that he was trying to take R.R. to the door of the classroom to turn him over to the security guard, whom he knew to be in the hall, when R.R. pushed through the door in front of him and tripped while trying to run away. This made R.R. so angry that he began to threaten Hernandez and curse at him. During a subsequent interview by Bostic on November 10, 1998, Hernandez told essentially the same story as he did in his earlier report. He

also corroborated R.R.'s story about the student telling him not to touch him and adamantly refusing to put the stickers away and sit down. Hernandez insisted that he never touched R.R. at any time but R.R. banged into him in his attempt to get away. This was basically the same version of the incident to which he testified at hearing. He held his left hand in the air to show that it was not near the child's neck.

In his testimony, Hernandez stated that R.R. went with him peacefully toward the door. The child was not cursing at him or threatening him until after he fell in the hall. Respondent suggested that R.R. was potentially a dangerous boy. When he was asked why, if this were the case, he did not call the security guard to remove R.R. from the classroom, Hernandez explained that the intercom in the classroom was broken. He later testified that the intercom was only set to receive incoming calls. In order to call out, he needed a key and he never requested one.

He not only admitted that he knew the security guard was in the hall but also claims that he was trying to take R.R. to her when the incident happened. He further admitted that he had called security to remove R.R. from his classroom at times in the past when a situation was developing.

Thomas testified that she was approached by Hernandez after her interview with Bostic. She believes that he was trying to get her to change her story, and she told him she would do that in order to get him to leave her alone. Thomas reported the conversation to Lovell and Lovell called Bostic to tell him. Bostic interviewed Thomas a second time on December 12, 1997 and took another statement from her. In the report, and in his testimony, he says that Thomas told him that Hernandez approached her a few times to change her statement. Respondent also asked Thomas to urge Johnson to change his.

Thomas contacted Bostic for a third time on December 17, 1997. She told him that she had been approached by another teacher, Carol Keeran, a union

representative, to change her story. Thomas refused to discuss the matter with Keeran and reported the conversation to the administration.

Hernandez vigorously denied that he tried to influence anyone's testimony and insisted that the conversations reported by Thomas had never taken place.

When Bostic came to investigate on December 11, 1997, Hernandez declined to speak to him without his union representative. At the time he was ready to close his investigation, Bostic had only the brief written statement prepared by Hernandez at Lovell's request on December 8, 1997, immediately following the incident. He used this statement to prepare his determination that Hernandez had physically abused R.R. Respondent was notified of this result on April 23, 1998.

After Bostic determined that the charges of abuse were substantiated, Hernandez's name was placed in DYFS's Central Register. The tenure charges against Hernandez were filed by the District with the Commissioner on October 15, 1998. Hernandez agreed to permit Bostic a direct interview on November 10, 1998. Bostic reviewed and reconsidered his prior determination in light of this interview but reached the same conclusion.

Based upon the testimony and the demeanor of the witnesses, I **FIND** that, on December 8, 1997, Hernandez threw R.R. from the doorway of his classroom with such force that R.R. struck his head on the opposite wall and bounced off. There were four people who observed this incident, three of whom testified at hearing. I **FIND** that the three who testified were credible witnesses and each gave testimony consistent with the others and with their prior statements made close to the time of the event. Hernandez's suggestion that Bradshaw would give false testimony because of the way respondent treated her daughter the year before is unpersuasive. Whatever ulterior motive Bradshaw might or might not have, she gave the same account of the incident as Thomas, Johnson and R.R.

I **FIND** that there was no justification for Hernandez to treat R.R. in this manner. According to respondent's own testimony, R.R. was not behaving in a threatening manner before he was thrown out into the hall. He refused to put away his stickers and sit down and then refused to leave the classroom but behaved in a peaceful manner. I **FIND** that Hernandez was aware that there was a security guard in the hall and the proper procedure was to call her to remove the child. The fact that the intercom was not working does not excuse respondent's conduct. He could have walked to the door and called out to her. I **FIND** that R.R. received a minor injury to his head as the result of being thrust into the wall. Finally, I **FIND** that Hernandez made no effort to see how badly he had injured R.R. but immediately returned to his classroom and callously closed the door behind him.

Respondent's Record of Employment

Hernandez testified that he had an outstanding record as a teacher and was often called upon by Lovell to deal with students that could not be controlled by other teachers. Between 1993 and 1996, he was also occasionally placed in charge of the building when the principal was called away. Hernandez was active in the parent's organization and served as its treasurer. He was elected a member of the team to develop an educational improvement plan for the Flagg school. He coached the debating team in the 1996-97 school year. He claims that he had no problems with the school administration until he became the teachers' union representative in September 1996 and wrote a report complaining of the physical conditions in the Flagg building.

Respondent was not permitted to introduce any evidence to show that the District only sought to remove him from his position because of anti-union animus. The first reason for this was that the charges against him were not based upon any protected activity in which he was engaged. The second reason was that the eyewitnesses against him were not part of the school administration and no anti-union animus could be imputed to them. The final reason is that the nature of the charges is

such that, if he were found guilty of them, his removal would be required and the presence or absence of anti-union animus is irrelevant.

Hernandez denied that he was ever told that his method of handling students needed improvement nor, from his testimony, did he believe he needed to improve. He stated that he always relied upon the shepherding method of removing students, described above, which was taught to him by Pettino, his union representative. On the other hand, he admitted, as a person who took charge of the building in the absence of the principal, he was aware that teachers were responsible for contacting security in the event of a problem with a student. He himself explained that this is the reason that there are security desks on each floor.

The record does not support respondent's assertion that he was never told that his method of dealing with students needed improvement.

Respondent submitted a series of Teacher Observation Reports and Annual Evaluation Reports, including Professional Improvement Plans, for the school years from 1992 through June 1997. The Teacher Observation Reports in the record are almost uniformly satisfactory.

In Hernandez's Professional Improvement Plan for June 1994, it was recommended that he "[p]articipate in staff development activities that focus on Conflict Resolution and Assertive Discipline."

In Hernandez's Professional Improvement Plan for the 1994-95 school year, it was suggested that he attend workshops to "improve on classroom management. Find alternate approaches to conflict resolutions."

In March 1996, Hernandez requested that he be transferred from Flagg to another school in the District. In his Teacher Annual Evaluation Report of June 15,

1996, Lovell recommended that he be transferred but he was still assigned to the Flagg School for the 1996-97 school year.

His Professional Improvement Plan for the 1997-98 school year contains the recommendations that he "[a]void over reacting to parent complaints. Resist being argumentative, and making statements that can be misconstrued." It was further recommended that he "[a]void confrontational situations with peers, students and parents."

When he was asked at hearing whether he ever attended a workshop to improve his handling of conflict situations as recommended, he testified that he did not because he was comfortable employing the shepherding method which he learned from Pettino.

In addition to the above, there is other good reason for respondent to have known that there was a question about the manner in which he was dealing with students. The first tenure charge, which was dismissed for lack of evidence, related to a DYFS abuse charge brought against him in 1994. The DYFS allegations of abuse against J.G. were found to be unsubstantiated with concern for the way Hernandez was relating to students. There is no assumption here that Hernandez was guilty of the abuse as alleged; however, it is clear that his method of dealing with student discipline had certainly been called into question.

Likewise, the DYFS charges against him with respect to A.F. in December 1996 led to a determination that the charges of abuse were unsubstantiated but, once more, concern was raised about the manner in which Hernandez was dealing with conflict situations.

Based upon the above, I **FIND** that respondent's employment records show that there were aspects of Hernandez's dealing with student disciplinary problems that were troubling to the school administration from 1994 and recommendations were made to him on how to improve his performance in this area. He must have been aware of

these recommendations since he signed the Professional Improvement Plans in evidence. Further, he must have been aware that there were DYFS investigations of his conduct with respect to students in two specific instances. Even though there was no substantiation of these charges, he would have to know that DYFS expressed concern as to his conduct on these occasions. As a result, I **FIND** Hernandez's testimony, that he did not know of any District concern with his performance or its offer of any suggestion that he improve it, to be incredible. This finding is further supported by respondent's own testimony that he was satisfied with the method that he learned from Pettino and was not interested in learning other strategies.

I **FIND** that respondent's record further discredits his allegations that disciplinary actions were taken against him as a result of his union activity. He became the teachers' union representative in September 1996 and wrote a report complaining of the physical conditions in the Flagg building in that capacity: the concerns about his response to students presenting disciplinary problems first surfaced in his records in 1994.

DISCUSSION OF LAW AND CONCLUSIONS

If proven by a preponderance of credible evidence, a teacher's violation of the statutory prohibition against corporal punishment, *N.J.S.A.* 18A:6-1, constitutes conduct unbecoming a teacher and warrants a reduction in compensation or dismissal. *In the Matter of the Tenure Hearing of Norma Pollard*, 96 *N.J.A.R. 2d* (EDU) 170.

N.J.S.A. 18A:6-1 reads in pertinent part:

> No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution; but any such person may, within the scope of his employment, use and apply such amounts of force as is reasonable and necessary:
>
> (1) to quell a disturbance, threatening physical injury to others;

(2) to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil;

(3) for the purpose of self-defense; and

(4) for the protection of persons or property;

and such acts, or any of them, shall not be construed to constitute corporal punishment within the meaning and intendment of this section.

Although the statute does not precisely define the phrase "corporal punishment," it clarifies it by authorizing the use of such force "as is reasonable and necessary" in the four circumstances listed above. *Craze v. Allendale Bd. of Ed.*, 1938 *S.L.D.* 185, 186.

I **FIND** that Hernandez's conduct in the incidents involving A.F. and R.R. did not arise under any of the circumstances of *N.J.S.A.* 18A:6-1(a), (b), (c) or (d), so that I **CONCLUDE** that he is not entitled to exculpation under the terms of the statute. A.F. was lying on the floor and making a lot of noise but constituted no physical threat to Hernandez or anyone else. R.R. was going along quietly with Hernandez to the classroom door when he was callously hurled out into the hall with no regard for his safety.

It must now be determined whether respondent's conduct constituted corporal punishment. The Commissioner of Education has articulated the legislative purpose behind *N.J.S.A.* 18A:6-1 in the case law as follows:

> The Commissioner finds in the century old statute prohibiting corporal punishment (*N.J.S.A.* 18A:6-1) an underlying philosophy that an individual has a right not only to freedom from bodily harm but also to freedom from offensive bodily touching even though there be no actual physical harm.
>
> [*In the Matter of the Tenure Hearing of Thomas Appleby*, 1969 *S.L.D.* 159, 172-173, *aff'd* St. Bd. 1970 *S.L.D.* 448, *aff'd* App. Div. 1972 *S.L.D.* 662 (citing *In the Matter of the Tenure Hearing of Frederick L. Ostergren*, 1966 *S.L.D.* 185).]

The Commissioner further explained that:

> Competent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience. If all other means fail, there is always a resort to removal from the classroom or school through suspension or expulsion. The Commissioner cannot find any justification for, nor can he condone the use of physical force by a teacher to maintain discipline or to punish infractions.
>
> [*In the Matter of the Tenure Hearing of David Fulcomer*, 1962 *S.L.D.* 160, 162, remanded St. Bd. 1963 *S.L.D.* 251, decision on remand by Commissioner 1964 S.L.D. 142, *aff'd* St. Bd. 1966 *S.L.D.* 225, remanded 93 *N.J. Super.* 404 (App. Div. 1967), decision on remand by Commissioner 1967 S.L.D. 215, *aff'd* App. Div. 1967 *S.L.D.* 220.]
>
> Therefore, according to the Commissioner:
>
> [W]hen teachers resort to "unnecessary and inappropriate physical contact with those in their charge [they] must expect to face dismissal or other severe penalty.
>
> [*Tenure Hearing of Ostergren*, 1966 *S.L.D.* 185, 186.]

Violations of the prohibition against corporal punishment have been found in circumstances involving the egregious use of physical force to use of no physical force. For example, in *School District of Borough of Red Bank v. Williams,* 3 *N.J.A.R.* 237 (1981), the administrative law judge determined that a teacher's use of a ruler to lightly rap on the hands of students constituted corporal punishment, even though no physical harm resulted. Moreover, in *In the Matter of the Tenure Hearing of Norma Pollard,* 96 *N.J.A.R. 2d* (EDU) 170, corporal punishment was established when the teacher placed students in a closet.

Corporal punishment has also been found in far more severe circumstances. For example, in *In the Matter of the Tenure Hearing of Eddie Lee Harrell*, A-753-93T3, (App. Div. December 27, 1994), corporal punishment was committed by a teacher who pushed one pupil into a brick wall and grabbed another pupil by the arm and threw him to the floor. Likewise, in *In the Matter of the Tenure Hearing of Charles Courtney*, 92 *N.J.A.R. 2d* (EDU) 399, a teacher committed corporal punishment when he twisted a pupil's arm and forced the pupil to hit himself in the face.

In the present case, when Hernandez threw R.R. into a wall and held A.F.'s head against the floor, I **CONCLUDE** that he committed two separate acts of corporal punishment. His abuse of R.R. was clearly within the realm of behavior deemed to be corporal punishment by prior case law. *See Harrell, supra.* When Hernandez held A.F.'s head to the floor, it was a violation of A.F.'s right to be free "from offensive bodily touching." *See Appleby, supra,* and *Ostergren, supra.*

Unbecoming Conduct

Dismissal or reduction in compensation of tenured teachers in the public school system pursuant to *N.J.S.A.* 18A:6-10 is warranted for "inefficiency, incapacity, unbecoming conduct, or other just cause." *N.J.S.A.* 18A: 6-10(b) (emphasis added).

While unbecoming conduct is not specifically defined in the statute or regulations, in *In the Matter of the Certificate of John Fargo*, 91 *N.J.A.R. 2d* (EDE) 1, it was held that this determination is discretionary and should be made on a case-by-case basis.

In the present case, I **CONCLUDE** that Hernandez is guilty of two incidents of corporal punishment constituting unbecoming conduct.

PENALTY

A lack of fitness to remain a teacher is best demonstrated by a series of incidents, but can be shown by a single incident if sufficiently flagrant. *Redcay v. State Bd. of Ed.,* 130 *N.J.L.* 369, 371 (Sup. Ct. 1943), *aff'd* 131 *N.J.L.* 326, 327 (E. & A. 1944); *In re Fulcomer*, 93 *N.J. Super.* 404, 421 (App. Div. 1967). Further, the nature of the offense, any mitigating circumstances, and the teacher's record must also be considered when determining unbecoming conduct. *In the Matter of the Tenure Hearing of Boyd*, 93 *N.J.A.R. 2d*, (EDU) 445, 452.

After the incident with J.G. in 1994, Hernandez was warned in a succession of Professional Improvement Plans, but still denies, that he needed to improve the manner in which he interacted with students. It should have been clear to him that this was a problem area for him, if only because his conduct touched off three consecutive DYFS investigations. I **FIND** this shows respondent to be inflexible in his lack of interest in improving his performance. I further **FIND** that Hernandez's conduct toward students deteriorated after each incident. When DYFS found the charges against him unsubstantiated with respect to A.F. and J.G., it was as though it gave him license to escalate his rough handling of students, culminating in his egregious treatment of R.R.

I **FIND** that both incidents, those involving A.F. and R.R. of which he has been found guilty, are serious and show an escalation of misconduct on his part. I **FIND** that there are aggravating circumstances in both situations which make it undesirable for Hernandez to remain in the classroom. In the case of A.F., he allowed himself to be goaded by bad language and a perceived insult to his authority into pressing a twelve-year-old boy's head to the floor and offering to fight him. In the case of R.R., Hernandez allowed his dislike of this eleven-year-old student to overcome his self-control so that he forcefully pitched the child across the hall into a wall so hard that the boy was injured. To make matters worse, after injuring R.R., Hernandez callously closed the door behind him and left R.R. to fend for himself.

I **FIND** that there are no mitigating circumstances in this matter. Hernandez's participation in school activities and the responsibilities with which he was entrusted during his teaching career at Flagg did not prevent him from being insensitive to the dignity and bodily integrity of his students. I **CONCLUDE** that there is no appropriate penalty other than to remove Hernandez from his position as a tenured teacher in the Newark Public School System.

ORDER

It is **ORDERED** that respondent, Rogelio Hernandez, be hereby removed from his position as teacher in the State Operated School District of Newark.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 23, 1999
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

March 26, 99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 29 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

md

APPENDIX

Witnesses

For Petitioner:

Uma Dharapuram (excluded)

Sarah Jennings

R.R.

JoAnn Bradshaw

Donna Sparks

Donna Thomas

Dwight Bostic

For Respondent:

Judith Canfield (excluded)

Robert Boatwright (excluded)

Rogelio Hernandez

Exhibits

P-1	DYFS Report, J.G. (excluded)
P-2	Statement of Bradshaw, dated December 12, 1997, contained in P-6
P-3	DYFS Report, A.F.
P-4	Incident Report of Thomas, dated December 8, 1997, contained in P-6
P-5	Statement of Hernandez, dated December 8, 1997, contained in P-6
P-6	DYFS Report, R.R.
R-1J	Teacher Observation Report, dated October 28, 1992
R-1K	Teacher Observation Report, dated December 3, 1992

R-1L Teacher Observation Report, dated January 13, 1993

R-1M Teacher Annual Evaluation Report, dated June, 1993 with attached Professional Improvement Plan

R-1N Teacher Observation Report, dated November 16, 1993

R-1O Teacher Observation Report, dated March 17, 1994

R-1P Teacher Annual Evaluation Report, dated June, 1994 with attached Professional Improvement Plan

R-1Q Teacher Observation Report, dated October 6, 1994

R-1R Teacher Observation Report, dated December 19, 1994

R-1S Teacher Observation Report, dated October 26, 1995

R-1T Teacher Observation Report, dated May 26, 1996

R-1U Teacher Annual Evaluation Report, dated June 15, 1996 with attached Professional Improvement Plan

R-1V Teacher Observation Report, dated November 22, 1996

R-1W Teacher Observation Report, dated May 30, 1997

R-1X Teacher Annual Evaluation Report, dated June 16, 1997 with attached Professional Improvement Plan

R-8 Four Certificates of Participation

OAL DKT. NO EDU 9830-98
AGENCY DKT. NO. 474-10/98

IN THE MATTER OF THE TENURE	:	
HEARING OF ROGELIO HERNANDEZ,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and the District's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4.

Respondent's exceptions contend that: (1) the Administrative Law Judge (ALJ) erred in concluding on page 9 of the initial decision that he never requested a key to the intercom, when his testimony proved otherwise, and said error is material and prejudicial to respondent; (2) the ALJ erred in referring to the dismissed Charge One, on page 13 of the initial decision, in her examination of respondent's notice from the District that it had concerns about respondent's methods of dealing with student disciplinary issues; (3) respondent, after the incidents underlying Charges One and Two, received satisfactory evaluations from the District and "absolutely no discipline" as a consequence of these incidents (Respondent's Exceptions at p. 5); (4) the District failed to prove by a preponderance of credible evidence the incidents with respect to A.F. (Charge Two) and R.R. (Charge Three); and (5) even assuming such charges were proven, termination is too severe a penalty for respondent.

In reply, the District asserts that: (1) the ALJ's error on page 9 with respect to respondent's request for an intercom key was neither material nor prejudicial to respondent; (2) the ALJ did not err by referring to the dismissed Charge One when finding that respondent was on notice that the District had questions regarding respondent's disciplinary methods; (3) despite respondent's satisfactory annual evaluations and the District's failure to withhold his salary increments following the first two incidents, termination is warranted; (4) Charges Two and Three have been proven by a preponderance of credible evidence; and (5) termination is an appropriate penalty, under these circumstances.

Upon careful and independent review of the record in this matter, which included transcripts from the hearing conducted at the OAL on January 15, 1999, January 19, 1999, January 20, 1999 and February 10, 1999,[1] the Commissioner determines to affirm the initial decision of the ALJ, with modification as set forth herein.

Initially, the Commissioner concurs that the record supports the parties' conclusion that respondent did, in fact, request a key from the administration of his school to enable him to use his classroom intercom for student discipline problems. (T4:113) However, the Commissioner concurs with the District that the ALJ's error in this regard is neither material to the outcome, nor prejudicial to respondent. As the District properly argued with respect to the R.R. incident (Charge Three):

> ***The District's failure to provide Respondent with an intercom key did not give him license to physically abuse a student who posed no physical threat to Respondent at the time of the incident. To suggest that this incident would have been avoided had Respondent had a key is another example of Respondent seeking to avoid responsibility for his actions. (District's Reply at p. 8)

[1] The hearing transcripts are hereinafter referred to as T1 (transcript from January 15, 1999), T2 (transcript from January 19, 1999), T3 (transcript from January 20, 1999) and T4 (transcript from February 10, 1999).

The Commissioner finds the District's argument in this regard to be particularly persuasive, given respondent's testimony that he was aware that School Safety Officer Donna Thomas was, on the day of the R.R. incident, posted outside his classroom and, further, given respondent's testimony that it was his practice to signal Ms. Thomas to come to his room when a student needed to be brought to the office. (T4: 33, 34)

Next, the Commissioner concurs that "[t]he record does not support respondent's assertion that he was never told that his method of dealing with students needed improvement," and that such notice was provided as early as 1994, the date of the incident which gave rise to the circumstances underlying Charge One. (Initial decision at pp. 12-13) Moreover, the ALJ's reference to the DYFS report attendant to that incident *specifically indicates* that she made no assumption that respondent was guilty of the abuse as alleged; rather, the ALJ clearly states that she considered the report to evaluate respondent's credibility. (*Id.* at p. 13) The Commissioner further notes, as did the ALJ, that respondent's June 1994 Professional Improvement Plan indicated that respondent should "[p]articipate in staff development activities that focus on Conflict Resolution and Asssertive Discipline." (Exhibit R-1P) His final evaluation also noted that respondent needed to "[d]evelop positive responses for typical disciplines common to upper grade students." (*Id.*) To the extent respondent contends that these and subsequent notices were insufficient to warn him of the District's concern, because they were tempered, in some way, by positive feedback and generally satisfactory evaluations, the Commissioner finds that such feedback does not diminish, or give respondent reasonable cause to dismiss, the concerns which were noted in his evaluations and professional improvement plans.

Finally, like the ALJ, the Commissioner finds that the record supports the conclusion that the District has proven, by a preponderance of credible evidence that

respondent's actions with respect to A.F. and R.R. constitute corporal punishment, and that his conduct was unbecoming a teaching staff member. In so finding, the Commissioner notes that he finds no basis in the record before him to challenge the credibility determinations made by the ALJ.

As to the appropriate penalty, the Commissioner has considered respondent's record of employment with the District since 1992, and concurs with the ALJ's recommendation that respondent be dismissed from his tenured position in the State-operated School District of the City of Newark. Recognizing that fitness for a particular position requires a balancing of interests, *In the Matter of the Tenure Hearing of Arlene Dusel*, 1978 *S.L.D.* 526, 531, and that "[u]nfitness for a position in the school system may be shown by a single incident, if sufficiently flagrant, but is 'best shown by numerous incidents,'" *In re Courtney*, 92 *N.J.A.R.* 2d (EDU) 399, 403, citing *Redcay v. State Board of Ed.*, 130 *N.J.L.* 369, 371 (Sup. Ct. 1934), aff'd 131 *N.J.L.* 326 (E. & A. 1944), the Commissioner finds that the totality of the testimonial and documentary record supports the ALJ's conclusion.

In reaching his determination, the Commissioner underscores the now axiomatic language of a prior tenure decision maintaining that:

> ***[teachers] are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. *** *In the Matter of the Tenure Hearing of Jacque L. Sammons,* 1972 *S.L.D.* 302, 321.

Like the ALJ, the Commissioner notes with concern that respondent's instances of unbecoming conduct toward pupils are serious and should not be discounted. "School officials need not wait

until some child is badly injured before removing a teacher prone to violence." *In re Courtney, supra*, at 403. As the District aptly argued:

> ***It is also clear from the testimony of both Respondent and Petitioner's witnesses that security was readily available in each instance. Respondent's behavior exemplifies a desire to personally handle disciplinary situations with physical force. Obviously, Respondent felt that A.F. and R.R. challenged his authority ***. In both instances, Respondent responded to the challenge of his authority with unnecessary physical force. *** These two incidents paint a portrait of a teacher who has little tolerance for student disobedience. Instead of following school procedures, however, Respondent chooses to settle differences with students by the use of extreme physical force. Judge Klinger correctly concluded that the aggravating circumstances in each of these situations make it undesirable for Respondent to remain in the classroom. (District's Reply at p. 30)

Equally troubling is respondent's inability to recognize, or in any way acknowledge, that his conduct was inappropriate. Taken together, the evidence demonstrates that his removal is warranted.

Accordingly, the initial decision of the OAL is affirmed, as modified with regard to the ALJ's finding on respondent's request for the intercom key. Respondent is dismissed from his tenured teaching position with the District as of the date of this decision. This matter is further referred to the State Board of Examiners pursuant to *N.J.A.C.* 6:11-3.6 for action against his certificate as it deems appropriate.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

May 10, 1999
May 12, 1999, Date of Mailing

150-99

EDU #9830-98
C # 150-99
SB # 26-99

IN THE MATTER OF THE TENURE :
HEARING OF ROGELIO HERNANDEZ, :
STATE-OPERATED SCHOOL DISTRICT :
OF THE CITY OF NEWARK, ESSEX :
COUNTY. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, May 10, 1999

For the Petitioner-Respondent, Joseph Verga, Esq.

For the Respondent-Appellant, Eugene G. Liss, Esq.

For the Intervenor Department of Youth and Family Services, Christina Remolina, Deputy Attorney General (John J. Farmer, Jr., Attorney General of New Jersey)

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

October 6, 1999

Date of mailing OCT 08 1999

151-99

C #151-99L
SB # 28-99

LUCILLE HARRISON, ET AL.,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, May 13, 1999

For the Petitioners-Appellants, Lucille Harrison, pro se, Robert A. Harrison, pro se, Rosanne Buttacavoli, pro se, Dave Buttacavoli, pro se, Louis R. Vigilante, pro se, Ronald Antonucci, pro se, and Catherine Antonucci, pro se

For the Respondent-Respondent, Fogarty & Hara (Stephen R. Fogarty, Esq., of Counsel)

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

October 6, 1999

Date of mailing OCT 08 1999

IN THE MATTER OF THE TENURE	:	
HEARING OF JUAN IGLESIAS,	:	
SCHOOL DISTRICT OF THE TOWN	:	COMMISSIONER OF EDUCATION
OF WEST NEW YORK, HUDSON	:	DECISION
COUNTY.	:	
_____	:	

May 17,1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1827-98

AGENCY DKT. NO. 6-1/98

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,

Petitioner,

v.

JUAN IGLESIAS,

Respondent.

Allan C. Roth, Esq., and **Jennifer E. Walker**, Esq., for petitioner (Scarinci and Hollenbeck, attorneys)

Julio Morejon, Esq., for respondent

Record Closed: March 22, 1999 Decided: March 26, 1999

BEFORE **ARNOLD SAMUELS**, ALJ:

On January 12, 1998 the petitioner, Board of Education of the Town of West New York, filed a certificate of determination and written charges against the

respondent, Juan Iglesias, pursuant to *N.J.S.A.* 18A:6-10 and *N.J.A.C.* 6:24-5.2 *et seq.*, seeking his dismissal from his tenured position, because of unbecoming conduct or other just cause. The respondent subsequently filed an answer with the Commissioner of Education.

On February 26, 1998 the Commissioner transmitted the matter to the Office of Administrative Law (OAL) for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to 13.

A telephone prehearing conference was held at the OAL on November 25, 1998, and a prehearing order was entered, defining and limiting the issues to be decided, fixing hearing dates, providing for discovery and regulating other procedural aspects of the forthcoming hearing, which was scheduled for March 22, 1999. (Previously scheduled hearing dates were adjourned in order to enable the respondent to obtain representation by an attorney, who needed to prepare the matter for prehearing and hearing. (The respondent had appeared *pro se* after the matter was transmitted to the OAL).

Prior to the scheduled hearing date, counsel advised that the parties had reached a settlement. The settlement terms were placed on the record on March 22, 1999, and the respondent testified, under oath, that he fully understood the terms and agreed to the settlement voluntarily. At the same time, a written settlement agreement was signed by the respondent and by authorized representatives of both parties. A copy of the agreement was filed in the OAL on the same date, and is attached hereto and made a part hereof.

A discussion was held, on the record, relating to whether the *Cardonick* Standards for the review of settlements in tenure matters applied to this agreement. *In Re Cardonick*, decided by the *Commr. of Educ.* (Apr. 7, 1982), aff'd *St. Bd. of Educ.* (Apr. 6, 1983), 1990 *S.L.D.* 842, 846. It was determined that, since the respondent, in his position as an Administrative Clerk for the West New York Board of Education did not possess or be required to possess any certificate or other certification from the

State Board of Examiners, the *Cardonick* Standards were inapplicable to his resignation from his tenured position.

The parties have agreed to settle this matter in accordance with the attached agreement.

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

1. The parties have voluntarily agreed to the settlement, as evidenced by their signatures or their representative's signatures on the agreement.

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

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

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

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

March 26, 1999
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

4/1/99
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 5 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

SCARINCI & HOLLENBECK
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SECAUCUS, NEW JERSEY 07096-3189
Telephone: (201) 392-8900
Attorneys for Petitioner,
West New York Board of Education

WEST NEW YORK BOARD OF EDUCATION	:	BEFORE THE OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	OAL Docket No.: EDUTH 1827-98N
v.	:	
JUAN IGLESIAS,	:	
Respondent.	:	

It is hereby stipulated and agreed by and between the parties, the Petitioner, the West New York Board of Education (hereinafter referred to as the "Board") and the Respondent, Juan Iglesias (hereinafter referred to as the "Employee".), that the above captioned matter be and is hereby settled upon the following terms and conditions:

1. The Complaint OAL Docket No.: EDUTH 1827-98N is hereby settled and withdrawn.

2. Employee resigns from his position at the Board effective October 1, 1997. Employee shall submit to the Board, contemporaneously with the execution of this Agreement, a letter of resignation effective October 1, 1997.

3. Employee acknowledges that he has reimbursed the Board in the amount of $1,728.00, which reflects the cost of the health care coverage premiums for Sebastain Perez. Employee further stipulates that Mr. Perez was not, nor has ever been, an employee of the Board.

4. Employee agrees not to seek employment at the Board or any other public employment position in the Town of West New York.

5. In settlement of the instant matter and in conclusion of any present or future claims, known or unknown, the Board shall pay Employee the sum of $7,300.00 within forty-five (45) days from the Commissioner of Education's entry of this Stipulation of Settlement. Employee waives any rights to back pay. The Board shall not pay Employee's attorney's fees.

6. This Stipulation of Settlement incorporates the entire terms of the agreements between the parties. The parties have had the ability to have the terms of this Agreement reviewed by an attorney.

7. The Board and the Employee shall not request any other relief with respect to this matter, other than that provided for by this Stipulation of Settlement.

8. Neither Employee nor the Board shall institute any appeal or any other action with respect to this matter and Employee waives any claims that he may have against the Board

and/or its employees.

9. This Stipulation of Settlement does not establish a precedent.

DATED: 3/22/99

By: Allan C. Roth
ALLAN C. ROTH, ESQ.
Attorney for Petitioner

DATED: 3/25/99

WEST NEW YORK BOARD OF EDUCATION

By: Janet Passante
JANET PASSANTE, PRESIDENT

DATED: 3/22/99

By:
JULIO MOREJON, ESQ.
Attorney for Employee

DATED: 3/22/99

By:
JUAN IGLESIAS
Employee

Ar\wnyboe\150_98\150-98-settlement

Janet Passante, President
West New York Board of Education
6028 Broadway
West New York, New Jersey 07093

Re: Resignation

Dear Ms. Passante:

Please accept this letter as notice of my resignation as Administrative Secretary/Clerk of the West New York Board of Education effective October 1, 1997.

Thank you.

Sincerely,

Juan Iglesias
227-67th Street
West New York, NJ 07093

OAL DKT. NO. EDU 1827-98
AGENCY DKT. NO. 6-1/98

IN THE MATTER OF THE TENURE	:	
HEARING OF JUAN IGLESIAS,	:	
SCHOOL DISTRICT OF THE TOWN	:	COMMISSIONER OF EDUCATION
OF WEST NEW YORK, HUDSON	:	DECISION
COUNTY.	:	
	:	

The record of this matter, the proposed stipulation of settlement, and the initial decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement.[1, 2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] The initial decision at pp. 2-3 evidences that the parties and the ALJ erroneously assume that, because the within respondent is not certificated, the *Cardonick* standard for settlements is inapplicable in this matter. The Commissioner emphasizes that settlement of all tenure matters must be accomplished consistent with this standard even when the provision regarding notification to the State Board of Examiners would not apply.

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

May 17,1999
Date of Mailing, May 17, 1999

154-99M

BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION ON MOTION
RESPONDENT.	:	

SYNOPSIS

Petitioning Board challenged the calculation of District income for the Board that was utilized in the determination of its State aid entitlement for the 1998-99 school year. Alleging it acted pursuant to statute in providing State aid to the Board for the 1998-99 school year, respondent Department moved for dismissal of the petition in that petitioner had failed to identify evidence and allege facts essential to its claims.

ALJ concluded that petitioner set forth sufficient facts in its petition to maintain its action against respondent. ALJ found petitioner clearly demonstrated a property interest and, thus, was protected by due process for its claim of alleged entitlement. ALJ concluded that the matter petitioner sought to adjudicate was properly before the OAL for determination as a "contested case." *N.J.S.A.* 52:14B-2(b). Moreover, the ALJ concluded that respondent's motion to dismiss, grounded upon respondent's assertion that the petition did not comport with *N.J.A.C.* 6:24-1.3, was denied.

Commissioner concurred with the ALJ that respondent's motion was properly denied. Commissioner found that the express language of *N.J.S.A.* 18A:7F-15 provides petitioner with the right of appeal, and that the parameters of such appeals have not, as yet, been further explicated through rule or decisional law. Matter was to continue at OAL for further proceedings as a contested case, the primary issue to be resolved being whether the district income wealth data relied upon by respondent were accurate.

May 19, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION ON MOTION

OAL DKT. NO. EDU 8816-98

AGENCY DKT. NO. 182-6/98

BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,

Respondent.

Richard Sacks, Esq., for petitioner

John Worthington, Deputy Attorney General, for respondent (Peter Verniero, Attorney General of New Jersey, attorney)

Record Closed: March 19, 1999 Decided: April 12, 1999

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Board of Education of the Township of Lakewood (Board) appeals from a determination by the Division of Finance (Division) of the New Jersey State Department of

Education (DOE) to reduce its 1998-99 core curriculum standards aid in the amount of $1,054,109. The Board seeks, among other things, the restoration of the $1,054,109.

The mater was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A prehearing conference was held on November 16, 1998, at which, among other things, the issues to be determined by this tribunal were set forth as follows:

Issues:

1. Whether the criteria used by the Division to reduce petitioner's core curriculum standards aid from $8,928,522 to $7,874,443 ($1,054,109) for the 1998-99 school year was appropriate and accurate?

2. Whether the Division may or may not reveal the sources of its calculations to reduce petitioner's core curriculum standards aid for the 1998-99 school year.

MOTION

Prior to the prehearing conference, respondent had propounded and served a motion to dismiss the instant matter together with a brief of law and exhibits. The Board had responded to the motion with its brief and exhibits. It was settled that oral argument on respondent's motion was to be heard on March 19, 1999, at the Trenton OAL, Mercerville, New Jersey. Oral argument was heard by the undersigned as scheduled and is now ripe for disposition.

RESPONDENT'S POSITION

The petitioner in this matter is the Board. The Board seeks a determination by the Commissioner that it be provided an additional $1,054,109 in core curriculum standards aid for the 1998-99 school year or, in the alternative, that it be provided $1,054,109 in stabilization aid for the 1998-99 school year. (*See*, Petition, demand for relief.)

The petition challenges the calculation of district income for the Board that was utilized in the determination of petitioner's State aid entitlement for the 1998-99 school year. It alleges its aid was miscalculated in the amount of $1,054,109 and requests that amount be provided in core curriculum standards aid. Since the Department acted pursuant to statute in providing State aid to the Board for the 1998-99 school year, and given that petitioner has failed to identify evidence and allege facts essential to its claims, the State now moves for dismissal of the petition.

By way of background, in 1996, the Comprehensive Educational Improvement and Financing Act of 1996 (CEIFA), *N.J.S.A.* 18A:7F-1 *et seq.* was enacted. *N.J.S.A.* 18A:7F-3 provides that, by the 1998-99 school year and beyond, district income is to be determined by aggregating the "income of the residents of the taxing district . . . based upon data provided by the New Jersey Division of Taxation in the New Jersey Department of the Treasury and contained on the New Jersey State Income Tax forms for the calendar year ending prior to the prebudget year." The procedure utilized by Treasury to determine the aggregate district income for the 1998-99 school year is set forth in the March 3, 1998 memorandum from Mike Azzara, Assistant Commissioner, DOE, to all chief school administrators, referenced in paragraph 10 of the petition (attached hereto).

As set forth in the memorandum, Treasury went to great lengths to ensure that only applicable tax forms were counted for each municipality. The aggregate wealth of each district, as determined by Treasury, was utilized by the Department of Education when calculating each district's State aid entitlement. This information was also provided in the letter of March 23, 1998, from Assistant Commissioner Mike Azzara to petitioner denying its appeal of its State aid determination (attached hereto).

As noted in the March 3, 1998 memorandum, the State aid figures provided to school districts were based upon a recalculation of State aid for all districts utilizing redetermined income figures for each school district. Treasury recalculated the income figures in order to ensure their accuracy for purposes of determining each school district's entitlement for State aid. The increase in State aid of $1,054,109 that petitioner seeks in this case constitutes the difference between the

original figures provided by the Department of Education, and the redetermined State aid figures referenced in the March 3, 1998 memorandum.

In the March 3, 1998 memorandum, it is noted that *N.J.S.A.* 18A:7F-15 provides that any school district that believes the amount of core curriculum standards aid assigned to it is incorrect may appeal the determination to the Commissioner of Education. As set forth in the March 3, 1998 memorandum and the March 23 1998 letter, districts appealing the calculation of their income determination must include information on the demographics of the district and the data source(s) utilized by the district that support the district's contention that its income was improperly calculated. In this case, no such data has been presented. Rather, petitioner seeks all data utilized by the State to calculate its income so that it may review the data and determine whether it agrees with the State's calculation.

Unquestionably, petitioner cannot file a petition of appeal seeking a $1,054,109 increase in State aid, and base the appeal on nothing more than a desire to review the confidential documentation utilized by Treasury so that petitioner may determine if it believes the documentation is accurate. As set forth in the attached memoranda, petitioner must set forth a basis for asserting that the State's income calculation is incorrect in order to appeal the calculation to the Commissioner, and must provide publicly accessible documentation to support its appeal. Because petitioner has not done so, the petition must be dismissed.

LEGAL ARGUMENT

POINT 1

PETITIONER HAS FAILED TO PLEAD REQUISITE FACTS OR OTHERWISE SET FORTH A BASIS FOR ITS CLAIMS AND THEREFORE THE PETITION MUST BE DISMISSED.

Petitioner alleges in its petition that it believes the determination of wealth income for the Board by the Department of Treasury was inaccurate (Petition, ¶¶5 and 6). Based upon this hypothesized inaccurate calculation of district income, petitioner seeks an increase in its State aid

of $1,054,109. However, petitioner fails to set forth a basis for this assertion in the petition. Rather, petitioner argues that it must review the data utilized by the State in order to assess whether its income was properly calculated. At that time, petitioner would presumably set forth its basis, if any, for challenging the determination of income for Lakewood Township. Such a pleading is clearly inadequate and must be dismissed.

Petitioner fails to plead any facts that would support a determination that its income was inaccurately calculated by Treasury and that it is thus entitled to an additional $1,054,109 in State aid for the 1998-99 school year.[1] In the absence of the necessary pleadings, the petition in this matter must be dismissed.

N.J.A.C. 6:24-1.3 provides that "[t]he petition must include . . . a statement of the specific allegation(s) *and essential facts* supporting them which have given rise to a dispute under the school law" (emphasis supplied). In *Cusseaux v. Pickett*, 279 *N.J. Super.* 335, 338 (Law Div. 1994), the court, when reviewing, pursuant to *R.* 4:5-2, the sufficiency of a complaint, stated that:

> The pleading is intended to appraise fairly the adverse party of the claims and issues raised. (Citations omitted). The complaint must do more than give notice of a claim, it must state the essentials of a cause of action. (Citation omitted). Implicit in these requirements is the necessity that there be a cognizable cause of action upon which relief can be granted.

A review of the petition in this case reveals that the requisite facts with regard to Lakewood's claims were not pled and that those claims must therefore be dismissed. In its petition, petitioner simply states that it "believes that the allocation of income and/or wealth to the Township of Lakewood was inaccurate" (Petition, ¶6). Nowhere in the petition does the petitioner allege that there is any credible evidence or documentation to support its claims.

---

[1] The amount requested by petitioner is the difference between the estimated amount of State aid it was initially notified of and the amount that was calculated by the Department of Education after petitioner's income was calculated by Treasury. Petitioner clearly has no basis for asserting that its income was improperly calculated. Rather, petitioner merely avers that its income may have been improperly calculated and that it should receive the amount of State aid that was originally estimated for it. *See*, Petition, ¶6. Absent a recitation of facts that would support the assertion that petitioner's income was incorrectly calculated, the petition must be dismissed.

Rather, petitioner alleges that it must be allowed to review the data utilized by the Departments of Education and Treasury to calculate its income in order to determine if petitioner agrees with the calculation (Petition, ¶¶11-13).

Petitioner's pleadings, at a minimum, should include factual allegations with citations to credible documentation setting forth that its income was improperly calculated, thus creating a question as to whether it is entitled to additional State aid. Petitioner's papers, as pled, do not allege any such facts. As such, petitioner has failed to demonstrate the facts necessary to support its claims. In the absence of sufficient pleadings concerning the income of Lakewood Township, the petition in this matter must be dismissed.

In addition, even if petitioner had alleged more than that the State aid figures were recalculated one month after they were issued in February 1998, and that its State aid was reduced, the petition must be dismissed because the State Income Tax returns that were utilized by Treasury to calculate district income are confidential and cannot be provided to petitioner.[2] *N.J.S.A.* 54:50-8 provides in pertinent part:

> a. The records and files of the Director respecting the administration of the State Tax Uniform Procedure Law or of and State tax law shall be considered confidential and privileged and neither the director nor any employee engaged in the administration thereof or charged with the custody of any such records or files, . . . nor any person who may have secured information therefrom under subsection d, e, f, or g of *R.S.* 54:50-9, or any other provision of State law, shall divulge, disclose or use for their own personal advantage any information obtained from the said records or files or from any examination or inspection of the premises or property of any person. Neither the director nor any employee engaged in such administration or charged with the custody of any such records or files shall be required to produce any of them for the inspection of any person or for use in any action or proceeding except when the records or files or the facts shown thereby are directly involved in any action or proceeding under the provisions of the State Tax Uniform Procedure Law or of the State tax law affected, or where

[2] In fact, the respondent does not have the requested forms. They are in possession of the Department of Treasury, which is not a party to this action. Therefore, even if the Commissioner were to agree with petitioner, he may not direct Treasury to provide documentation to petitioner, because it is not a department over which the Commissioner of Education has jurisdiction.

> the determination of the action or proceeding will affect the validity or amount of the claim of the State under some State tax law, or in any lawful proceeding for the investigation or prosecution of any violation of the criminal provisions of the State Tax Uniform Procedure Law or of any State tax law.
>
> B. The prohibitions of this section . . . shall specifically include, without limitation, violations involving the divulgence of any information from or any copy of a federal return or federal return information required by New Jersey law to be attached to or included in any New Jersey return.

As held in *Monmouth Airlines, Inc. v. Director, Division of Taxation*, 2 *N.J. Tax* 47 (1980), There is no discretion allowing courts to breach the confidentiality of tax records protected by this statute, and exceptions to the prohibition set forth in *N.J.S.A.* 54:50-9 are not applicable to this matter.

In light of the above set forth statutory prescription, the State income tax returns utilized by Treasury to calculate income pursuant to *N.J.S.A.* 18A:7F-3 are confidential documents. As such, Treasury cannot provide them to petitioner. In addition, as set forth in the attachments to this brief, Treasury engaged in a comprehensive process to ensure the accuracy of its income determinations for each school district. The petition in this case offers nothing to question the accuracy of these calculations. Absent such pleadings, and considering that the documents utilized by Treasury are confidential, the petition in this case must be dismissed.[3]

[3] Petitioner cannot request that the relevant tax returns be provided in a redacted form to avoid dismissal of this case because, in such form, the returns would be of no use. Absent the name, address and other information that would identify taxpayers, the tax returns could not be challenged by petitioner as being an inaccurate listing of Lakewood Township taxpayers and income. Therefore, it is clear that, absent sufficient pleadings and documentation to call into question the determination of State aid for petitioner, the petition must be dismissed.

POINT II

THE DEPARTMENT OF EDUCATION ACTED LAWFULLY AND PURSUANT TO N.J.S.A. 18A:7F-10 IN DETERMINING THE AMOUNT OF STATE AID TO BE RECEIVED BY PETITIONER.

The Department of Education at all times acted in accordance with the statutory parameters of CEIFA when it certified state aid to Lakewood for the 1998-1999 school year and denied Lakewood stabilization aid. Specifically, the Department was acting pursuant to *N.J.S.A.* 18A:7F-10, which directs that stabilization aid is *not* to be provided to a district whose pupil population has decreased. Because the Department was acting pursuant to specific provision in CEIFA when certifying state aid to Lakewood, the petition must be dismissed.

CEIFA contains a stabilization provision to assist districts in the transition from prior funding to funding under CEIFA. *N.J.S.A.* 18A:7F-10. This stabilization provision has two effects: to cap aid increases under CEIFA and to cap aid decreases under CEIFA. The purpose of the provision is to avoid immediate significant shifts in aid which could prove disruptive or detrimental to the school district budget process and the effective and efficient use of educational funding. As such, stabilized aid growth for the 1997-1998 school year under CEIFA is capped at the greater of 8% or 50% of the enrollment growth since October 1991. For the 1998-99 and 1999-2000 school years, stabilized aid growth is capped at 10%, 50% of the enrollment growth since October 1991, or 100% of annual enrollment growth.

The State aid figures provided for Lakewood constitute that to which it is entitled pursuant to law. Petitioner seeks stabilization aid for the 1998-1999 school year because its State aid figure was reduced by $1,054,109. However, this reduction was not from the State aid Lakewood received in the past. Rather, the reduction is from the original State aid figures provided by the Department in February, 1998, which figures were subsequently recalculated and reissued. (*See*, the March 3, 1998 memorandum from Mike Azzara to all Chief School Administrators.) *N.J.S.A.* 18A:7F-10 calls for the provision of stabilization aid in certain circumstances if there is a difference between the State aid provided in the prebudget year and the

calculation for the budget year. In this case, petitioner has alleged no such difference. Clearly, stabilization aid was created to stabilize aid from one year to the next, not to address a situation wherein State aid is recalculated for the same year one month after the initial figures are released by the Department of Education.

The intent of stabilization aid is to ensure that a district's State aid will not increase or decrease too drastically from one year to the next as a result of the enactment of a new formula. In this case, petitioner received one figure as its State aid for the 1998-1999 school year, and then, one month later, received a recalculated State aid figure. Petitioner never received the original amount of State aid. Therefore, petitioner does not qualify to have its State aid stabilized based upon having been provided a State aid figure for 1998-1999 that was altered one month later.

In addition, as can be seen from the attached form from the Office of Finance,[4] Lakewood's enrollment has decreased since 1991. Therefore, because the enrollment has decreased, *N.J.S.A.* 18A:7F-10 directs that stabilization aid is not to be provided to petitioner. Therefore, even if petitioner was basing its claim on State aid figures from 1997-1998 and 1998-1999, rather than on the initial and final calculations of the Department for 1998-1999, it is still not entitled to stabilization aid because its student enrollment decreased.

For all of the foregoing reasons, the petition must be dismissed because the petition fails to allege the necessary facts to create a question as to whether petitioner's income was incorrectly calculated and the Department acted in accordance with CEIFA in denying stabilization aid to the district.

PETITIONER'S POSITION

The Comprehensive Education Improvement and Financing Act of 1996 (CEIFA), *N.J.S.A.* 18A:7F-1, *et seq.* became effective December 20, 1996 to be applied to the 1997-1998

[4] The Commissioner may take judicial notice of the form, as it is an official report of the New Jersey Department of Education.

school year. For the school year 1997-1998, the district income for the Township of Lakewood was determined to be $584,137,416 with corresponding State aid in the amount of $8,137,008.

Petitioner, in preparation of its budget for the fiscal year 1998-1999, was notified by respondent that it would receive core curriculum standards aid in the amount of $8,928,552. On February 3, 1998, petitioner was advised that the core curriculum standards aid for the 1998-1999 school year was reduced by $1,054,109 to $7,874,433. The reduction in State aid was alleged to have been based upon recalculations of the Township of Lakewood's wealth, as determined by the Treasury Department of the State of New Jersey, the Department of Education and/or the Commissioner of Education of the State of New Jersey.

The "district income" as determined by the State of New Jersey for Lakewood Township for the school year 1997-1998 was $584,137,416. "District income" as determined by the State for the school year 1998-1999 was originally established to be $486,532,661 and this amount was revised to be $536,838,457. The income figures reported by respondent for the period 1997-1998 and 1998-1999 are dramatically different and inconsistent. In addition, petitioner contends that the allocation of income and/or wealth to the Township of Lakewood is inaccurate.

In accordance with the applicable provisions of *N.J.S.A.* 18A:7F-1, *et seq.*, specifically 18A:7F-15, petitioner appealed the aid determination, seeking reinstatement of State aid together with stabilization aid and the disclosure of the documentation utilized to determine the amount of "district income" and State aid. Petitioner's appeal was denied by the Assistant Commissioner of Education and petitioner was informed that the requested information would not be produced. As a result, petitioner filed the within action in accordance with the provisions contained in *N.J.S.A.* 18A:7F-1, *et seq.*

POINT I

RESPONDENT'S MOTION MUST BE DENIED AS PETITIONER HAS PLEAD REQUISITE FACTS AND IS STATUTORILY AUTHORIZED PURSUANT TO N.J.S.A. 18A:7F-15 TO BRING THIS ACTION

Petitioner initiated this matter by availing itself to the statutory language set forth in *N.J.S.A.* 18A:7F-15 which provides in relevant part:

> A school district may make an appeal to the commissioner on the amount of its core curriculum standards aid on the basis that the calculation of income within the local share formula under section 14 of this act does not accurately reflect the district's income wealth.

See Copy of Petition, annexed hereto as Exhibit A. Notwithstanding respondent's demands and assertions to the contrary, the above referenced statute does not require a school district to submit information on demographics, data sources, etc., in support of its petition. In addition, neither the Commissioner of Education nor the Department of Education has adopted regulations to govern nor define appeals of State aid authorized by *N.J.S.A.* 18A:7F-15. Nor does respondent identify or rely upon any specific authority which would require petitioner to provide "compelling arguments" in support of its appeal.

The statute's plain language simply requires a school district to allege that its core curriculum standards aid has been inaccurately calculated. Petitioner has acted in accordance with the statute and therefore its petition must not be dismissed. Furthermore, petitioner's pleading complies with the requirements of *N.J.A.C.* 6:24-1.3 in that the petition contains specific allegations and essential facts supporting them which have given rise to a dispute under the school laws. In addition, as set forth above, the petition alleges that it has been brought in accordance with the provisions contained in *N.J.S.A.* 18A:7F-1, *et seq.*

Respondent's unsupported assertion that petitioner must provide "publicly accessible documentation" in support of its appeal, while denying access to the very data upon which "district income" is based and calculated, places petitioner in a "Catch-22" situation.[5] Petitioner is unaware of any "publicly accessible documentation" which can be used to offset the information relied upon by respondent, which information will not or cannot be disclosed.

Equally important, the burden of proof thrust upon petitioner by respondent's argument is not based upon the clear language of the statute authorizing State aid appeals nor administrative regulations governing State aid appeals.

Generally, the burdens of proof and persuasion are imposed on the party best able to satisfy those burdens, because of the greater expertise and access to relevant information. *J.E. on behalf of G.E. v. State*, 131 *N.J.* 552, 569-570 (1993); *Lascari v. Board of Education*, 116 *N.J.* 30, 45 (1989); *Andersen v. Exxon Co.*, 89 *N.J.* 483, 500 (1982). In some instances, while the burden of proof is on the defendant, the burden of persuasion remains with the plaintiff. The Supreme Court has recognized that "the party with greater expertise and access to relevant information should bear those evidentiary burdens. *Id.* It has also been recognized that such a result is particularly sound in less adversarial settings in which both parties maintain a common objective. *Id.* "In those circumstances, the goal of the parties is not so much to win as to reach the correct result." *Id.*

In both *J.E. on behalf of G.E. v. State, supra*, and *Lascari, supra*, a case concerning the adequacy of an individualized education program, the Court required the defendant/respondent to bear the burden of proof based upon, among other things, its access to records and expertise in the field. It is respectfully submitted that petitioner in this case is similarly situated with the plaintiff/petitioner in the above cited cases. Based upon the foregoing law, the burdens of proof and persuasion must be imposed upon respondent.

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[5] "A paradoxical rule found in the novel *Catch 22* by Joseph Heller; a problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule; also the circumstance or rule that denies a solution." *Merriam Webster's Desk Dictionary.*

"A dilemma or circumstance from which there is no escape because of two mutually incompatible conditions, both of which are necessary." *Oxford Encyclopedia English Dictionary, 3rd Edition.*

It is clear that respondent is the party best able to satisfy the burdens of proof and persuasion. Respondent is the party with access to all relevant information and the party with the greater "expertise." This result is clearly sound as this matter involves a lesser adversarial setting, in which, arguably, both parties maintain a common objective, that is, to provide State aid to petitioner consistent with the constitutional requirements and statutory guidelines. This result is also consistent with the principles of due process and fundamental fairness.

Based upon the foregoing, it is respectfully submitted that petitioner has plead the requisite facts, is statutorily authorized to bring this petitioner, and, as such, respondent's motion to dismiss must be denied.

POINT II

PETITIONER IS ENTITLED TO STATE AID

As acknowledged in respondent's brief, CEIFA provides for stabilization aid for school districts. The entitlement for stabilization aid for the 1998-1999 school year was set forth and explained in a memo dated March 3, 1998 from Assistant Commissioner Mike Azzara to all Chief School Administrators and Business Administrators. *See* Memo dated March 3, 1998 annexed as Exhibit B. This memo contains a specific provision for additional State aid to which petitioner is entitled:

> The Department of Education has re-run the state aid formula for all districts and the aid entitlements of a number of districts will be adjusted accordingly. Additionally, to further mitigate decreases caused by factors other than declining enrollments, districts with an aid decrease and no decline in enrollments will receive additional stabilization aid in the amount of the decrease . . . .

As indicated in Exhibit C annexed, the Lakewood School District did not have an enrollment decline from the 1997-1998 school year. Rather, district enrollment increased from 5070.5 in the school year 1997-1998 to projected enrollment of 5139.5 for the school year 1998-

1999. It is not disputed that petitioner has had a reduction in State aid as a result of respondent's recalculation of its district income.

Thus, petitioner has met the criteria, as established by the Commissioner of Education, for stabilization aid.

Based upon the foregoing, it is respectfully submitted that respondent's motion to dismiss the petition be denied.

RESPONDENT'S REPLY

In reply to petitioner's argument, the respondent states that in its opposition, the Lakewood Board of Education argues that it need not submit any information nor plead any facts in support of its petition. Instead, petitioner suggests that the Department of Education must carry the burden of proof in this case. Finally, Lakewood again asserts that it is entitled to stabilization aid. For the reasons set forth below, all of petitioner's assertions are without merit and must be dismissed.

First, petitioner's argument that it need not provide any information to the Department on an appeal pursuant to N.J.S.A. 18A.7F-15 is clearly incorrect. Without doubt, at a minimum, all appeals brought to the Commissioner as a controversy arising under the school laws must conform with the administrative regulations which direct the content of the petition. *N.J.A.C.* 6:24-1.3. The regulation provides that a "petition must include . . . a statement of the specific allegation(s) and essential facts supporting them which have given rise to a dispute under the school laws. . . ." *Id.* Here, petitioner has failed to set forth any facts which support its allegation that the income wealth calculation is inaccurate.

Moreover, in this type of appeal, the Department of Education provided direction to school districts as to the types of information they should provide if they determined to appeal the wealth calculation. When making a letter application to the Assistant Commissioner, a district must include:

> . . . a narrative explanation for requesting the review, and it must include the district's local demographics and data source, including the year such source or sources were compiled, which support the district's contention. If the data sources are aged, the district must explain to the best of its knowledge why the aged data is a valid basis to support its contention and describe any changes in local demographics from the date of the data source and 1995.
>
> [Azzara Memorandum of March 3, 1998.]

Here, while petitioner identified a source of demographic information to the Assistant Commissioner, the County of Ocean Data Book, it failed to set forth any salient facts to support its conclusion that the income wealth calculation was flawed.[6] And again, in its petition before the Commissioner, notwithstanding the demographic information is readily available to the petitioner, it failed to set forth any essential facts to support its petition. For these reasons, as well as the reasons set forth in the State's moving brief, the petition should be dismissed.

Petitioner also argues in its opposition brief that the respondent should have the burden of proof in this litigation, and therefore, the petition as plead, is sufficient. Petitioner fails to recognize that burdens of proof are neither allocated nor shifted in initial pleadings. Instead pleadings must be sufficiently pled to set forth a cause of action and essential facts to support the action. Thus, while it may be appropriate to discuss burdens of proof at the commencement of a hearing or trial, it is without question that the petitioner still must plead the requisite facts in its petition.

Moreover, petitioner attempts to support its argument that the State has the burden here with the allegation that it is unaware of any documentation to support its pleadings (Petitioner's Brief at 4). However, petitioner's own submissions to the Assistant Commissioner belie this

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[6] The requirement to include this type of supporting factual information does not exceed the scope of the statutory provision, *N.J.S.A.* 18A:7F-15, as suggested by petitioner. As interpreted by petitioner, a school district that wishes to contest the calculation of income wealth for its district needs simply to aver that the calculation is incorrect, and that statement should fulfill petitioner's obligations with regard to pleadings. Clearly this interpretation is flawed. Not only does it run contrary to the provisions to bring a controversy before the Commissioner, it encourages factually unsupported and frivolous litigation.

assertion. In the March 10, 1998 application to Assistant Commissioner Azzara, petitioner plainly stated:

> The latest demographic information available to the district contained in the County of Ocean Data Book, published in September of 1997, and the district's records do not support the Commissioner's determination.

In light of this earlier statement, the arguments set forth in petitioner's legal brief must be dismissed as without merit.

Finally, petitioner's analysis of Assistant Commissioner Azzara's memorandum regarding stabilization aid is erroneous and does not support petitioner's contention that it is entitled to such aid. Mr. Azzara's memorandum of March 3, 1998 states:

> The Department of Education has re-run the State aid formula for all districts and the aid entitlements of a number of districts will be adjusted accordingly. Additionally, to further mitigate decreases caused by factors other than declining enrollments, districts with an aid decrease and no decline in enrollments will receive additional stabilization aid in the amount of the decrease . . .

Petitioner misconstrues "aid decrease" to mean a decrease caused by the recalculation of aid Instead, in accordance with *N.J.S.A.* 18A:7F-10, the "decrease" is over State aid for the 1997-1998 school year. Thus, petitioner is not entitled to stabilization aid pursuant to statute, and the memorandum of the Assistant Commissioner does not serve to create an entitlement to Lakewood. As such, the Department of Education appropriately did not provide stabilization aid to the Lakewood School District.

For all of the reasons set forth above, and for those reasons set forth in respondent's moving brief, the petition of the Lakewood Board of Education must be dismissed.

At the oral argument held on March 19, 1999, respondent proffered a Certification executed by Richard L. Kaluzny, Ph.D., Director, Office of Revenue and Economic Analysis with the New Jersey Department of Treasury, wherein Dr. Kaluzny stated as follows:

> Richard L. Kaluzny, of full age, hereby certified as follows:
>
> 1. I am currently employed by the State of New Jersey, Department of Treasury, as Director, Office of Revenue and Economic Analysis. I have been employed in this position since August 1998 and prior to that time I was the Chief of the Office of Tax Analysis from October 1986 through August 1998.
>
> 2. I am familiar with the above-captioned matter involving Petitioner, the Lakewood School District, as the Department of Treasury is responsible for providing municipal data to the Department of Education for the annual computation of municipal school aid and I possess knowledge regarding the methodology used by Treasury for compiling data to be used by the Department of Education for determining school district income.
>
> 3. In 1997, the Department of Treasury, pursuant to the Comprehensive Education Improvement and Financing Act (CEIFA), codified at *N.J.S.A.* 18A:7F-3; 7F-14, provided data setting forth municipal income for all municipalities in New Jersey to be utilized by the Department of Education in calculating each school district's local share of Core Curriculum Standards Aid (CCSA) for the 1998-1999 school year.
>
> 4. Municipal aggregate income data was collated as follows: The Department of Treasury gathered 1995 municipal income from the New Jersey Total Income reported (line 27a) on the 1995 NJ-1040 forms filed by 3,497,169 resident taxpayers. This is the broadest definition of gross income contained on the tax form. The number of exemptions claimed on the returns for filers, spouses, dependent children and other dependents was used to determine the number of people represented by these returns. The Department of Treasury assigned returns to municipalities based on the taxpayer-supplied codes taken from the table found in the NJ-1040 instruction booklet. This method provided codes for about 80% of the returns. When possible, codes for the remaining 20% were based on the Office of Telecommunications and Information Systems (OTIS) procedure. (*See* attached Mail Address Verification and Geocode Procedure.) This resulted in approximately 95% of the returns being assigned a municipal code. The remaining 5% were not assigned.

5. When the initial compilations of municipal income (which were the basis for the February 11, 1998 district income figures) were made, the codes for some municipalities, including Lakewood, were incorrect. This occurred because the Division of Taxation (Taxation) and OTIS used different community codes for 99 municipalities. As described in Paragraph four *supra*, Taxation uses the community codes found in the Gross Income Tax NJ-1040 instruction booklet. OTIS uses the standard Department of Community Affairs codes. Treasury was unaware of this discrepancy when the initial municipal income data was compiled.

6. The February 11, 1998 municipal income data was based on a procedure for assigning tax returns to municipalities that used the Taxation codes as the primary data source and, where these codes were missing, used OTIS-generated codes if they were available. The result was that returns that had a Taxation code of 1515 for Lakewood were combined with returns that were missing a Taxation code and were given an OTIS-assigned code of 1515, which represented Lavallette Borough, thus producing inaccurate income data for Lakewood.

7 The discrepancy between the Taxation and OTIS codes was identified by Treasury after the February 11, 1998 figures were published and a number of municipalities raised concerns about their income and population calculations. Treasury reconciled the Taxation and OTIS coding systems when performing the new income calculations for the subsequently published revised figures.

8. As a result, Lakewood's income was revised from $480,223,456 to $530,529,252. The revised figures, like the initial numbers, were based on assignments using the Taxation-supplied codes as the primary data source, with the OTIS-generated codes as a supplemental source for returns that did not have Taxation codes. This process added 1,979 returns to Lakewood that had been erroneously assigned to Lakehurst, and removed 131 returns that should have been assigned to Lavallette in the February 11, 1998 compilations of municipal income.

9. Utilization of the proper municipal income resulted in an increase in Lakewood's local share of Core Curriculum Standards Aid, resulting in a reduction of $1,054,109 in CCSA from the State for the 1998-1999 school year.

10. The initial State School Aid notification received by Lakewood reflected an amount to which Lakewood was not entitled. The revised notification, issued on or about March 2,

1998, reflects the proper district income for Lakewood, and reflects Lakewood's proper local share pursuant to CEFA for the 1998-1999 school year.

DISCUSSION AND CONCLUSIONS

I

The first issue to be considered, pursuant to respondent's motion to dismiss, is whether or not the Lakewood Board has sufficiently set forth pleadings to maintain its action before the Commissioner of Education (Commissioner). Respondent contends that petitioner has failed to plead any facts to support a determination that its income was inaccurately calculated by Treasury. Respondent relies upon the State Board of Education adopted rule, *N.J.A.C.* 6:24-1.3, which provides that a petition of appeal before the Commissioner must include a statement of the specific allegations and essential facts supporting those allegations which give rise to a dispute under the school law.

Petitioner, however, contends that it may maintain its action grounded upon the specific language of the statute as contained in *N.J.S.A.* 18A:7F-15. This statute holds that the Board may appeal before the Commissioner where the Board believes that the calculation of income within the local share formula does not accurately reflect the school district's income wealth for core curriculum purposes. Petitioner observes that there are no procedural limitations set forth in the statute nor has the State Board adopted any procedural regulations for maintaining appeals pursuant to *N.J.S.A.* 18A:7-15.

Having carefully reviewed and considered the entire record before me, I **CONCLUDE** that petitioner has set forth sufficient facts in its petition of appeal to maintain its action against respondent. Even assuming, *arguendo*, that petitioner's pleadings fail to satisfy the requirements at *N.J.A.C.* 6:24-1.3, I **FIND** and **CONCLUDE** that respondent's arguments places form over substance. This is so because of our Supreme Court s holding in *J.E. on behalf of G.E. v. State*, *supra*, where it held that a "contested matter" is extant, under *N.J.S.A.* 52:14B-2(b), where a

property interest, among other things, is at issue. Here, petitioner has clearly demonstrated a property interest and, thus, is protected by due process for its claim of alleged entitlement.

The Court, in *J.E. on Behalf of G.E. v. State, supra,* continued to state that if the agency (Department of Education) determined the matter before it to be a contested matter, then an agency proceeding is referred to the OAL for a hearing in accordance with the Administrative Procedure Act (APA), *N.J.S.A.* 52:14B-1 to -15, and the Uniform Administrative Procedure Rules, *N.J.A.C.* 1:1-1.1 to -21.6. Here, the Department of Education determined the instant matter to be a "contested case" and transmitted it to the OAL for a ". . . trial-type hearing for those proceedings in which the legal rights and duties of specific parties are required by statute or constitutional right to be determined by an agency." *Id.* at 562.

Accordingly, I **FIND** and **CONCLUDE** that the matter petitioner seeks to adjudicate is properly before the OAL for determination as a "contested case." *N.J.S.A.* 52:14B-2(b). I further **CONCLUDE** that respondent's motion to dismiss, grounded upon respondent's assertion that the petition of appeal does not comport with *N.J.A.C.* 6:24-1.3, is hereby **DENIED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

12 April 1999
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

15 April 99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 19 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 8816-98
AGENCY DKT. NO. 182-6/98

BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION ON MOTION
RESPONDENT.	:	

This matter was opened before the Commissioner on June 4, 1998. Thereafter, respondent filed a Motion to Dismiss, and the record was transmitted to the Office of Administrative Law (OAL), with a request that said motion be decided prior to scheduling a hearing on the merits.[1] On April 12, 1999, the Administrative Law Judge (ALJ) issued an interlocutory order which was inadvertently transmitted to the Commissioner for review as an initial decision. At respondent's request, arguments submitted on exception were deemed an application for interlocutory review, in accordance with *N.J.A.C.* 1:1-14.10, and, following petitioner's submission of a reply, the request for review was granted.

Respondent argues, for the reasons set forth in its papers on Motion to Dismiss, that the within Petition of Appeal pleads no facts or information calling into question the

[1] To the extent that the Initial Decision may be read to suggest that the transmittal of the record to OAL pursuant to the Administrative Procedure Act necessarily signifies that the Commissioner has determined it to be a contested matter deserving of a "trial-type hearing," (Initial Decision at p. 20), the Commissioner notes that transmittal of a matter to the OAL does not compel a determination that a hearing must be held, as OAL rules expressly provide for the filing of motions to dismiss and motions for summary decision.

corrected income calculation and state aid figure. (Respondent's Brief at p. 3) In this connection, respondent asserts that the ALJ's reliance on *J.E., supra*, is misplaced, in that petitioner "has no property right with respect to state school aid that would trigger an entitlement to a hearing." (*Id.* at pp. 4-5) Additionally, respondent reasserts its position that petitioner is not entitled to stabilization aid in the amount of the difference in aid figures from February 1998 to March 1998. (*Id.* at p. 7) Finally, respondent argues that the first issue, as identified on page two of the ALJ's decision, erroneously suggests that respondent bears the burden of proof in this case and "appears to set forth that the appropriateness of the income calculation is at issue, rather than the accuracy thereof.***" (*Id.* at pp. 7-8)

In reply, petitioner affirms that the Petition of Appeal should not be dismissed, in that the Board has pled sufficient facts to withstand respondent's motion. (Petitioner's Reply at p. 4) Further, petitioner maintains that it is entitled to appeal the calculation and amount of state aid, and asserts that it is also entitled to stabilization aid, as per a March 3, 1999 memorandum issued by the Department of Education. (*Id.* at p. 6)

Upon careful review of the record, the Commissioner concludes, as did the ALJ, that respondent's motion is properly denied.[2] Initially, the Commissioner finds that the express language of *N.J.S.A.* 18A:7F-15 provides petitioner with the right of appeal, and that the parameters of such appeals have not, as yet, been further explicated through rule or decisional law. Moreover, nowhere in the record is there any indication of what type of source or sources petitioner might have relied upon to buttress with facts the claim of its petition that the district income wealth data relied upon by the Department were inaccurate. Therefore, given these circumstances, dismissal of the petition at the current juncture would be premature.

[2] In reaching this determination, the Commissioner finds no need to address the issue of whether petitioner has a property interest sufficient to sustain the within Petition of Appeal.

In so determining, however, the Commissioner specifically clarifies that, in further proceedings in this matter, petitioner will maintain the burden of proof. Additionally, as respondent correctly notes, the primary issue to be resolved in such proceedings is whether the district income wealth data relied upon by the Department were accurate. (*N.J.S.A.* 18A:7F-15)

Accordingly, for the reasons set forth above, respondent's motion to dismiss is hereby denied. This matter shall continue at the OAL for further proceedings as a contested case.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

May 19, 1999
Date of Mailing, May 19, 1999

156-99

H.C., on behalf of minor children, J.C. and P.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NUTLEY, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

May 24, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3412-98

AGENCY DKT. NO. 47-2/98

H.C. ON BEHALF OF MINOR

CHILDREN, J.C. AND P.C.,

Petitioner,

v.

BOARD OF EDUCATION OF THE

TOWNSHIP OF NUTLEY, ESSEX COUNTY,

Respondent.

Alan Ruddy, Esq., for petitioner
(DiBiasi & Ruddy, attorneys)

Cherie L. Maxwell, Esq., for respondent
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: March 31, 1999 Decided: April 5, 1999

BEFORE **MARGARET M. HAYDEN**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on April 2, 1998, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

Settlement discussions were held and a settlement was reached.

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

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

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

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

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

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

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

Apr 5, 1999
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

4/9/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 13 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

H.C, on behalf of P.C. and J.C.

v.

Nutley Board of Education

OAL Docket No. EI 3412-
Agency Docket No. 47-2/9

Settlement Agreement

Petitioner H.C. and Respondent Nutley Board of Education ("Board") hereby agree to the following terms in resolution of the above matter.

1. Petitioner H.C. agrees to pay to the Board prorated tuition for J.C. to attend the Nutley Schools during the 1998-99 school year from the commencement of the school year through November 17, 1998. Said tuition shall be calculated by dividing the Board established tuition rate by 180 days, multiplied by the number of days school has been in session for 1998-99 through November 17, 1998.

2. H.C. shall pay the tuition called for under paragraph 1 by December 1, 1998, said monies to be held in escrow by Petitioner's counsel until the Board notified Petitioner's counsel of its determination following its initial investigation of the domicile of the Ching family

3. The Board shall conduct an initial investigation of the domicile of the Ching family. The Ching family agrees to cooperate with the Board's investigation, including reasonable access to the family quarters.

4. If the Board determines that the Ching family is domiciled outside of Nutley, following its initial investigation,

the above settlement terms are nullified and the matter will proceed to hearing in accordance with the initial pleadings.

5. If the Board determines upon its initial investigation that the Ching family is domiciled in Nutley, the Board will so notify Petitioner's counsel and the tuition provided for under paragraph 1 shall be transferred to the Board forthwith.

6. The Board retains the right to continue to investigate the domicile of the Ching family following the initial investigation, with reasonable access provided by the Chings to the family quarters, until March 1, 1999.

7. In the event that a subsequent investigation under paragraph 6 leads to a Board determination that the Chings are not domiciled in Nutley, the settlement terms will be nullified and the matter will proceed to hearing on March 23, 1999.

8. If the matter is litigated and Petitioner prevails in establishing domicile in Nutley during the relevant time period at issue in the case, the Board agrees to refund any monies it had been paid pursuant to paragraph 1 forthwith.

9. The Board shall be permitted to take photographs of the inside of the dwelling as part of its investigation.

10. This Agreement is subject to the approval of the Nutley Board of Education.

11. The parties enter this Agreement voluntarily after consultation with legal counsel.

Nutley Board of Education

Harry Ching

Harry Ching

By:

Dated: Nov. 17, 98

Dated: Nov. 17, 98

Cheryl L Maxwell

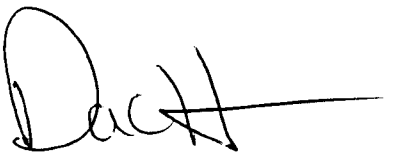
OAL DKT. NO. EDU 3412-98
AGENCY DKT. NO. 47-2/98

H.C., on behalf of minor children, J.C. and P.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NUTLEY, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, settlement agreement and initial decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

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

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

May 24, 1999
Date of Mailing, May 24, 1999

159-99

IN THE MATTER OF THE TENURE	:	
HEARING OF CECILIA JAMES,	:	
STATE-OPERATED SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
THE CITY OF NEWARK, ESSEX COUNTY.	:	DECISION
	:	

May 24, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1664-97

AGENCY DKT. NO. 582-12/96

STATE-OPERATED SCHOOL DISTRICT

OF THE CITY OF NEWARK,

Petitioner,

v.

CECILIA JAMES,

Respondent.

Philip E. Stern, Esq., for petitioner (Sills, Cummis, Radin, Tischman, Epstein & Gross, attorneys)

Eugene G. Liss, Esq., for respondent

Record Closed: March 18, 1999 Decided: April 1, 1999

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

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on February 6, 1997, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B -1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

Prior to the date of the hearing, the parties settled the matter and on March 18, 1999, they submitted the attached Settlement Agreement. Having reviewed the record and the settlement terms, I **FIND**:

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

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

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

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

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

April 1, 1999
DATE

Chairman Gantz ALJ
for **MARYLOUISE LUCCHI-McCLOUD**, ALJ

Receipt Acknowledged:

4/7/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 13 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

pb

SILLS CUMMIS ZUCKERMAN RADIN
TISCHMAN EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(201) 643-7000
Attorneys for State Operated
School District of the City of Newark

In the Matter of the	BEFORE THE COMMISSIONER OF EDUCATION
Tenure Hearing of	AGENCY DOCKET NO.: 582-12/96
CECELIA JAMES	OAL DOCKET NO.: EDUTH 01664-97N
STATE OPERATED SCHOOL DISTRICT, OF THE CITY OF NEWARK	STIPULATION OF SETTLEMENT

This Agreement, made this _____ day of April, 1998, by and between the State-Operated School District of the City of Newark (hereinafter "District") and Cecelia James, a tenured teacher employed by the District (hereinafter "Ms. James").

WHEREAS, Tenure charges alleging chronic absenteeism, incapacity and insubordination against Ms. James were filed with the District on or about November 7, 1996, at which time Ms. James was suspended without pay, and

WHEREAS, said charges were certified to the Commissioner of Education on or about December 11, 1996, and

WHEREAS, subsequent to the certification of said charges against Ms. James, further investigation disclosed that the charges were unsubstantiated; and

WHEREAS, the District would not have filed and certified the subject charges had it been aware of the aforementioned newly discovered information; and

NOW THEREFORE, the parties hereby agree to resolve this matter on the following basis:

1. The District will withdraw the tenure charges alleging chronic absenteeism, incapaci[illegible]and insubordination against Ms. James it has certified to the Commissioner of Education.

2. The District will reimburse Ms. James for any lost remuneration stemming from the certification of the subject tenure charges. These payments shall constitute the total financial obligation of the District to Ms. James arising out of the subject tenure charges and Ms. James hereby waives any claims she may have to any payments from the District other than as provided above as they pertain to the subject tenure charges.

3. Ms. James hereby releases, waives and forever discharges the District from any and all claims, demands, rights, actions, damages or liabilities of any description arising out of or related to the subject tenure charges.

4. This Agreement is not and shall not be construed to be an admission of liability or wrongdoing by either party. Rather, the parties have entered into the Agreement for the sole purpose of resolving the aforementioned tenure charges.

5. This Agreement is freely and voluntarily executed by each party hereto. Both parties have had the terms of this Agreement thoroughly explained by their respective legal counsel and understand such terms and the legal implications arising therefrom.

6. This Agreement is subject to the approval of the Commissioner of Education. Should the Commissioner fail to approve the application for approval of the parties' settlement and withdrawal of the tenure charges, this Agreement shall be null and void.

STATE-OPERATED SCHOOL
DISTRICT OF THE CITY OF NEWARK

By: DR. BEVERLY HALL
State District Superintendent

Dated:

CECELIA JAMES

Dated: July 24, 1998

OAL DKT. NO EDU 1664-97
AGENCY DKT. NO. 582-12/96

IN THE MATTER OF THE TENURE	:	
HEARING OF CECILIA JAMES,	:	
STATE-OPERATED SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
THE CITY OF NEWARK, ESSEX COUNTY.	:	DECISION
	:	

The record, stipulation of settlement and initial decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon thorough consideration of the record, the Commissioner is unable to accept the settlement of this tenure matter as set forth in the settlement agreement. Respondent has been charged *inter alia* with excessive absenteeism due to approximately 302 days of absences over four year school years, 1992-1993 through 1995-1996. While respondent disputes that her absences constitute excessive absenteeism and contends that some of the days were work-related, the Answer to the certified tenure charges does not allege that the Employee Attendance Record sheets for the four school years under examination herein, which were submitted as part of the Statement of Evidence, do not in essence accurately document/record the days she was absent from work. Now, more than two full years after the certification of the tenure charges to the Commissioner, the District avers that the charges are unsubstantiated because "further investigation" conducted subsequent to the certification of the charges disclosed newly discovered information. However, the District does not inform the Commissioner what this newly discovered information is.

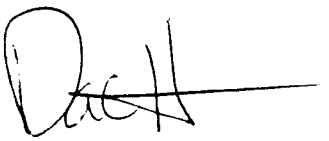
Given the above, the Commissioner admonishes this District and all others that a failure to investigate tenure charges *fully prior to* their certification to him can result, as is apparently the case herein, in a Board/District's inability to prosecute the charges. As stated in *In the Matter of the Tenure Hearing of Sandra Connors, Board of Education of the City of Camden*, decided April 8, 1999 and *In the Matter of the Tenure Hearing of Salvatore Ferrugia, State Operated School District of the City of Newark*, decided April 30, 1999, a Board/District's failure to *fully* investigate charges *prior to* their certification to the Commissioner carries the major consequence of needless expenditure of large amounts of taxpayer money, to say nothing of the potential impact on the personal and professional reputation of the person who has been charged. For example, in addition to the attorney fees already accrued in this matter, the settlement herein would bestow upon respondent nearly 2 ½ years worth of salary for the period of time she has been suspended during the pendency of this tenure case which alleges excessive absenteeism.

Given that the record in this matter does not provide the Commissioner with any idea as to what newly discovered information prevents the District from proceeding on the charges, the Commissioner cannot at this point conclude that it is in the public interest to approve the settlement (*In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846). To approve such a settlement without further explication as to why the charges are now unsubstantiated would be extremely difficult in light of the allegation that respondent was absent from her teaching position for approximately 302 days over a four-year period.

Accordingly, this matter is remanded to the Office of Administrative Law in order that the record may be supplemented to explain what newly discovered information now, nearly

2 ½ years after certification of the tenure charges, makes the charges unsubstantiated and how approval of the settlement would be in conformity with *In re Cardonick.*[*]

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

[*] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

May 24,1999
Date of Mailing May 24, 1999

161-99R

IN THE MATTER OF THE TENURE	:	
HEARING OF BARBARA SOLMOR,	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF EDISON, MIDDLESEX COUNTY.	:	DECISION ON REMAND
_____:		

May 24, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8174-98
AGENCY DKT. NO. 311-9/98
(ON REMAND EDU 8955-97)

IN THE MATTER OF THE TENURE HEARING OF BARBARA SOLMOR, BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY

Viola S. Lordi, Esq., on behalf of petitioner, Edison Board of Education (Wilentz, Goldman & Spitzer, attorneys)

Stephen E. Klausner, Esq., on behalf of respondent, Barbara Solmor (Klausner & Hunter, attorneys)

Record Closed: April 5, 1999 Decided: April 5, 1999

BEFORE **SOLOMON A. METZGER,** ALJ:

This matter arises out of tenure charges filed by petitioner pursuant to the School Law, *N.J.S.A.* 18A:6-10 *et seq.*, and regulations promulgated thereunder. The matter was transmitted to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The parties have now submitted a consent order in this matter which is annexed. Having reviewed the terms of the settlement and it appearing that it was entered into voluntarily and fully disposes of all issues in controversy, I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

4/5/99
DATE

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

4/7/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 8 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

/caa

Exhibit A

AU STATE LEGAL PAPER CO. EDITH RECYCLED

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STATE OF NEW JERSEY
OFFICE OF AG
1999 APR -5 A 11:44

WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
90 Woodbridge Center Drive
Post Office Box 10
Woodbridge, New Jersey 07095
(732) 636-8000
Attorneys for Petitioner

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
Agency Ref. No. 311-8/97
OAL Docket No. EDU 8955-97

THE EDISON BOARD OF EDUCATION, MIDDLESEX COUNTY, Petitioner,	:	Before the Commissioner of Education
v.	:	**CONSENT ORDER APPROVING SETTLEMENT AGREEMENT**
BARBARA SOLMOR, Respondent.	:	

This matter having been opened to the Office of Administrative Law (Hon. Solomon A. Metzger, A.L.J., presiding), pursuant to N.J.A.C. 1:1-19.1, upon the joint application of Viola S. Lordi, Esq. (Wilentz, Goldman & Spitzer, A Professional Corporation, attorneys for petitioner), and Stephen E. Klausner, Esq. (Klausner & Hunter, attorneys for respondent), to issue a Final Decision incorporating and approving the terms of the

Settlement Agreement executed by petitioner and respondent attached hereto as Exhibit "A;" and it appearing that the parties have consented to the entry of the within Order, as appears from the consent affixed hereto;

IT IS, on this 5th day of April 1998;

ORDERED that the full terms of the Settlement Agreement attached hereto are approved and that this proceeding shall be and hereby is dismissed according to the terms of the Settlement Agreement.

SOLOMON A. METZGER, A.L.J.

We hereby consent to the form and entry of the within Order.

WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
Attorneys for Petitioner

BY: _____ Dated: 3/31/99
VIOLA S. LORDI

KLAUSNER & HUNTER
Attorneys for Respondent

BY: _____ Dated: 3/24/99
STEPHEN E. KLAUSNER

SETTLEMENT AGREEMENT

THIS AGREEMENT is made and entered into on this 18th day of March 1999, by and between the **EDISON TOWNSHIP BOARD OF EDUCATION** with offices located at 100 Municipal Boulevard, Edison, New Jersey 08879 (hereinafter sometimes referred to as the "Board" or "Edison Board"),

and

BARBARA SOLMOR, whose address is P.O. Box 242 Fords, New Jersey, 08863 (hereinafter referred to as "Ms. Solmor")

WITNESSETH:

WHEREAS, Ms. Solmor is a tenured special education teacher employed by the Board since September 1988; and

WHEREAS, the Board withheld Ms. Solmor's increment for the 1997-1998 school year on the basis of unsatisfactory performance; and

WHEREAS, in August 1997, the Board certified tenure dismissal charges against Ms. Solmor to the Commissioner of Education ("Commissioner") pursuant to N.J.S.A. 18A:6-11 ("Charges"); and

WHEREAS, the Board later suspended Ms. Solmor without pay for the 120-day period permitted by N.J.S.A. 18A:6-14; and

WHEREAS, the Commissioner transmitted the Charges to the Office of Administrative Law for a hearing; and

WHEREAS, the Board has determined that it is in the best interest of the Edison Township School District to withdraw the Charges and enter into this Settlement Agreement with Ms. Solmor

because this Agreement will help ensure the continued delivery of adequate and appropriate educational services to special education students under the supervision of the Board, without the necessity of significant consumption of the time and energies of Board employees who must be called to testify in support of the Charges at any hearing conducted on the Charges and who would, thereby, be taken away from their duties in the schools of the Edison Township School District; and

WHEREAS, the Board is cognizant of Ms. Solmor's physical ill health, her emotional difficulties and the serious illness of her mother which may have contributed to what the Board has asserted to be her unsatisfactory performance as a special education teacher; and

WHEREAS, without admitting any of the Charges, Ms. Solmor acknowledges that her physical ill health, her emotional difficulties and the serious illness of her mother may have adversely affected her teaching performance; and Ms. Solmor notes that her difficulties in this regard appear to be coming to resolution, due to the recent death of her mother; and

WHEREAS, Ms. Solmor understands that N.J.A.C. 6:11-3.6 states, in part, that, upon the decision of the Commissioner, cases contested before the Commissioner resulting in loss of tenure or dismissal of a teacher or teaching staff member for

inefficiency, incapacity, conduct unbecoming a teacher, or other just cause, shall be forwarded to the State Board of Examiners for determination of possible revocation or suspension; and

WHEREAS, the within contested case has not resulted in loss of Ms. Solmor's tenure as the parties have agreed to settle this matter without a hearing; and

WHEREAS, Ms. Solmor further understands that, although the Commissioner is not required by the express language of N.J.A.C. 6:11-3.6 to forward this matter to the State Board of Examiners for determination of possible revocation or suspension, the Commissioner has the discretion to do so; and

WHEREAS, Ms. Solmor and the Edison Board believe that this is not an appropriate matter for exercise of the Commissioner's discretion as stated above because (1), as the parties have noted, Ms. Solmor's physical ill health, her emotional difficulties and the serious illness of her mother may have adversely affected her teaching performance; and (2) Ms. Solmor's physical ill health and emotional difficulties now appear to be resolving themselves since the death of her mother.

NOW, THEREFORE, the Board and Ms. Solmor, for the consideration herein specified, agree as follows:

1. The parties stipulate to the dismissal of the tenure dismissal proceeding brought by the Board against Ms. Solmor

(Agency Ref. No. 311-8/97; OAL Docket No. EDU 8955-97) upon the execution of this Agreement by both parties.

2. The Board shall restore Ms. Solmor's increment for the 1997-1998 school year, retroactive to September 1997.

3. The Board shall pay Ms. Solmor the amount of salary withheld from her subsequent to the filing of the Charges as described above.

4. Upon the execution of this Agreement by both parties, Ms. Solmor shall be placed on medical leave of absence from her duties as a special education teacher in the Edison Township School District, with pay in accordance with the terms and conditions of the Agreement between the Board and the Edison Township Education Association for the period July 1, 1996 to June 30, 1999, and with all benefits/emoluments she is currently receiving in that capacity, for the remainder of the 1998-1999 school year.

5. Ms. Solmor shall submit her written resignation from employment by the Board effective at the conclusion of the 1998-1999 school year; that is, said written resignation shall note that Ms. Solmor's last day of employment by the Board shall be June 30, 1999. The Board shall accept Ms. Solmor's resignation at its next scheduled regular action meeting subsequent to the Board's receipt of Ms. Solmor's written resignation. Ms. Solmor

shall no longer be entitled to any payments or benefits/emoluments from the Board as of July 1, 1999, subject to the U. S. Consolidated Omnibus Budget Reconciliation Act (COBRA). The Board shall provide any prospective employer of Ms. Solmor only with such information about her employment by the Board which is designated as "public" information by NJ Executive Order No. 11 (November 15, 1974; Gov. Brendan Byrne).

6. Upon the execution of this Agreement, the parties shall exchange general releases.

WHEREAS, this agreement has been approved by a vote of the members of the Edison Township Board of Education at its meeting on March 18, 1999 and has been made a part of the minutes of that meeting;

WHEREAS, the Board has authorized its President and Secretary to execute this Agreement; and

WHEREAS, Ms. Solmor has had the opportunity to consult with her own independent counsel as to this Agreement and has consulted with counsel as to same; and

WHEREAS, Ms. Solmor has approved the terms and conditions of this Agreement; and

IN WITNESS WHEREOF, the Undersigned set their hands, and the Board has set its seal, to this Agreement effective on the day and year first above written.

WITNESS:

BARBARA SOLMOR

ATTEST:

DANIEL P. MICHAUD
Board Secretary

EDISON TOWNSHIP BOARD OF EDUCATION

BY: Bruce A Polkowitz

BRUCE A. POLKOWITZ
President

WITNESS:

Sophie E. Klausner

Barbara Solmor

BARBARA SOLMOR

ATTEST:

EDISON TOWNSHIP BOARD OF EDUCATION

BY: _____

DANIEL P. MICHAUD
Board Secretary

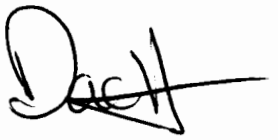
BRUCE A. POLKOWITZ
President

OAL DKT. NOS. EDU 8174-98 and EDU 8955-97 (On Remand)
AGENCY DKT. NO. 311-9/98

IN THE MATTER OF THE TENURE	:	
HEARING OF BARBARA SOLMOR,	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF EDISON, MIDDLESEX COUNTY.	:	DECISION ON REMAND
	:	

The record of this matter, the proposed settlement agreement and the initial decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement.* A copy of this decision will be transmitted to the State Board of Examiners for action, if any, as it deems appropriate.



COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.
May 24,1999
Date of Mailing, May 24, 1999

162-99

IN THE MATTER OF RAYMOND	:	
RODNEY COLEMAN, WILLINGBORO	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION,	:	DECISION
BURLINGTON COUNTY.	:	
_____	:	

May 24, 1999

IN THE MATTER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
OF	:	
	:	**Docket No.: C15-98**
RAYMOND RODNEY COLEMAN,	:	
Willingboro Board of Education	:	
Burlington County	:	**DECISION**

PROCEDURAL HISTORY

This matter arises from a complaint filed by Patricia LaRocco, a member of the Willingboro Board of Education (Board), against another member of the Board, Raymond Rodney Coleman. Therein, she alleged that Mr. Coleman violated the School Ethics Act, N.J.S.A. 18A:12-21 et seq., when he participated in Board discussions concerning the Board's lease of school facilities to a church in which he is a Deacon. Specifically, she alleged that his conduct violated N.J.S.A. 18A:12-24(a), (b), (c), (f) and (g) of the School Ethics Act.[1] On August 28, 1998, Dr. LaRocco amended her complaint to add an allegation that Mr. Coleman also violated N.J.S.A. 18A:12-24(c) of the Act when he voted against her motion to rescind the lease to the church at the Board's August 24, 1998 meeting.

Mr. Coleman filed his answer on November 10, 1998 denying all of the allegations in the complaint and denying having violated the School Ethics Act.

The Commission investigated the case and heard testimony from witnesses at its meeting on December 15, 1999. At the Commission's February 23, 1999 meeting, the Commission concluded that there was probable cause to credit the allegations in the complaint that Mr. Coleman violated N.J.S.A. 18A:12-24(c) when he participated in Board discussions on whether the Board should lease a building to the church and voted not to rescind the lease to the Cathedral of Love. The Commission found no probable cause and dismissed the allegations that he violated N.J.S.A. 18A:12-24(a), (b), (f) and (g) for the reasons set forth in its probable cause determination. The Commission determined that the facts were not in dispute and thus, invited Mr. Coleman to file a written submission setting forth why he should not be found in violation of the act for the aforementioned conduct.

[1] Dr. LaRocco also alleged that Mr. Coleman violated Willingboro Board of Education Policy 9270, New Jersey School Board Member Code of Ethics #6 and National School Board's Code of Ethics #3, #9 and #11; however, the School Ethics Commission only has jurisdiction to determine whether there has been a violation of the School Ethics Act.

The Commission received Mr. Coleman's written submission on March 16, 1999. Therein, he argued that he has no involvement with the Academy, which is separate and distinct from the church. Dr. LaRocco also filed a written submission with the Commission clarifying that she never alleged that Mr. Coleman wrongfully received the COPA report as was set forth in the Commission's probable cause determination. The Commission notes this correction. She also set forth that Mr. Coleman should receive at least a censure for his conduct.[2] At its March 23, 1999 meeting, the Commission rendered this decision finding Mr. Coleman in violation of N.J.S.A. 18A:12-24(c) of the School Ethics Act.

FACTS

Based on the pleadings and the Commission's investigation, the Commission finds that the following facts are undisputed. Dr. LaRocco and Mr. Coleman are both members of the Willingboro Board of Education who were elected in April 1998. Mr. Coleman is a member of the Deacon Board of the Cathedral of Love Church, which is located in Willingboro. By letter of May 20, 1998, Reverend Baxter, the Pastor of the Cathedral of Love, expressed interest in purchasing the Country Club School or the J. Cresswell Stuart Elementary School (Stuart School) from the Board or in the alternative, leasing the Stuart School. The letter indicated that the church would use the school as a child-care facility and house its Academy for grades K-4. By letter of June 22, 1998, he amended his request to focus on a proposal to lease the Stuart School.

The Interim Business Administrator, N. John Amato, wrote Rev. Baxter a letter on July 17, 1998 informing him that there were discrepancies in the way that the application was received and that all applications had to be presented in writing to the Board for approval at a regularly scheduled meeting. The Board met in executive session on July 27, 1998. According to the minutes, at this meeting Mr. Coleman moved that the Board vote on whether the Board and the Cathedral of Love will enter into a lease agreement. Mrs. Smith seconded the motion. The Board deliberated on this matter with Mr. Coleman participating. He then withdrew his motion. The Board also discussed whether Mr. Coleman has a conflict of interest. Mrs. Smith then moved that the Board honor the Proposed Agreement at $6.40 per square foot. The vote on the motion, which apparently was a straw poll, was six in favor and one against. Dr. LaRocco was not present at this meeting and Mr. Best was out of the room. Also at this meeting, Mrs. Green moved that the Board accept the air conditioning proposal of the Cathedral of Love and Mrs. Carter moved that the Board maintain articles of the lease that the Cathedral had excised including those of penalty, security and an "event of default" clause. These motions were approved by a vote of seven in favor and one against. Mr. Best had returned to cast his vote in favor. Mr. Coleman participated in each of these votes. At the conclusion of the executive session, the Board agreed that Mr. Amato would contact Rev. Baxter with the Board's counter offer of cost for square footage.

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[2] Dr. LaRocco also requests that the Commission issue an order prohibiting Mr. Coleman from participating in discussions and votes on any matter concerning the Cathedral of Love in the future. The Commission has concluded that it is authorized only to recommend the penalties set forth in N.J.S.A. 18A:12-29(c), which do not include prohibitions on future conduct.

On July 28, 1998, Mr. Amato wrote Rev. Baxter a letter setting forth that at the Board's executive session meeting, the Board made a counter proposal of $6.40 per square foot for rental of 10 classrooms and two multi-purpose rooms at the Stuart School. He also informed him that the Board reestablished some articles that were previously left out of the lease. On July 31, 1998, Rev. Baxter essentially agreed to the Board's terms and asked that his letter be accepted as confirmation that they have a meeting of the minds. Rev. Baxter further requested that Mr. Amato take the steps necessary to see that a formal lease agreement is prepared.

In an August 5, 1998 memorandum, the then Board Solicitor, Paula Mullaly, advised the Board against entering into the lease and advised Mr. Coleman against participating. On August 11, 1998, approximately one week after submitting that memorandum, the Board Solicitor submitted her resignation to be effective August 28, 1998. At the August 17, 1998 Conference Meeting of the Board, the Board approved the lease by a vote of 5-2 with Mr. Coleman abstaining. However, the minutes indicate that Mr. Coleman participated in the discussion of the lease prior to the vote. On August 24, 1998, Dr. LaRocco moved to rescind the lease between the Cathedral of Love and the Board because she believed that the action was taken improperly. The motion failed with Dr. LaRocco and Board member Margaret Reynolds voting in favor and the other eight members present voting against it, including Mr. Coleman. The lease agreement was signed on August 24, 1998.

The Commission's investigation disclosed that the Board leases its properties at varying rates, but six of the 12 lease renewals for the 1998-1999 school year had a rate of $12.39 per square foot. Two other lessees rent at approximately $11.00 per square foot. Burlington County College rents at $9.74 per square foot, but this rate is apparently due to their agreement to provide their own custodial services. The lowest lease rate for the 1998-1999 school year was $2.83 per square foot paid by Willingboro Township. Burlington County Day Care, which was leasing rooms at the Stuart School prior to the Cathedral of Love, paid $11.28 per square foot. It had paid $9.15 per square foot when it was providing its own maintenance. An appraiser's report set the market rent for the Stuart School at $3.20 per square foot, but the operating cost was noted to be $7.85 per square foot. It is the appraiser's report that Rev. Baxter said that his researcher relied on in initially seeking the $3.83 per square foot rate.

ANALYSIS

The issue on which the Commission found probable cause is whether Mr. Coleman's conduct violated N.J.S.A. 18A:12-24(c) of the School Ethics Act. It provides:

> No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

Prior to the enactment of the School Ethics Act, the Superior Court addressed the question of when a church or religious affiliation may constitute a conflict of interest. In *Landau v. Township of Teaneck*, 231 *N.J. Super.* 586, 595 (Law Division 1989), Judge Simon stated, "It is clear that the interest of a synagogue or church passes to all its members." (Citing *Marlboro Manor, Inc. v. Montclair Township,* 187 *N.J. Super.* 359, 361-62 (App. Div. 1982) and *Zell v. Borough of Roseland*, 42 *N.J. Super.* 75 (App. Div. 1956). Therefore, she stated, the council member would be in conflict were he a member of congregation seeking to purchase property from the township. However, the council member did not have a conflict because he was a member of a different congregation of the same faith. The Local Finance Board was presented with the exact question that the *Landau* Court addressed. In *In Re Elizabeth Urquhart, Council Member City of Plainfield*, Complaint #LFB-96-040 (February 11, 1998), the Local Finance Board found that a council member violated the local Government Ethics Law by acting in her official capacity in a matter where she has a direct or indirect personal involvement that might reasonably be expected to impair her objectivity when she voted on matters relevant to the church of which she is a member.

As set forth in the probable cause determination, Mr. Coleman and Rev. Baxter testified that Mr. Coleman is a Deacon in the Cathedral of Love, which is a denomination of the Church of God in Christ. Mr. Coleman is also a Deacon in the Church of God in Christ. His duties with the Cathedral of Love are to ensure the upkeep and maintenance of the church. He also teaches Sunday school. He does not have responsibility for the financial operations of the church. He does not have responsibilities with regard to the church's Academy. Mr. Coleman added that his children attend public school and have no plans to enter the Cathedral of Love Academy. The Executive Board of the church is the highest level of leadership under Rev. Baxter and it assists Rev. Baxter with decisions regarding the operation of the church. Mr. Coleman is not a member of the Executive Board. The Deacons handle maintenance and ministerial functions such as visiting the sick.

In his written submission in response to the probable cause determination, Mr. Coleman states that the Cathedral of Love Church of God in Christ, Inc. and the Cathedral of Love Christian Academy are two separate and distinct organizations. He says that they are managed and operated by two separate and distinct governing bodies although they share the same owner, Rev. Baxter, and the same name. He states that Rev. Baxter's Christian Academy is not, in his understanding, a part of the church organization of which he is a member. He further states that the church does not benefit financially or otherwise from the business affairs of Rev. Baxter's Christian Academy. He believes that since the two entities are separate and distinct from each other, one as a religious place of worship and the other a Christian school, and since Rev. Baxter negotiated with the Board as owner/proprietor of the Christian Academy, there is no violation of N.J.S.A. 18A:12-24(c).

While the Commission acknowledges Rev. Baxter's testimony that he does not require the endorsement, support or sanction of the church to engage in proprietary affairs as he deems fit, Rev. Baxter never stated that when he engages in such affairs he is not acting on behalf of the church. At all times, he is acting on behalf of the church. According to Mr. Coleman's view, the fact that the Academy is called the Cathedral of Love Christian Academy is merely by

coincidence. Clearly, it is so named because it is the Cathedral of Love's school. The Cathedral of Love is the entity that signed the lease with the Board and it is the Cathedral of Love that continues to have the obligations under the lease. Thus, the Commission rejects the argument that Rev. Baxter was acting not on behalf of the church, but on behalf of himself and his family. Consequently, the Commission rejects the argument that Mr. Coleman has no involvement with the Academy.

The Commission is satisfied that Mr. Coleman has responsibilities to the church that may appear to pull him in a direction that differs from the best interests of the school district. Mr. Coleman is not just a member of the church, but a member of the Deacon Board. Therefore, the Commission must conclude that he had a personal involvement with the church that might reasonably be expected to impair his objectivity or independence of judgment. Thus, the Commission finds that Mr. Coleman's conduct violated N.J.S.A. 18A:12-24(c) when he participated in Board discussions and later voted against the motion to rescind the lease to the Cathedral of Love.

DECISION

For the foregoing reasons, the School Ethics Commission finds that respondent Raymond Rodney Coleman violated N.J.S.A. 18A:12-24(c) of the School Ethics Act when he participated in discussions concerning the Cathedral of Love's lease of the Stuart School and later voted not to rescind the lease. The Commission has previously said that the advice given by an attorney that a school official could participate or vote on a matter is a mitigating factor. This case presents the converse. The Commission notes that the Board Solicitor advised Mr. Coleman that he should not participate in discussions regarding the lease because of his association with the church, but he continued to do so. This is an aggravating factor. Thus, since Mr. Coleman had recently joined the board in May 1998 when this controversy arose, a reprimand may have sufficed due to his inexperience. However, in this case he was told by the Board Solicitor to recuse himself and he did not. Therefore, the Commission recommends that the Commissioner of Education impose a penalty of censure.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction only, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini, Chairperson

Resolution Adopting Decision -- C15-98

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents and testimony given in support thereof; and

Whereas, the Commission concluded at its meeting of February 23, 1999 that there was probable cause to credit the allegations in the complaint that respondent violated the School Ethics Act; and

Whereas, the Commission considered the written submission of Mr. Coleman in response to the Commission's finding of probable cause and concluded that Mr. Coleman violated N.J.S.A. 18A:12-24(c) of the School Ethics Act; and

Whereas, the Commission has reviewed the proposed decision of its staff finding such a violation, recommending a penalty of censure, and setting forth the reasons therefore; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on March 23, 1999.

Lisa James-Beavers
Executive Director

AGENCY DKT. NO. 67-4/99

IN THE MATTER OF RAYMOND	:	
RODNEY COLEMAN, WILLINGBORO	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION,	:	DECISION
BURLINGTON COUNTY.	:	
_____	:	

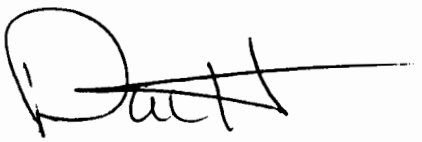
The record of this matter and the decision of the School Ethics Commission (Commission) have been reviewed. Initially, the Commissioner must emphasize that, pursuant to *N.J.S.A.* 18A:12-29(c), the Commission's determination as to violation of the Act **is not reviewable by him**. Only the Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed following a finding of a violation by the Commission. Therefore, this decision is restricted solely to a review of the recommended penalty and its implementation.

The parties submitted no comments to the Commissioner with respect to the Commission's recommended penalty.

Upon thorough review of the full record in this matter, the Commissioner determines to accept the Commission's recommendation that censure is the appropriate penalty in this matter for the reasons expressed in the Commission's decision finding that a violation of the School Ethics Act occurred.

IT IS HEREBY ORDERED that Raymond Rodney Coleman be censured as a school official found to have violated the School Ethics Act.*

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

May 24, 1999
Date of Mailing, May 24, 1999

AGENCY DKT. NO. 67-4/99

IN THE MATTER OF RAYMOND	:	
RODNEY COLEMAN, WILLINGBORO	:	**RESOLUTION OF CENSURE**
BOARD OF EDUCATION,	:	
BURLINGTON COUNTY.	:	
	:	

WHEREAS, the Willingboro Board of Education member, Raymond Rodney Coleman, was found by the School Ethics Commission at its meeting on March 23, 1999 to have used his position as a school official to participate in discussions regarding lease of school facilities to a church in which he is a Deacon, and subsequently voted not to rescind the lease;

WHEREAS, the School Ethics Commission concluded that such conduct violated *N.J.S.A.* 18A:12-24(c) of the School Ethics Act; and

WHEREAS, after considering the facts determined during the course of the investigation and Mr. Coleman's testimony regarding this matter, the School Ethics Commission, in a decision dated March 23, 1999, recommended to the Commissioner of Education that he impose upon Mr. Coleman the penalty of censure pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6:3-9.19(c)1; and

WHEREAS, no comments were submitted to the Commissioner by Mr. Coleman with regard to this penalty; and

WHEREAS, the Commissioner has concluded that the Commission's censure is the appropriate penalty for the aforementioned violation for the reasons set forth in the Commission's decision; now therefore

BE IT RESOLVED, that Raymond Rodney Coleman is hereby censured as a school official found to have violated the School Ethics Act; and

BE IT FURTHER RESOLVED, that the Willingboro Board of Education is ordered to read this resolution at the next public meeting following its adoption by the School Ethics Commission and to post it in such places as the Board posts its public notices.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

163-99

IN THE MATTER OF THE TENURE	:	
HEARING OF KENNETH WILBURN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
ATLANTIC CITY, ATLANTIC COUNTY.	:	
	:	

May 24, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ORDER OF DISMISSAL

OAL DKT. NO. EDU 2078-97

AGENCY REF. NO. 55-2/97

IN THE MATTER OF THE TENURE HEARING OF KENNETH WILBURN, BOARD OF EDUCATION OF ATLANTIC CITY, ATLANTIC COUNTY,

---

George Frino, Esq., appearing for the Charging Board of Education

Steven Cohen, Esq., for respondent, Kenneth Wilburn

Record Closed: April 5, 1999 Decided: April 5, 1999

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Board of Education of the City of Atlantic City (Board) filed charges of conduct unbecoming a teaching staff member with the Commissioner of Education (Commissioner) on February 7, 1997, certifying that the charges, if true in fact, would be sufficient to warrant dismissal of respondent as a teacher in the Board's school district.

The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. By consent of the parties, the matter was placed on the OAL Inactive List pending the outcome of criminal charges against respondent.

On March 17, 1999, the undersigned was in receipt of a letter from respondent's attorney, dated March 16, 1999, in which Mr. Cohen stated, in pertinent part:

> When I last wrote to you, the criminal charges against Mr. Wilburn were still pending. Mr. Wilburn had entered a plea, but had not been sentenced.
>
> Mr. Wilburn, has now been sentenced. As part of a negotiated plea agreement, he agreed to surrender his teaching certificate and to forfeiture of his teaching position/public employment with the Atlantic City Board of Education pursuant to *N.J.S.A.* 2C:51-2.
>
> It is my understanding that Mr. Wilburn surrendered his teaching certificate to Susan H. Curcio, Atlantic County Chief Assistant Prosecutor at or about the time he was sentenced.

Upon receipt of Mr. Cohen's letter of March 16, 1999, the undersigned telephoned Atlantic County Chief Assistant Prosecutor Susan H. Curcio, to request a copy of the Order of Forfeiture of Public Employment executed by the Honorable Arthur V. Guerrera, J.S.C. Chief Assistant Prosecutor forwarded a copy of the Order which is attached hereto and which states, in pertinent part, that:

It is on 25th day of January, 1999, **HEREBY ORDERED** that:

1. Pursuant to the provisions of *N.J.S.A.* 2C:51-2a(2), defendant [Kenneth Wilburn] shall immediately forfeit his position of employment with the Atlantic City Board of Education;

2. Pursuant to the provisions of *N.J.S.A.* 2C:51-2d, defendant [Kenneth Wilburn] shall be forever disqualified from holding any office or position of honor, trust or profit under this State or any of its administrative or political subdivisions.

CONCLUSIONS

I **FIND and CONCLUDE** that issues concerning respondent Kenneth Wilburn's alleged unbecoming conduct are now moot with the surrender of his teaching certificate pursuant to the Order of Forfeiture of Public Employment executed by Judge Guerrera. Therefore, I **CONCLUDE** there is no need to proceed with a tenure hearing nor is it necessary for the Commissioner to refer the instant matter to the New Jersey State Board of Examiners.

ORDER

Accordingly, the instant matter is returned to the Commissioner because it is determined to be moot. *Paul E. Polskin v. Board of Education of North Plainfield, Somerset County,* 1968 *S.L.D.* 217, 218.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is

otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

5 April 1999
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

4/8/1999
DATE

Debbie Antanaitis/pr
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 9 1999
DATE

Barbara A Hermel
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

NONE

DOCUMENTS IN EVIDENCE

FOR PETITIONER:

None

FOR RESPONDENT:

R-1 Order of Forfeiture of Public Employment

JEFFREY S. BLITZ
Atlantic County Prosecutor
P.O. Box 2002
1470 19th Avenue
Mays Landing, NJ 08330
(609) 645-5908

File No. 96-004142

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CRIMINAL
ATLANTIC COUNTY

STATE OF NEW JERSEY : Indictment No. 96-12-02693-C-INV

Plaintiff : ORDER OF FORFEITURE OF PUBLIC EMPLOYMENT

v. :

KENNETH WILBURN :

Defendant :

STATE OF NEW JERSEY
ADMINISTRATIVE OFFICE OF THE COURTS
FILED
APR 5 10 30 AM '99

This matter having been brought before the Court on January 13, 1999 by Susan H. Curcio, Atlantic County Chief Assistant Prosecutor, in the presence of Anthony J. Zarillo, Jr., Esq., attorney for defendant, Kenneth Wilburn, and the State having moved for an Order of Forfeiture of Public Employment pursuant to N.J.S.A. 2C:51-2, and the Court having found the following:

a. On May 11, 1998, defendant entered a plea of guilty to two counts of misconduct in office under Counts 7 and 10 of the above-listed indictment;

b. On the dates charged by Counts 7 and 10 of the above-listed indictment, defendant was a public employee employed as a teacher by the Atlantic City Board of Education;

c. As a result of the above-mentioned plea of guilty, the defendant was sentenced by this Court on January 13, 1999;

d. The crimes charged in Counts 7 and 10 of the above-listed indictment were second-degree crimes and involved or touched on the defendant's position of employment with the Atlantic City Board of Education within the meaning of N.J.S.A. 2C:51-2d;

5

and for good cause shown;

It is on this 25th day of January, 1999, HEREBY ORDERED that:

1. Pursuant to the provisions of N.J.S.A. 2C:51-2a(2), defendant shall immediately forfeit his position of employment with the Atlantic City Board of Education;

2. Pursuant to the provisions of N.J.S.A. 2C:51-2d, defendant shall be forever disqualified from holding any office or position of honor, trust or profit under this State or any of its administrative or political subdivisions.

ARTHUR V. GUERRERA, J.S.C.

5b

OAL DKT. NO. EDU 2078-97
AGENCY DKT. NO. 55-2/97

IN THE MATTER OF THE TENURE	:	
HEARING OF KENNETH WILBURN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
ATLANTIC CITY, ATLANTIC COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the within record, the Commissioner agrees with the conclusion of the Administrative Law Judge that, as a result of respondent's forfeiture of public employment in Superior Court on January 25, 1999, which precludes him from being employed, in "any office or position of honor, trust or profit," in a school district of this State, it is unnecessary to proceed with a hearing on the instant tenure charges as they have been rendered moot by such forfeiture.

Accordingly, the initial decision of the OAL is affirmed and the within Petition of Appeal is dismissed.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

May 24, 1999
Date of Mailing, May 24, 1999

164-99

ANN HAGEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

May 24, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9050-96

AGENCY DKT. NO. 292-7/96

ANN HAGEN,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

Respondent.

Alan S. Porwich, Esq., for petitioner
(Feintuch, Porwich & Feintuch, attorneys)

Charlotte Kitler, Esq., for respondent

Record Closed: April 6, 1999 Decided: April 7, 1999

BEFORE **ELINOR R. REINER**, ALJ:

On July 22, 1996, petitioner, Ann Hagen, filed a verified petition of appeal with the Commissioner of Education, requesting that respondent restore all sick days deducted from petitioner's sick leave bank for the period between April 25, 1996 and May 8, 1996. On August 8, 1996, respondent filed an answer, contending that petitioner was not entitled to benefits pursuant to *N.J.S.A.* 18A:30-2.1.

On August 26, 1996, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The matter was assigned to Administrative Law Judge Ken Springer on October 2, 1996 and a prehearing conference scheduled for January 21, 1997. Thereafter, the matter was assigned to the undersigned judge and on January 14, 1998 placed on the inactive list pending disposition of petitioner's workers compensation case. As a result of the ruling of Workers' Compensation Judge Stephen Tuber, counsel requested that the matter be restored to the active calendar for final disposition. The case was thereafter relisted for hearing on April 8, 1999. As a result of settlement conferences held between the parties, a settlement was reached.

The parties have agreed to settle this matter and have prepared the attached consent order indicating the terms of settlement.

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

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

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

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

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

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

April 7, 1999
DATE

ELINOR R. REINER, ALJ

Receipt Acknowledged:

4/9/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 13 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

al

FEINTUCH, PORWICH & FEINTUCH
26 Journal Square, Suite 1003
Jersey City, New Jersey 07306
(201)656-8600
Attorneys for Petitioner

ANN HAGEN,	:BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
Petitioner,	:
vs.	:Agency Ref. No. 292/7-9696N :OAL DKT. NO. EDUOR-09050-96N
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, COUNTY OF HUDSON	: **CONSENT ORDER**
Respondent.	:

THIS MATTER having been brought before the Office of Administrative Law by Feintuch, Porwich & Feintuch, attorneys for petitioner, and Charlotte Kitler, Esq., attorney for respondent, consenting hereto, and it appearing that the Division of Workers' Compensation ruled on the length of petitioner's temporary disability in Ann Hagen vs. Jersey City Board of Education, C.P. No. 97-0022049, and for good cause being shown,

IT IS on this day of , 1999,

ORDERED that Respondent shall restore all Petitioner's sick days deducted from Petitioner's sick leave bank from April 25, 1996 through May 8, 1996.

ELINOR REINER, A.L.J.

WE HEREBY CONSENT TO THE FORM AND ENTRY OF THE WITHIN ORDER.

FEINTUCH, PORWICH & FEINTUCH
Attorneys for Petitioner

ALAN S. PORWICH, ESQ.

DATED: 3/31/99

CHARLOTTE KITLER, ESQ.
Attorney for Respondent

DATED: 3/30/99

OAL DKT. NO. EDU 9050-96
AGENCY DKT. NO. 292-7/96

ANN HAGEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, consent order, and initial decision settlement issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

May 24, 1999
Date of Mailing, May 24, 1999

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	
ROBERT FALCO, BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION OF THE RAMAPO	:	DECISION
INDIAN HILLS REGIONAL HIGH	:	
SCHOOL DISTRICT, BERGEN COUNTY.	:	
	:	

SYNOPSIS

Petitioning Board filed an Order to Show Cause to suspend the teaching certificate of respondent teacher for up to one year because he resigned from his teaching position without the requisite 60 days' notice. *N.J.S.A.* 18A:26-10. Respondent contended the Board's filing was untimely, pursuant to *N.J.S.A.* 6:24-1.2(c), as the action which triggered the running of the 90-day rule of *N.J.A.C.* 6:24-1.2(c) was his cessation of employment on February 27, 1998.

ALJ concluded that the filing limitation period commenced on the date the Board took official action on the resignation at its next regularly scheduled meeting. Consequently, the ALJ concluded that the 90-day period commenced on March 23, 1998 and ended on June 21, 1998. Therefore, the Board's petition was timely filed. Moreover, the ALJ found that even if the filing were untimely, the circumstances herein warranted relaxation of the 90-day rule as the Board's original filing was improperly submitted as a request, not an Order to Show Cause. Having reviewed the record, the ALJ concluded that the primary reason for respondent's resignation was his disagreement over the evaluation of his performance. Thus, the ALJ determined that immediate resignation was an unacceptable response and that no genuine issues of material fact existed. ALJ granted Board's Motion for Summary Decision and denied petitioner's Motion to Dismiss.

Commissioner adopted findings and determination in initial decision as his own, finding respondent's arguments with respect to timeliness of the petition without merit. Noting that the language of the applicable statute, *N.J.S.A.* 18A:26-10, clearly requires that for a cause of action to arise under its terms 1) a teaching staff member ceases to perform his duties before the expiration of the term of his employment and 2) the board does not consent to the teaching staff member's action. As such, the Commissioner determined that the "final action" contemplated by *N.J.A.C.* 6:24-1.2(c) occurred on March 23, 1998, when the Board formally resolved to reject respondent's resignation as offered and decided as a body to pursue its rights under the statute. Thus, the Board's Order to Show Cause, filed on June 16, 1998, was timely. Commissioner concurred that respondent failed to fulfill the terms of his employment with the Board and violated the law by failing to give 60 days' notice of his intent to terminate his employment without the approval of the Board. Finding such behavior to be unprofessional conduct, the Commissioner ordered respondent's certificate suspended for a period of one year as of the date of this decision. Commissioner notified State Board of Examiners of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 9283-98
AGENCY DKT. NO. 1998-6/98N

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF ROBERT FALCO, BOARD OF EDUCATION OF THE RAMAPO INDIAN HILLS SCHOOL DISTRICT, BERGEN COUNTY

Allan P. Dzwilewski, Esq., for the petitioner, Board of Education of the Ramapo Indian Hills School District, Bergen County (Schwartz, Simon, Edelstein, Celso and Kessler, attorneys)

Robert Falco, respondent, pro se

Record Closed: April 5, 1999 Decided: April 7, 1999

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

Petitioner Board of Education of the Ramapo Indian Hills School District, Bergen County (Board) filed an Order to Show Cause to suspend the teaching certificate of respondent, Robert Falco, for up to one year because he resigned from his teaching position without the requisite 60 days' notice. *N.J.S.A.* 18A:26-10.

On October 1, 1998, the matter was transferred to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The parties filed cross-motions for summary decision and dismissal.

FACTS

1. On June 20, 1997, Falco entered into an employment contract with the Board to teach in the public schools from September 1 to June 30, school year 1997-1998. The contract provides in part:

> It is hereby agreed by the parties hereto that this contract may at any time be terminated by either party giving to the other 60 days' notice in writing of intention to terminate the same, but that in the absence of any provision herein for a definite number of days' notice the contract shall run for the full term named above.

2. On February 27, 1998, in a letter addressed to superintendent of schools Paul Saxon, Falco wrote:

> Regretfully, I must inform you of my resignation effective 3:15 p.m. on Friday, February 27, 1998.
>
> At a recent conference between Mr. Cardinale, Mr. Opremcak, and myself, several comments were made by Mr. Opremcak, concerning my performance that were both inaccurate and unfounded. Foremost was Mr. Opremcak's remark that he was concerned about my "rate of growth." Paradoxically, in my past evaluations Mr. Opremcak cited growth as a strength I possessed, not a weakness. Mr. Opremcak also noted at our conference that he had a concern about "content." He did not elaborate on this topic nor did he note any specific deficiencies. This issue was never raised in any prior evaluations. These unfounded comments constitute harassment.
>
> Mr. Opremcak's unfounded comments are profoundly disturbing to me. My immediate concern is the emotional stress that I would have to endure working under these conditions. By virtue of my health, I can no longer work under these conditions.
>
> It is for the aforementioned reasons that I must regretfully resign.

3. On or about February 28, 1998, a conference was held between the school Principal, Mario Cardinale and Falco. Falco was represented by the Ramapo Indian Hills Education Association (Association). At the meeting, Cardinale asked

Falco to reconsider his resignation and/or to provide the contractual notice. Falco refused the request.

4. In a letter dated March 2, 1998, the Association requested that Saxon (1) "make an immediate and thorough investigation of this situation," including a personal meeting with Falco and the Association to address Falco's concerns, and (2) not present Falco's letter of resignation to the Board until he (Saxon) had completed that investigation.

5. On March 2, 1998, Saxon informed Falco that on March 9, 1998, prior to the Work Session, the Board would meet in a closed Executive Session and would discuss his resignation effective February 27, 1998. Also, Falco was advised that upon his request the Board would review the matter at the public portion of the meeting on March 9.

6. Falco did not respond to Saxon's letter, and he did not appear at the Board meeting on March 9, 1998.

7. On March 9, 1998, the Board met in Executive Session. Saxon informed the Board that Falco resigned without giving 60 days' notice as required by the employment contract. The Board voted to accept Falco's resignation effective April 27, 1998, and to seek a suspension of Falco's teaching certificate for unprofessional conduct in failing to give appropriate notice of his resignation.

8. On March 23, 1998, at a regular meeting, the Board adopted the following resolution:

> WHEREAS, Robert Falco, Science Teacher at Ramapo H.S., submitted his resignation on February 27, 1998, to be effective that same day and
>
> WHEREAS, Robert Falco has not performed teaching duties since February 27, 1998, and
>
> WHEREAS, this failure to provide a 60-day notice is in violation of the employment contract and Title 18A:28-8

> NOW, THEREFORE, BE IT RESOLVED, that the resignation of Robert Falco be accepted effective April 27, 1998, and BE IT FURTHER RESOLVED that the failure to provide 60-days' notice be deemed unprofessional conduct and that the Commissioner of Education be requested to suspend the teaching certificate of Robert Falco for a period not to exceed one year pursuant to [*N.J.S.A.*] 18A:26-10.

9. On April 3, 1998, the Board requested that the Commissioner suspend Falco's teaching certificate for one year pursuant to *N.J.S.A.* 18A:26-10 and included a certified copy of its resolution approved on March 23, 1998.

10. On April 7, 1998, the Board informed Falco that at the regular meeting of March 23, 1998, it voted to seek the suspension of his teaching certificate and that it had submitted its resolution to the Commissioner.

11. On April 13, 1998, the Department of Education advised the Board that proceedings to suspend Falco's teaching certificate for resigning without adequate notice required an Order to Show Cause and supporting affidavit. Further, the Department instructed the Board on procedure and enclosed a sample form of Order with directions for service on Falco.

12. On June 8, 1998, the Board filed an Order to Show Cause before the Commissioner to suspend Falco's teaching certificate for resigning without adequate notice.

DISCUSSION

Timeliness of Filing

Respondent contends that the Board's filing of an Order to Show Cause was untimely pursuant to *N.J.A.C.* 6:24-1.2(c), the "90-day rule," and should be dismissed. Specifically, the Board filed the Order to Show Cause 101 days after Falco notified the District of his immediate resignation. Respondent argues that the 90-day period commences the date the teacher fails to work. Respondent relies in part on *Board of*

Education of Elmwood Park v. Farrell, 95 *N.J.A.R.*2d (EDU) 375. Here, the triggering event was Falco's submission of his resignation on February 27, 1998. Thus, the Board's filing on June 8, 1998, is untimely. Moreover, respondent submits that there is nothing in the record to justify relaxation of the 90-day rule.

The Board argues that the petition is not barred by *N.J.A.C.* 6:24-1.2(c). Specifically, the contested matter arose on March 23, 1998, the date the Board took official action to accept Falco's resignation. Although Falco submitted his letter of resignation on February 27, the Board is empowered to act as a body and could take no action on Falco's resignation until its regular meeting on March 23, 1998. *N.J.S.A.* 18A:10-1. Moreover, teachers who do not receive "the consent of the board" to terminate their duties before the expiration of their terms of employment will be subject to suspension of their certificates. *N.J.S.A.* 18A:26-10. Further, prior to the Board's meeting and its decision to file charges pursuant to *N.J.S.A.* 18A:26-10, Falco could have unilaterally rescinded the resignation. Thus, Falco's resignation was of no effect until it was accepted by the Board.

Further, the Board argues that *Elmwood Park v. Farrell* is distinguishable. In that case, after the board had accepted Farrell's resignation, she informed her supervisor that she intended to leave work before the date approved by the board. The Commissioner determined that the 90-day period commenced on the date the board was notified that the employee did not intend to comply with the notice requirements, not the date that Farrell initially submitted her resignation. Moreover, eight months passed before the board filed the Order to Show Cause. The Board also cited *Pinelands Regional School District v. Rehm*, 1986 *S.L.D.* 606, in which the Commissioner concluded that the applicable limitation period commenced after the board was informed of and took action with respect to the resignation, not the date that the employee submitted her resignation. Petitioner's Br. at 10.

The Board submits that the application of the limitation period should be determined on the particular facts relevant to the controversy. Here, the 90-day period commenced on March 23, 1998, when the Board took action accepting the resignation.

The "90-day rule," *N.J.A.C.* 6:24-1.2(c), provides that:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

I have carefully considered the timeline of events and the facts to determine if petitioner was timely in accordance with *N.J.A.C.* 6:24-1.2(c).

An offer and acceptance of a teacher's resignation is acknowledged by the conduct of the parties:

> A teacher's contract of employment may be terminated by his resignation, but the resignation, in order to be effective, must be offered by the teacher with intent to terminate his employment, to the board or officer having the power to remove or dismiss, and it must be accepted strictly in accordance with the terms of the offer by the board having power to accept, acting as a board.
>
> [*Kozak v. Board of Education of the Township of Waterford*, 1976 *S.L.D.* 633, 638, quoting 78 *C.J.S.* 1101.]

Here, Falco submitted a letter of resignation on February 27, 1998, effective immediately. However, his resignation on February 27 was not his final decision. Falco could have rescinded his letter before it was accepted by the Board. Indeed, after he submitted the letter, Falco and his representative met with Cardinale. During the conference Falco declined the request to reconsider his decision to resign. Instead, Falco proposed an alternative position. In a letter dated March 2, 1998, to the superintendent of schools, Falco requested that Saxon, "in his role as Chief Administrator, make an immediate and thorough investigation" of the evaluation process for non-tenured teachers. Further, Falco proposed to delay submitting his letter of resignation to the Board until the investigation was concluded.

The Board's decision to take formal action on Falco's resignation at its next regularly scheduled meeting was not unreasonable. The Board argues that it should not "be compelled to act as a body immediately after an employee submits an untimely and inappropriate resignation." Petitioner's Br. at 12. Such a mandate would "unduly prejudice the Board, usurp its authority to control its calendar and operate in accordance with its By-Laws and disrupt its operation." *Ibid.* Thus, on March 23, 1998, at a regular meeting, the Board adopted a resolution "that the resignation of Robert Falco be accepted effective April 27, 1998, and . . . that the failure to provide 60-days' notice be deemed unprofessional conduct and that the Commissioner of Education be requested to suspend the teaching certificate of Robert Falco for a period not to exceed one year pursuant to [*N.J.S.A.*] 18A:26-10."

Based on the whole of the record, I **CONCLUDE** that the limitation period commenced on the date the Board took official action on the resignation at its next regularly scheduled meeting. Consequently, I **CONCLUDE** that the 90-day period commenced on March 23, 1998, and ended on June 21, 1998. I therefore **CONCLUDE** that the Board filed a timely petition pursuant to *N.J.A.C.* 6:24-1.2(c).

If the Commissioner concludes that the 90-day period commenced on the date the resignation was submitted, February 27, 1998, I further **CONCLUDE** that the circumstances warrant relaxation of the 90-day rule. *N.J.A.C.* 6:24-1.15 provides as follows:

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

Although the statute of limitations set forth in *N.J.A.C.* 6:24-1.2(c) is to be strictly applied, the 90-day rule may be relaxed under exceptional circumstances or if there is a "compelling" reason. The authority to relax or waive the 90-day rule is invoked only

where strict adherence would be inappropriate, unnecessary or where injustice would occur. *DeMaio v. Board of Educ. of New Providence*, 96 *N.J.A.R.*2d (EDU) 449, 453, citing *Gordon v. Passaic Board of Educ.*, 1985 *S.L.D.* 1929, 1931. For example, in *Elmwood Park v. Farrell*, eight months passed between the date Farrell failed to report to work and the date the board (petitioner) filed an Order to Show Cause. In her initial decision, the ALJ noted that petitioner initially filed for a certification penalty before the school superintendent, rather than the Commissioner. Moreover, petitioner did not address the reasons for the delay and for filing the motion papers before the wrong agency. Additionally, there was no showing that Farrell contributed to the delay. Finally, the ALJ noted that "the motion papers do not evidence communications from petitioner to respondent from March to December 1993 pertaining to the filing of the proceeding, until the blank order to show cause was issued." *Farrell, supra*, 95 *N.J.A.R.*2d at 378. Consequently, the Commission affirmed the ALJ's conclusion that the 90-day rule should not be relaxed.

Here, I have considered the conduct of the Board and Falco to determine if circumstances exist to relax the 90-day rule. Immediately after Falco submitted his letter of resignation, he and his representative met with the administrative staff to discuss his position. Petitioner attempted to dissuade Falco from resigning without notice. Thereafter, the Association presented an alternative position. Falco was prepared to delay submitting his resignation to the Board if Saxon conducted an investigation of the performance evaluation process. These negotiations indicate that Falco's February 27 letter of resignation was not final. Falco's offer was rejected and his resignation was considered by the Board at its next scheduled meeting, March 23, 1998. On April 3, 1998, the Board filed a request, rather than an Order to Show Cause, before the Commissioner to suspend Falco's teaching certificate. The Commissioner notified the Board of the error and the request for certificate suspension was filed in the proper form on June 8, 1998. The Board argues that "form should not govern over substance." In these circumstances, I agree. Based on the evidence presented, I **CONCLUDE** that the Board acted promptly and that Dr. Falco has not been prejudiced. Therefore, in this matter, it is appropriate to relax the 90-day rule.

Summary Decision

Pursuant to *N.J.A.C.* 1:1-12.5(b), summary decision is appropriate:

> if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.

Summary decision in administrative proceedings parallels summary judgment in the courts. Summary judgment is:

> designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at a trial.
>
> [*Judson v. Peoples Bank and Trust Company of Westfield*, 17 *N.J.* 67, 74 (1954).]

In administrative proceedings, as in the courts, it is "the movant's burden to exclude any reasonable doubt as to the existence of any genuine issue of material fact." *Id.* at 74. Thus, "[a]ll inferences of doubt are drawn against the movant in favor of the opponent of the motion. The papers supporting the motion are closely scrutinized and the opposing papers indulgently treated." *Id.* at 75.

The New Jersey Supreme Court in *Brill v. Guardian Life Insurance Co.*, 142 *N.J.* 520, 539-40 (1995), applied the summary judgment standard employed by the federal courts. Under *Brill*, once the movant has presented competent evidence tending to show the absence of any genuine issue for trial, the nonmovant must do more than simply create some doubts as to the material facts. Moreover, the nonmoving party cannot rely on disputed issues of fact that are insubstantial. Rather, *Brill* requires the nonmovant to raise a factual issue substantial enough to sustain a reasonable conclusion in the nonmovant's favor if a hearing were held. If the evidence, along with

reasonable inferences, could sustain a judgment in favor of the nonmovant the motion must be denied.

There is no automatic right of a local school board to a one-year suspension of a teacher's certificate. Indeed, *N.J.S.A.* 18A:26-10 provides:

> Any teaching staff member employed by a board of education, who shall, without the consent of the board, cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year.

Respondent does not dispute resigning without 60 days' notice to the Board. However, he believes that mitigating circumstances exist that should be presented to the trier of fact. Respondent references his letter of resignation and his statement in Answer to the Order to Show Cause. Respondent submits that his medical condition is a disputed mitigating factor and a genuine issue of material fact.

The Board does not dispute Falco's contention that he suffers from a medical condition. However, the Board argues that as a matter of law, Falco's not being able to perform his duties due to a medical condition is not a mitigating factor for resignation without proper notice.

Based on the moving papers, the respondent's resignation, his communications with petitioner prior to March 23, 1998, and his Answer to the Order to Show Cause, I **CONCLUDE** that the primary and motivating reason for Falco's resignation was the fact that he disagreed with the evaluation of his performance. Although he may have been distressed over a poor evaluation, immediate resignation was an unacceptable response. Respondent had options. He could have requested a sick leave. Instead, he offered to withhold his resignation if the petitioner would agree to conduct "an immediate and thorough investigation" of the evaluation process. Petitioner declined respondent's offer.

I **CONCLUDE** that no genuine issues of material fact exist.

ORDER

It is hereby **ORDERED** that the motion for summary decision filed by the Board of Education of the Ramapo Indian Hills School District is **GRANTED**.

It is further **ORDERED** that the motion to dismiss filed by petitioner is **DENIED**.

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

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

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

April 7, 1999
DATE

Mumtaz Bari-Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

4/9/99
DATE

Debbie Antanaitis
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 13 1999
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	
ROBERT FALCO, BOARD OF	:	COMMISSIONER OF EDUCATION
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	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of respondent Falco were timely filed pursuant to *N.J.A.C.* 1:1-18.4.[1] The Board requested and was granted a short extension of time within which to submit reply exceptions and filed such replies in accordance with the established timeline.

Respondent excepts to the Administrative Law Judge's (ALJ) determination that the within petition of appeal was timely, contending, as he did below, that the triggering event which commenced the running of the 90-day filing period, pursuant to *N.J.A.C.* 6:24-1.2(c), was his resignation from his position on February 27, 1998, not the date the Board took formal action to accept such resignation. In this regard, he advances that *N.J.A.C.* 6:24-1.2(c) specifies,

> [t]he petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. (Respondent's Exceptions at p. 3)

[1]The Initial Decision erroneously lists respondent as *pro se* in this matter. The record, rather, confirms that he is represented by Linda Ganz Ott, Esq. (Bucceri and Pincus).

Pursuant to this regulatory provision, respondent avers:

> The petitioner must be aware of the action taken by the "district board of education, **individual party** or agency" in order to trigger the ninety (90) day rule. (emphasis added.) The key to the trigger date in a matter where a board of education seeks the suspension of a teacher's certification is when the teacher ceases to perform his or her duties, not when a resignation is accepted. Here, it is the action of the respondent that triggers the 90 day limitation period, not anything the Board does. It is the "other action" of an "individual party...which is the subject of the requested contested case hearing." *N.J.A.C.* 6:24-1.2(c). Therefore, it is irrelevant that a resignation can be rescinded before acceptance of that resignation by a board of education. (*Id.*)

Respondent, therefore, argues that as February 27, 1998 was the date which triggered the Board's cause of action herein, its filing for an Order to Show Cause with the Commissioner, some 101 days after this date, is untimely and must be dismissed. (Respondent's Exceptions at p. 5)

Respondent particularly objects to the ALJ's finding support for her determination that the Board's submission was timely in the letter from the Association to the Board dated March 2, 1998, which she found indicated that the parties were at that time engaged in negotiations about his resignation. In this regard, respondent urges:

> ***The letter was not from respondent, but from the Association president.*** There is nothing in the letter that indicates that respondent requested such actions or that he endorsed the request by the Association. The Association was concerned about the treatment of all science department staff as well as respondent. The Association president, not respondent, asked that the letter of resignation not be submitted to the Board before an investigation was completed. This letter should have no effect on a determination of the limitations period. (Respondent's Exceptions at p. 2)

Finally, respondent disputes the ALJ's concluding that relaxation of the 90-day rule was warranted by the circumstances existing in this matter should the Commissioner of Education determine that the triggering event was respondent's resignation date. (Respondent's Exceptions at p. 5) He contends that the limitation period of *N.J.A.C.* 6:24-1.2(c) is strictly enforced, there being few exceptions to stringent compliance with the rule. Respondent proffers that this rule "is only relaxed where it would

be inappropriate, unnecessary or unjust to strictly apply it." (Respondent's Exceptions at p. 6) Here, he advances:

> Based on February 27, 1998 as the trigger date, the petitioner had until May 28, 1998 to file its order to show cause. The ALJ notes that the petitioner incorrectly requested the suspension of respondent's certificate in an April 3, 1998 letter to the Commissioner of Education and by return letter dated April 7, 1998 petitioner was informed of the correct procedure for filing an order to show cause. I.D. at 8. This mistake is not an "exceptional circumstance" or "'compelling'reason" to relax the rules. I.D. at 7. There was still sufficient time to file the order to show cause before the May 28, 1998 deadline. (*Id.*)

Respondent, therefore, urges that the Initial Decision be reversed and all proceedings in this matter be dismissed with prejudice. (*Id.*)

In reply exceptions the Board advances that the ALJ correctly determined that the controversy in this matter arose on March 23, 1998, when the Board took official action on respondent's resignation. As such, it urges, she correctly found that the Board's Order to Show Cause, filed prior to the expiration of 90 days from this date, was timely pursuant to *N.J.A.C.* 6:24-1.2(c). (Board's Reply Exceptions at p. 11) In support of this position it argues that *N.J.A.C.* 6:24-1.2(c), which specifies,

> [t]he petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a **final** order, ruling or other action by the district board of education *** (Emphasis added) (Board's Reply Exceptions at p. 5),

must be read and interpreted in conjunction with *N.J.S.A.* 18A:26-10, the provision under which the within cause of action arose. *N.J.S.A.* 18A:26-10 states:

> Any teaching staff member employed by a board of education, who shall, *without the consent of the board*, cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year. (Emphasis added) (*Id.*)

The Board proffers it is clear from a reasoned examination that

> the final action which is the subject of the contested case herein arose when the Board took its official action on March 23, 1998. Until it

> took that action there existed no case or controversy subject to the Commissioner's jurisdiction under *N.J.S.A.* 18A:26-10. The latter section specifically provides that it is only applicable where the cessation of duties is without the consent of the Board. As such, there can be no violation [of] *N.J.S.A.* 18A:26-10 where the Board consents. (*Id.*)

Consequently, the Board opines, unless and until the Board took formal action to withhold its consent to respondent's resignation, such resignation was of no effect vis-à-vis the controversy at issue here. The Board further proffers that March 23, 1998 was the first date subsequent to respondent's resignation that it was empowered to act as a body[2], and, as such, the within controversy arose at this time, thereby triggering the 90-day appeal period specified by *N.J.A.C.* 6:24-1.2(c). Further buttressing this position, the Board reasons, is the fact that it is well-settled law "that a resignation is of no effect and can be rescinded at any time prior to Board acceptance. *Kozak v. Board of Education of the Township of Waterford*, 1976 *S.L.D.* 633.***" (Board's Reply Exceptions at p. 6) Thus, it contends, respondent could have unilaterally rescinded his resignation up to the point of the Board's formal action. (*Id.*) It further proffers that, contrary to respondent's exception arguments, "[t]he non-final status of [his] resignation when submitted" (*id.*) is additionally evidenced by the Association's March 2, 1998 request that the Board defer action on this resignation. (Board's Reply Exceptions at p. 7) Respondent's exception disclaimer of the fact that the Association was acting on his behalf, the Board advances, 1) is clearly without support in the record, 2) was not raised below and, thus, cannot be considered (see *N.J.A.C.* 1:1-18.4(c)), and 3) is fully belied by the fact that respondent copied the Association President on his Answer to the within petition, all of which substantiate that respondent was represented by the Association from the inception of this matter. (*Id.*) It must, therefore, be concluded, it urges, that respondent has waived and is estopped from now asserting that the Association in its March 2, 1998 letter was not acting on his behalf. (*Id.*)

[2]It is noted that the Board's submissions below and its exceptions here report that the meeting conducted on March 9, 1998 was a "work meeting" at which no official action could be taken.

The Board next maintains that the ALJ appropriately concluded that, even if the Commissioner were to determine that the 90-day filing period commenced on the date of respondent's resignation, the circumstances of this matter warrant the relaxation of this limitation period. (Board's Reply Exceptions at p. 8) It asserts that the limitation period should be viewed in light of the statute under which the instant controversy arose, the facts existing in the matter, and with due consideration to the purpose of such limitation period, *i.e.*, "to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend***" and "'to penalize dilatoriness and serve as a measure of repose'"***. (*Id. citing Kaprow v. Board of Educ. of Berkeley Tp.*, 131 *N.J.* 572, 587 (1993) (citations omitted)) Here, it argues, there was no undue delay in the Board's consideration of respondent's resignation, it having acted at the first regularly scheduled meeting subsequent to the event. Almost immediately thereafter, on April 3, 1998, the Board filed a request for suspension of respondent's certificate with the Commissioner. Notwithstanding that such request was not in the form of an Order to Show Cause as is required, penalization for such an "oversight," it argues, would place form over substance. (Board's Reply Exceptions at p. 9) Consequently, the Board avows, as it acted promptly and respondent was not prejudiced, relaxation of the limitation period is appropriate here. (Board's Reply Exceptions at p. 11)

Upon his independent and careful review of the record in this matter, the Commissioner concurs with the determination of the ALJ that the within Order to Show Cause was timely filed and with her conclusion that summary decision in this matter is appropriately granted to the Board.

Initially, in considering the timeliness of the Order to Show Cause, the Commissioner observes that the quintessence of an action brought pursuant to *N.J.S.A.* 18A:26-10 is that, upon the existence of certain circumstances, a board moves before the Commissioner requesting suspension of a teaching staff member's certification for unprofessional conduct. Specifically, the law provides:

> Any teaching staff member employed by a board of education, who shall, without the consent of the board, cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year.

The Commissioner finds that the language of this controlling statute is clear, concise and explicit as to the requisite conditions for a cause of action to arise under its terms, namely, 1) a teaching staff member ceases to perform his duties before the expiration of the term of his employment, **and** 2) the board does not consent to the teaching staff member's action. As such, the Commissioner cannot accept respondent's contention that the cause of action in this matter arose upon his cessation of employment on February 27, 1998, as he determines that, by its plain language, the governing provision herein additionally contemplates, as a condition precedent to the arising of a cause of action under its terms, the Board's refusal to accept respondent's resignation under the conditions proffered. That this additional component is necessary in order to initiate a cause of action here is particularly evident when due consideration is given to the fact that if, at any time prior to the Board formally acting to consider his resignation, respondent had officially rescinded such resignation as was his right to do (see *Kozak, supra*), or if the Board had, for whatever reason, accepted it as offered, no cause of action would have arisen under *N.J.S.A.* 18A:26-10. Remaining cognizant of the fact that boards of education are empowered to act only as a body and only in accordance with the laws which govern their operation (see *N.J.S.A.* 18A:10-1 *et seq.*), the Commissioner finds that the within Board acted with no undue delay when, at its official meeting on March 23, 1998, it resolved to reject respondent's resignation as offered and decided as a body to pursue its rights under the statute. It was, therefore, on March 23, 1998, the Commissioner determines, that the final action contemplated by *N.J.A.C.* 6:24-1.2(c) occurred, providing the Board with 90 days from that date, or

until June 21, 1998, to file its Order to Show Cause. Consequently, such submission, made on June 16, 1998, was timely.[3]

Moving to consideration of this matter on its merits, the Commissioner concurs with the ALJ that the grant of summary decision to the Board is appropriate under the circumstances existing here, as he is persuaded by the record before him that no genuine issue of material fact exists in this matter. (*Brill, supra*) To the contrary, the relevant facts here are uncontested, *i.e.*, respondent resigned without giving the requisite notice, and the Board did not accept his resignation as proffered. Accordingly, pursuant to *N.J.S.A.* 18A:26-10, respondent is guilty of unprofessional conduct.

The Commissioner recognizes that the governing statute in this matter does not dictate the automatic suspension of a teacher's certificate upon satisfaction of its terms but, rather, vests the Commissioner with the discretion to withhold such penalty if he feels the particular circumstances of the case so warrant. *Board of Education of Black Horse Pike Regional School District v. Mooney*, 1984 *S.L.D.* 810. In opposing the grant of summary decision here, it is noted that the respondent argued below that his medical condition is a disputed mitigating factor in connection with his resignation and, due to the discretion afforded the Commissioner in determining whether or not a penalty should be imposed for his admitted violation of law, "[t]his disputed mitigating factor is a genuine, material issue of fact to be determined by a trier of fact" and clearly precludes the grant of summary decision. (Respondent's Letter Brief, dated March 4, 1999 at p. 6) The Commissioner finds such an argument without merit, as existing case law evidences that circumstances which justify giving relief to a teaching staff member who has violated the provisions of *N.J.S.A.* 18A:26-10 are rare. See, *e.g.*, *Penns Grove-Carneys Point Board of Education v. Leinen*, 94 *N.J.A.R.* 2d (EDU) 405, 407 (even when health issues are involved); *In the Matter of the Revocation of the Teacher's*

[3]In light of the Commissioner's determination that the petition in this matter was timely filed, he finds it unnecessary to reach to the ALJ's initial decision discussion as to whether circumstances here warrant the relaxation of the 90-day rule.

Certificate of Jerome Finkelstein, 1960 *S.L.D.* 75; and *Collingswood Borough Board of Education v. Cashel*, 1988 *S.L.D.* 1898.

Moreover, the Commissioner finds the circumstances in this matter analogous to those which existed in *In the Matter of the Suspension of the Teacher Certificate of Lance Cronmiller*, 1970 *S.L.D.* 147, 148 where, after he had received expressions of dissatisfaction from a pupil and her mother, and believing that he, subsequently, failed to receive the support he expected from his colleagues and superiors, the respondent concluded that he had been placed in an untenable position which induced him to resign immediately and without notice. In ordering the revocation of this respondent's certificate for a year, the Commissioner stated:

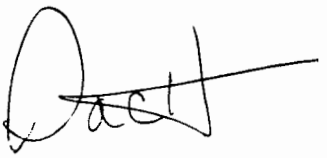
> ***The provocation under which he acted, whether fancied or real, is not relevant. Whatever feelings the teacher may have had cannot constitute a valid excuse for flouting the law and unilaterally abrogating the terms of his employment. Moreover, the teacher had avenues of appeal by which he could have sought a resolution of his grievances which he failed to employ. Nor did he attempt to arrange terms under which he could be relieved of his duties, obtain an early release, or in any other way reach an agreement. Instead, he walked off the job. Under such circumstances the Commissioner can find no justification for or condonation of the teacher's actions. (at 148)

The record here indicates that respondent abruptly resigned subsequent to receiving what he perceived as a negative evaluation which he contends caused him emotional stress so affecting his health that he could not continue working. The Commissioner determines that, while it is reasonable to conclude that an individual who experiences a negative evaluation would suffer emotional stress, immediate resignation is an unacceptable response.

Accordingly, the initial decision of the OAL is affirmed for the reasons stated therein and amplified above. The Commissioner determines that Robert Falco failed to fulfill the terms of his employment with the Board and violated the law by failing to give 60 days' notice of his intent to terminate his employment without the approval of the Board. He further finds such behavior to be unprofessional conduct necessitating the suspension of his certificate for the full period of time permitted by *N.J.S.A.* 18A:26-10. It is, therefore, ordered that Robert Falco's certificate be

suspended for a period of one year as of the date of this decision. By copy of this decision, the State Board of Examiners is so notified.[4]

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

[4] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

May 24,1999
Date of Mailing, May 24, 1999

166-99

MARY ANN PINTO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

May 24, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 960-97
AGENCY DKT. NO. 9-1/97

MARY ANN PINTO,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,
Respondent.

Kathleen A. Naprstek, Esq., for petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

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

Record Closed: April 6, 1999 Decided: April 7, 1999

BEFORE **ANTHONY T. BRUNO**, ALJ:

This matter was transmitted to the Office of Administrative Law on February 27, 1997, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

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

April 7, 1999
DATE

ANTHONY T. BRUNO, ALJ

Receipt Acknowledged:

4/9/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 12 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

tmp

SETTLEMENT AGREEMENT

This Agreement is made by and between Mary Ann Pinto (herein, "Ms. Pinto") and the Board of Education of the Middletown Township School District (herein, "Board of Education").

WHEREAS, the Board of Education is legally charged with the effective management and operation of the Middletown Township School District (herein, School District"); and

WHEREAS, Ms. Pinto is an employee of the School District; and

WHEREAS, Ms. Pinto has instituted an action against the Board of Education before the Commissioner of Education captioned Mary Ann Pinto v. Board of Education of the Township of Middletown, Monmouth County, Agency Ref. No. 9-1/97, OAL Dkt. No. EDUOR 00960-97S, wherein she alleges an unlawful denial of benefits under N.J.S.A. 18A:30-2.1; and

WHEREAS, the Board of Education has filed an Answer in the aforementioned action denying any wrongdoing, on its part; and

WHEREAS, the only issue that remains pending for resolution in the aforementioned action concerns the availability to Ms. Pinto of statutory benefits for three (3) specific pay periods, namely, the pay periods ending November 30, December 15, and December 31, 1997; and

WHEREAS, the resolution of the aforementioned issue turns upon the resolution of another issue, which is currently pending

before a Workers' Compensation Court in a proceeding involving these same parties, namely, whether an absence period commencing on March 25, 1997, was caused by a new medical condition or a continuation of the medical condition which gave rise to a period of absence that commenced on October 17, 1996; and

WHEREAS, Ms. Pinto and the Board of Education now wish to resolve the action pending before the Commissioner of Education without the need for further litigation;

NOW, THEREFORE, in consideration of the mutual covenants and promises set forth below, Ms. Pinto and the Board of Education agree to the following:

1. Ms. Pinto shall forthwith withdraw the Petition of Appeal filed with the Commissioner of Education, with prejudice, and shall provide Counsel for the Board of Education with a copy of documentation evidencing same.
2. Subject to any appeal filed therefrom, Ms. Pinto and the Board of Education shall be bound by the decision to be rendered by the Workers' Compensation Court on the aforementioned issue, as it relates to actions required to be taken regarding the aforementioned pay periods.
3. Ms. Pinto permanently releases any and all claims, demands, rights and causes of action that she may now, or in the future, have against the Board of Education or its officers, agents and employees, relating to the subject matter encompassed by the Petition of Appeal filed with the Commissioner of Education.

4. To the extent permitted by law, the parties to this Agreement and their representatives shall keep its terms confidential.

5. This Agreement does not constitute an admission of liability or wrongdoing by either party. In addition, it shall not be cited as precedent, or be used in any future legal proceeding (except for the enforcement of its terms), by either party or their representatives.

6. Each party has had an ample opportunity to review this Agreement and to consult with an attorney, prior to signing it.

7. The Agreement constitutes the parties' entire understanding and agreement on the subjects addressed herein.

8. The Agreement shall be governed by, and is subject to, the laws of the State of New Jersey.

Mary Ann Pinto
MARY ANN PINTO

Sworn to, and subscribed before me, on this 26 day of February, 1999.

Cindy R. Herrera
CINDY R. HERRERA
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires June 17, 2003

JOHN JOHNSON, President
Board of Education

Sworn to, and subscribed before me, on this ____ day of February, 1999.

OAL DKT. NO. EDU 960-97
AGENCY DKT. NO. 9-1/97

MARY ANN PINTO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record, settlement agreement and initial decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.
May 24, 1999
Date of Mailing, May 24, 1999

167-99

NEWARK NURSES ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

May 24, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5699-98

AGENCY DKT. NO. 138-5/98

NEWARK NURSES ASSOCIATION,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT

OF THE CITY OF NEWARK, ESSEX COUNTY,

Respondent.

Randi Doner-April, Esq., for petitioner

(Balk, Oxfeld, Mandell & Cohen, attorneys)

Cherie L. Maxwell, Esq., for respondent
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: March 31, 1999 Decided: April 7, 1999

BEFORE **ELINOR R. REINER**, ALJ:

On May 14, 1998, petitioner, Newark Nurses Association, filed a petition of appeal with the Commissioner of Education, alleging that respondent failed to properly pay school nurses pursuant to *N.J.S.A.* 18A:29-4.2. On June 8, 1998, respondent filed an answer alleging that the petition failed to state a claim upon which relief could be granted.

On June 25, 1998, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law as a contested

case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.*. 52:14F-1 to -13. The matter was assigned to the undersigned judge on August 24, 1998, and a telephone prehearing conference scheduled for October 26, 1998. The prehearing conference was held on that date and the issues were isolated. The parties agreed that a hearing would not be required in this matter and contemplated filing cross-motions for summary decision. Prior to the due date for those submissions, the undersigned was advised of a tentative settlement. As a result of settlement conferences held between the parties, a settlement was reached.

The parties have agreed to settle this matter and have prepared the attached Settlement Agreement indicating the terms of settlement.

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

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

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

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

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

1. The Board guarantees that the payment of increments shall begin by December 23, 1998.

2. The Board guarantees that full retroactive checks for increments shall be paid in a separate check in the second pay period in January 1999.

3. Upon execution of this Agreement by the Board, the Association will withdraw the Petition of Appeal in this matter, with prejudice.

4. Upon execution of this Agreement by the Board, the Association will withdraw the unfair practice charge bearing docket number CO-H-98-409 currently pending before the Public Employment Relations Commission.

BALK, OXFELD, MANDELL & COHEN
Attorneys for Petitioner
By:

RANDI DONER APRIL

Dated: 3/29/99

SILLS, CUMMIS, ZUCKERMAN, RADIN, TISCHMAN, EPSTEIN & GROSS
Attorneys for Respondent
By:

CHERIE L. MAXWELL

Dated: 1/27/99

OAL DKT. NO. EDU 5699-98
AGENCY DKT. NO. 138-5/98

NEWARK NURSES ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, settlement agreement and initial decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

May 24, 1999
Date of Mailing, May 24, 1999

R.S., on behalf of minor child, C.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

May 28, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 389-99
AGENCY DKT. NO. 560-12/98

R. S. ON BEHALF OF MINOR CHILD, C.S.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK, MIDDLESEX COUNTY,
Respondent.

Richard Lupo, Esq., for petitioner (Simon and Lupo, attorneys)

Martin S. Goldin, Esq., for respondent (Borrus, Goldin, Foley, Vignuolo, Hyman, Stahl & Clarkin, attorneys)

Record Closed: April 8, 1999 Decided: April 9, 1999

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter was transmitted to the Office of Administrative Law on February 1, 1999, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

April 9, 1999
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

April 13, 1999
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 14 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cc

1999 APR -8 A 10:34

BORRUS, GOLDIN, FOLEY, VIGNUOLO, HYMAN, STAHL & CLARKIN, P.C.
2875 U.S. Highway #1
Post Office Box #7463
North Brunswick, New Jersey 08902
Attorneys for Respondent
(732) 422-1000

REGINA SHULAS, on behalf of the minor child, CODY SHULAS	:	BEFORE THE COMMISSIONER OF EDUCATION
Petitioner,	:	Docket No. 560-12/98
v.	:	
NORTH BRUNSWICK TOWNSHIP BOARD OF EDUCATION	:	CIVIL ACTION
Respondent.	:	STIPULATION OF SETTLEMENT

The parties hereto, through their respective counsel (Simon and Lupo, Esqs., attorneys for the petitioner; and Borrus, Goldin, Foley, Vignuolo, Hyman, Stahl & Clarkin, P.C., attorneys for the respondent), having amicably resolved all issues, the parties hereto hereby consent to the entry of an order containing the following terms, provisions and conditions:

1. Both the petition and the counterclaim filed herein are hereby dismissed, with prejudice;

2. The petitioner, Regina Shulas, shall pay directly to the respondent, the North Brunswick Township Board of Education, the sum of $600.00. The said sum shall be paid in

BORRUS, GOLDIN, FOLEY, VIGNUOLO, HYMAN, STAHL & CLARKIN
A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW
2875 US HIGHWAY #1
P.O. BOX 7463
NORTH BRUNSWICK, N.J. 08902

six (6) equal monthly installments of $100.00 each, beginning April 1, 1999 and continuing on the first day of each and every month thereafter for a total of six (6) months.

The undersigned hereby consent to the form, entry, terms, provisions and conditions of the within stipulation of settlement.

NORTH BRUNSWICK TOWNSHIP BOARD OF EDUCATION, Respondent

REGINA SHULAS, Petitioner

By: Richard Novak, President

The undersigned hereby consent to the form and entry of the within stipulation of settlement.

SIMON & LUPO, ESQS.
Attorneys for Petitioner

By: Richard Lupo, Esq.

BORRUS, GOLDIN, FOLEY, VIGNUC , HYMAN, STAHL & CLARKIN, P.C.
Attorneys for Respondent

By: Martin S. Goldin, Esq.

BORRUS, GOLDIN,
FOLEY, VIGNUOLO,
HYMAN, STAHL
& CLARKIN
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OAL DKT. NO. EDU 389-99
AGENCY DKT. NO. 560-12/98

R.S., on behalf of minor child, C.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, stipulation of settlement, and initial decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.
May 28,1999
Date of Mailing, May 28,1999

169-99

N.C., on behalf of minor children, M.P. and J.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

May 28, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9813-98
Agency Dkt. No. 411-9/98

N.C. ON BEHALF OF THE MINOR CHILDREN,
M.P. AND J.P.,
Petitioner,
v.
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT
Respondents/Counterclaimant.

N.C., *pro se*

Joanne L. Butler, Esq., for respondent/counterclaimant
(Schenck, Price, Smith and King, attorneys)

Record Closed: April 6, 1999 Decided: April 9, 1999

BEFORE **SEBASTIAN GAETA, JR.**, ALJ:

STATEMENT OF CASE

Petitioner filed with the Commissioner of Education a petition asserting that the respondent Board of Education had denied to M.P. and J.P. a free education. Respondent filed an answer and a counterclaim for tuition costs for the period of alleged ineligible attendance by M.P. and J.P. in respondent's schools.

Hearings were scheduled to commence on March 23, 1999. Prior to the hearings, the parties indicated that the matter would be amicably settled. On April 6, 1999, a Stipulation of Settlement and Mutual Dismissal of Petition and Counterclaim, signed by N.C. and a representative of respondent, was received at the Office of Administrative Law.

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

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

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

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

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

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

April 9, 1999
DATE

Sebastian Gaeta
SEBASTIAN GAETA, JR., ALJ

Receipt Acknowledged:

4/14/99
DATE

Debbie Astanasio/ps
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 16 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cb

SCHENCK, PRICE, SMITH & KING
10 Washington Street
P. O. Box 905
Morristown, New Jersey 07963-0905
(201) 539-1000
Attorneys for South Orange and Maplewood Board of Education

N.C. ON BEHALF OF THE MINOR CHILDREN, M.P. AND J.P., **Petitioner,** **v.** **BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT** **Respondent/Counterclaimant.**	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DKT NO. EDUOS 09813-98N** **Agency Ref. No. 411-9/98** **STIPULATION OF SETTLEMENT AND MUTUAL DISMISSAL OF PETITION AND COUNTERCLAIM**

Petitioner Nadine Colas and Respondent/Counterclaimant Board of Education of the School District of South Orange and Maplewood, herein stipulate as follows:

1. This settlement is being made without any admission of liability or wrongdoing on the part of any party and is for the purpose of amicably resolving this dispute. The parties specifically deny any wrongdoing or liability relating to any other party's claim.

2. The parties waive any and all claims which were or could have been asserted in the within action or any other action, including attorneys fees and damages pursuant to any federal or State constitutional or civil rights claims, including 42 U.S.C. 1983, and specifically release the other party from any claims arising out of or related to these claims.

3. As a result of the foregoing, Petitioner Colas hereby withdraws the Petition filed pursuant to N.J.S.A. 18A:38-1, with prejudice, and Respondent/Counterclaimant Board hereby withdraws its Counterclaim pursuant to N.J.S.A. 18A:38-1, with prejudice.

Nadine Colas
NADINE COLAS

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT

Document #: 358386/JLB

OAL DKT. NO. EDU 9813-98
AGENCY DKT. NO. 411-9/98

N.C., on behalf of minor children, M.P. and J.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, stipulation of settlement and mutual dismissal, and initial decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

May 28, 1999
Date of Mailing, May 28, 1999

170-99

IN THE MATTER OF THE TENURE	:	
HEARING OF ALLEN KING, STATE-	:	
OPERATED SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
CITY OF NEWARK, ESSEX COUNTY.	:	DECISION
	:	

June 1, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5075-98
AGENCY DKT. NO. 26-2/98

IN THE MATTER OF THE TENURE HEARING OF ALLEN KING

Cherie L. Maxwell, Esq. for petitioner
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Eugene G. Liss, Esq., for respondent,

Record Closed: April 12, 1999 Decided: April 12, 1999

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

Statement of the Case

This matter involves tenure charges of unbecoming conduct certified by the State-Operated School District of the City of Newark ("District") against Allen King under the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 to -18.1.

Allen King is a tenured social studies teacher employed by the District. By resolution adopted on January 29, 1998, the District found the existence of probable cause to certify tenure charges which, if true, are sufficient to warrant dismissal or reduction in salary. Basically, the District accused Mr. King of making inappropriate sexual comments to his students and fellow staff members and one instance of

improper touching of a female student. Mr. King has consistently denied the charges against him.

On February 3, 1998, the District filed its written tenure charges with the Commissioner of Education ("Commissioner"). Mr. King filed his answer on April 30, 1998. Subsequently, on May 19, 1998, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for a determination as a contested case.

Both parties have agreed to a proposed settlement, subject to approval by the Commissioner. In accordance with the decision of the State Board of Education in *Cardonick v. Brooklawn Bd. of Ed.*, 1983 *S.L.D.* ___ (St. Bd. April 6, 1983), the record of any proposed settlement must include:

> . . . the nature of the charges, circumstances justifying the settlement, consent or authorization by the Board of Education and the teacher to the proposed agreement, the Administrative Law Judge's finding that the teacher entered into the agreement with a full understanding of his rights, and [a finding] that the agreement is consistent with the public interest.

On March 22, 1999, the OAL held a public hearing on the issue of whether or not the proposed settlement should be accepted. Counsel for both parties set forth on the record the reasons why settlement would be in the public interest. Mr. King testified that he fully understood and voluntarily agreed to the terms of settlement. In addition, the parties have prepared a stipulation of settlement, which is attached and fully incorporated in this decision.

Based on my review of the record, I **FIND** that the proposed settlement is consistent with the public interest for the following reasons:

1. Allen King has been employed as a teacher by the District or its predecessor for fourteen years. Except for the incidents resulting in the tenure charges, he has received satisfactory evaluations of his performance as a teacher.

2. There are several evidentiary problems that will make it difficult for the District to prove its allegations. Most of the witnesses are former students who no longer attend school in the District. Some of them have moved and will be difficult to locate. Others are unwilling to cooperate with the District and will not voluntarily testify against Mr. King.

3. Since the single instance of alleged improper touching involved an adult student, the Division of Youth and Family Services declined to investigate the circumstances.

4. At the time of the alleged incidents, Mr. King was assigned to teach at an alternative school for youngsters who had exhibited serious behavior problems. Several of the proposed witnesses have had encounters with law enforcement authorities or have criminal records.

5. If a hearing is necessary, the District intends to call about eight witnesses and the teacher intends to call about eight witnesses. Therefore, the hearing will last at least six days and may not finish within the time allotted.

6. Under the proposed terms of settlement, Mr. King will resign from his position effective December 31, 1999 and will remain on administrative leave until that time. Any payment to Mr. King will be offset by his accrued leave, including sick days and personal leave.

7. The parties estimate that Mr. King's salary until the date of his resignation will be approximately $22,000 and that his accumulated leave is worth approximately $8,800, so that the net payment amounts to roughly $13,200.

8. Even if the matter proceeds to hearing, it is unlikely that a final decision will be rendered prior to the end of the current school year. Meanwhile, Mr. King is entitled by law to a continuation of his pay pending the outcome of the hearing.

9. From the District's viewpoint, the outcome under the settlement will be essentially the same as if it prevailed after a lengthy and costly tenure hearing. Monies spent on litigation costs could be put to better use for the benefit of the children of the City of Newark.

10. Before entering into this agreement, Mr. King fully understood his rights and had an adequate opportunity to consult with legal counsel.

11. Mr. King is aware that, pursuant to *N.J.A.C.* 6:11-3.6, the Commissioner may refer this matter to the State Board of Examiners for any licensing action which it may deem appropriate.

12. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that the terms of settlement are in the public interest.

It is **ORDERED** that the parties comply with the settlement terms and that the proceedings are hereby concluded.

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

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

April 13, 1999
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

4/14/99
DATE

Debbie Antanaitis/sgp
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 16 1999
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

al

SILLS CUMMIS RADIN TISCHMAN
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One Riverfront Plaza
Newark, New Jersey 07102-5400
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Attorneys for State-Operated
School District of the City of Newark

COMMISSIONER OF EDUCATION
OAL Docket No. EDUOR 5075-98
Agency Ref. No. 26-2/98

In the Matter of the
Tenure Hearing of

Allen King

VOLUNTARY SETTLEMENT AGREEMENT, WAIVER AND RELEASE

The State-Operated School District of the City of Newark ("Newark" or "District") and Allen King ("King") agree to the following terms in full resolution of this matter:

WHEREAS, King disputes the allegations of the tenure charges; and

WHEREAS, the parties agree that it is in the public interest to enter into this agreement in resolution of said charges in order to avoid the uncertainty and expense of litigation; and

WHEREAS, the parties further agree that the terms of this agreement will not present any risk of harm to students and/or the safe operation of the school district.

5a

NOW, THEREFORE, the parties agree as follows:

1. King agrees to submit to the District, in writing and upon approval of this Agreement, a resignation from his employment effective December 31, 1999.

2. King shall be placed on paid administrative leave for the period from the execution of this Agreement through December 31, 1999. King shall exhaust all accrued leave during this administrative leave.

3. King acknowledges that the payments reflected in this Agreement constitute the full financial obligation of the District and that he shall receive no additional payments. In exchange for the above consideration, King, on behalf of himself, his heirs, successors and assigns, hereby fully releases and forever discharges the District, its representatives, agents, officers and employees, for any and all actions, claims and liabilities of whatsoever kind in character, that he has had or may now have against any of them, including without limitation, any and all claims related to his employment with the District or the termination of that employment.

4. King acknowledges, as required under *In re Cardonick*, that, despite the approval of this Agreement, the issue of possible revocation of his teaching certificate may be considered by the State Board of Examiners.

5. This Agreement is subject to the approval of the State District Superintendent and the Commissioner of Education. Upon approval of this Agreement, the District agrees that the tenure charges against King shall be withdrawn.

6. The parties enter this Agreement voluntarily and without coercion, after consultation with their respective counsel.

Allen King

Dated: 3/22/99

Dated: March ____, 1999

State-Operated School District of the City of Newark

By: Barbara L. Hall

Dated: April 8th, 1999

OAL DKT. NO. EDU 5075-98
AGENCY DKT. NO. 26-2/98

IN THE MATTER OF THE TENURE	:	
HEARING OF ALLEN KING, STATE-	:	
OPERATED SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
CITY OF NEWARK, ESSEX COUNTY.	:	DECISION
	:	

The record, settlement agreement and initial decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement.* A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.
June 1, 1999
Date of Mailing, June 1, 1999

171-99

C.T., on behalf of minor child, R.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL SCHOOL DISTRICT NUMBER ONE, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

June 1, 1999

OAL DKT. NO. EDU 10334-98
AGENCY DKT. NO. 416-9/98

C.T., on behalf of minor child, R.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL SCHOOL DISTRICT NUMBER ONE, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of petitioner's failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on February 27, 1999, providing petitioner ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by the petitioner, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

June 1, 1999
Date of Mailing, June 1, 1999

172-99

RUBEN GONZALEZ, PAUL J. O'DONOHUE, CLAUDE CRAIG AND STEVEN G. BLOCK,

PETITIONERS,

V.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioners, employees of the Newark Board prior to takeover, argued they were terminated without notice, contrary to *N.J.S.A.* 18A:7A-44b and c. They sought reinstatement with back pay.

ALJ determined that petitioners' employment was terminated by the discretionary action of the State superintendent rather than abolishment of their positions pursuant to the takeover statute and, as at-will employees, they are not entitled to relief.

Commissioner adopted findings and determination in initial decision as his own. Matter was dismissed.

June 1, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. EDU 12388-95
12390-95; 12391-95 & 12394-95
AGENCY DKT. NOS. 444-11/95;
441-11/95; 442-11/95 & 443-11/95
(**CONSOLIDATED**)

RUBEN GONZALEZ, PAUL J. O'DONOHUE,
CLAUDE CRAIG AND STEVEN G. BLOCK,
Petitioners,
v.
STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK,
Respondent.

Philip Elberg, Esq., for petitioners (Medvin & Elberg, attorneys)

Perry L. Lattiboudere, Esq., for respondent (Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: February 23, 1999 Decided: April 9, 1999

BEFORE **DIANA C. SUKOVICH**, ALJ:

PROCEDURAL HISTORY

Ruben Gonzalez, E.d.D. (Gonzalez or petitioner), Paul J. O'Donohue (O'Donohue or petitioner), Steven G. Block (Block or petitioner), and Claude Craig

(Craig or petitioner) filed petitions with the State Department of Education (DOE), on November 15, 1995, contesting the terminations of their employment by the State-operated school district of the City of Newark (District or respondent). Respondent filed answers on December 6, 1995. The DOE transmitted the matters to the Office of Administrative Law on December 8, 1995 for determination as contested cases pursuant to *N.J.S.A.* 52:14F-1 to -13.

A prehearing conference was conducted on March 4, 1996, at which time it was agreed that the matters would be consolidated. An order to that effect was issued on March 7, 1996. Telephone conferences were conducted throughout the proceedings.

Various orders were issued by this judge and by the Commissioner of the DOE (Commissioner). Respondent filed a motion for summary decision; and petitioners, a cross-motion for summary decision. I issued an order denying the motions on January 10, 1997. The Commissioner issued a decision on motion on February 11, 1997.

Respondent filed another motion for summary decision on approximately April 7, 1997. This judge issued an order denying that motion on April 24, 1997. The Commissioner issued an order affirming the denial on May 12, 1997.

The parties also raised various evidentiary issues. On May 5, 1997, I orally denied a motion by petitioners to depose Dr. Beverly Hall (Hall); that ruling was memorialized by a letter order issued May 6, 1997. On May 9, 1997, this judge orally denied a motion by respondent to quash a subpoena served by petitioners upon Dr. Barbara Anderson (Anderson), an assistant commissioner with the DOE. The Commissioner issued an order affirming that ruling on May 14, 1997.

Counsel for the DOE asserted privileges on behalf of Anderson. I issued an order on October 1, 1997, requiring that the documents in question be provided for an *in camera* review. I issued an order on the merits on April 8, 1998. The Commissioner issued an order on April 27, 1998, affirming the April 8, 1998 order.

Hearings were conducted in May 19997 and July 1998. Petitioners and respondent filed post-hearing initial briefs on September 11 and September 15, 1998, respectively. Respondent filed a reply brief. At this judge's request, petitioners filed calculations of their claimed damages on November 24, 1998. The District filed a response on December 11, 1998. A telephone conference was thereafter conducted. I issued an order on February 23, 1999 regarding documents which petitioners requested be moved into evidence. The record is deemed closed on February 23, 1999.

NATURE OF THE CASE

On July 12, 1995, the DOE removed the Newark Board of Education (Board) and created a State-operated school district, pursuant to *N.J.S.A.* 18A:7A-34 *et seq.*, commonly referenced as the "Takeover Statute." Petitioners were employees of the Board prior to the takeover. Respondent terminated their employment on August 17, 1995.

Petitioners argue that they were terminated without notice, contrary to *N.J.S.A.* 18A:7A-44 and *N.J.S.A.* 18A:27-4.1, and that they therefore should be reinstated, with back pay. The District argues that those provisions are not applicable, that petitioners were "at will employees," before and after the takeover, and that they were not entitled to notice. The issue, broadly, is whether petitioners have proven their claims by a preponderance of the credible evidence.

FINDINGS OF FACT

This judge's order of January 10, 1997 denying the motions for summary decision set forth certain findings of fact and determined that a hearing should be conducted regarding the questions of whether petitioners fell within *N.J.S.A.* 18:7A-44a or c, whether respondent implemented a reorganization of central and administrative supervisory staff, pursuant to *N.J.S.A.* 18A:7A-44b, and what relief should be granted to petitioners if they prevail. In his February 11, 1997 decision, the Commissioner did

not disturb the findings of fact set forth in the January 10, 1997 order. Therefore, those findings, as well as findings based upon a review of the evidence subsequently offered by the parties, are incorporated herein.

Based upon a review of the entire record, I **FIND** the following to be facts.

Petitioners were at-will employees of the Board. O'Donohue was appointed by the Board to the position of Director of Purchasing and Warehousing, effective September 1, 1980. He served in that position until August 17, 1995. O'Donohue reported to Alonzo Kittrels (Kittrels), the Board's executive director of finance who, in turn, reported to the superintendent of schools.

The position of Director of Purchasing and Warehousing was an unclassified civil service position. O'Donohue did not have tenure in any position he held with the Board. O'Donohue was a central administrative or supervisory employee of the Board. His accomplishments included automating the district's financial management and procurement system, assuming responsibility for fixed asset management, and utilization of a warehousing system for textbooks.

Craig was employed by the Board effective May 4, 1973. From that date through June 1, 1989, he held various provisional positions under civil service statutes. The Board appointed Craig to the unclassified civil service position of Executive Director of Personnel, effective June 1, 1989. He was terminated from that position, effective August 23, 1991. The Board provisionally appointed Craig to the position of Hearing Officer, effective August 23, 1991. He remained in that provisional civil service appointment until August 17, 1995. Craig did not have civil service protection. Craig was not tenured in any position with the Board.

In his last position, Craig was employed in the Board's Office of Hearing Grievance. He was the Board's only hearing officer and heard approximately 500 cases annually. Craig never supervised any employees as a Hearing Officer. Craig

was a central administrative or supervisory employees of the Board. His average annual salary was approximately $75,000.

Block was appointed by the Board to the position of Executive Director, in the Office of Accountability and Quality Assurance, effective October 31, 1994. His position did not have civil service status, and Block had no tenure in that position with the Board. Block was a central administrative or supervisory employee of the Board. He reported directly to the executive superintendent.

Block's position related to supporting and augmenting the Board's efforts to implement reform in a program of comprehensive school improvement. His responsibilities included the provision and encouragement of reviews, inspections, evaluations, and analyses utilized by teachers and principals, in-school managers and technical personnel, and essential office staff. His accomplishments included the design and implementation of senior staff review of the quality of reform initiatives, a planning and development effort to bring a school quality review process to the school district, and development and initial implementation of a peer review program designed to provide reviews of the quality of plans by Board personnel prior to implementation.

Gonzalez was employed by the Board from 1979 until 1982, at which time he was asked to leave. From 1979 through 1982, he served as the Board's director of the English as a Second Language Program and Bilingual Education. Gonzalez was a central administrative or supervisory employee of the Board.

Gonzalez was appointed by the Board to the position of Executive Superintendent, effective July 1, 1993. He did not have tenure in any position with the Board and did not have civil service status. He was one of five Assistant Executive Superintendents, responsible for one of the five clusters of schools into which the district was divided. Gonzalez's supervised Cluster 4, that part of the City with the largest portion of Hispanic students.

Gonzalez oversaw all schools within Cluster 4, including operations and physical structures of the building. He worked closely with the principals and interfaced with the "community." (Gonzalez's direct testimony.) He reported directly to the Board's Superintendent of Schools and was responsible for sending various reports to the DOE regarding conditions in the schools in Cluster 4.

Hall was appointed as the State District Superintendent after the State Board of Education (State Board) removed the Board and created a State-operated school district. The State assumed control on or about July 12, 1995. At that time, Hall was appointed as Acting Superintendent for up to one year. The Board was eliminated upon the takeover of the district.

On July 13, 1995, Block was called to a meeting with the interim acting State Superintendent. Peter Catini (Catini), a DOE assistant commissioner, Nancy Kaplan (Kaplan), a Deputy Attorney General, and Anderson were also present. Block was asked to provide an undated letter of resignation and was assured that the incoming Acting State District Superintendent, Hall, would evaluate his job and performance and would, as a result, determine if he would be terminated, reassigned, or held-over.

Block would be retained in his position, or he could be reassigned. Block had no knowledge of any subsequent evaluations.

Approximately two weeks later, he met with Beatrice Collymore, an acting deputy state superintendent at the time. They had a "wide-ranging" conversation regarding reform in urban school districts and, to Block's perception, "seemed to be generally in agreement." Block "urged" her to facilitate a meeting between him and Hall. (Block's direct testimony). That was the only substantive conversation that Block had with individuals regarding the takeover.

On or about July 13, 1995, Craig attended a meeting with Anderson, who was then the acting superintendent of the District, Catini, and Kaplan. Anderson stated that "as a matter of procedure," she was requesting resignation letters from Board

employees and that she had determined from the State Department of Personnel that Craig previously did not have civil service status and that he was an "at-will employee." Anderson also indicated that she would be submitting the resignation letters to the incoming District superintendent. Craig discussed the various types of hearings he conducted. Catini noted that Craig had conducted an "extraordinary" number of hearings annually, which comment gave Craig "added confidence" that he would be retained. (Craig's direct testimony.)

Prior to the takeover, Craig believed that his employment could be terminated without notice if he did not perform his job "correctly." To his knowledge, the State was "working" on the takeover for one and one-half to two years prior to the actual implementation of the reorganization. Subsequent to the takeover, based upon the number of annual hearings in the school district, and the fact that he was the only hearing officer, Craig "assumed" that if he "acted properly," he would be retained as an employee of respondent. (*Ibid.*)

Before and after the takeover, O'Donohue had frequent contact with a Dr. Capello (Capello), who had assumed the position of director of finance. O'Donohue felt that he was "kind of led" to believe that he would have "no problem" related to the takeover. O'Donohue was aware that he had no civil service status, nor tenure, with the Board, and had felt that the status of his employment *vis-à-vis* the takeover was "nebulous." (O'Donohue's direct testimony.)

On July 13, 1995, O'Donohue, as well as other individuals, were called to a meeting at which resignation letters were requested. Someone told O'Donohue that he did not have civil service status nor tenure, and he responded that he needed his job. He was told by that individual that he/she would do what they could to "keep" him. (*Ibid.*)

On or about July 13, 1995, Gonzalez attended a meeting with Anderson, Catini, and someone from the Attorney General's office. He was asked to provide a letter of resignation.

On or about July 13, 1995, Gonzalez received a letter, dated July 13, 1995, from Anderson, the then Acting District Superintendent. This letter read as follows:

> As you know, as an 'at-will' employee, you serve at the pleasure of the Acting State District Superintendent. Your employment is, therefore, subject to termination at any time without cause. However, to facilitate any employment actions that may be taken during this transition period, I am requesting letters of resignation from all central office district staff that serve in an 'at-will' capacity in the Newark School District. As we discussed, I would like you to submit that letter of resignation to me by noon tomorrow, July 14, 1995. In the event your resignation is accepted, you will be notified in writing by the Acting State District Superintendent.
>
> Thank you for your anticipated cooperation in an orderly transition to state operation of the Newark School District.
>
> [Ex. P-7.]

On or about July 13, 1995, O'Donohue, Block and Craig received letters, dated July 13, 1995, from Anderson, similar to the letter sent to Gonzalez.

On or about July 13, 1995, Gonzalez submitted a letter of resignation to Anderson, dated July 13, 1995. That letter read as follows:

> As per your request, I am submitting my resignation as assistant executive superintendent, effective upon acceptance.
>
> [Ex. B to Randall Kator's certification in support of petitioners' cross-motion for summary decision.]

On or about July 13, 1995, O'Donohue, Block, and Craig submitted letters of resignation to Anderson similar to that submitted by Gonzalez.

At some point prior to July 17, 1995, an "introductory building-wide meeting" was conducted. Hall indicated that she would "evaluate things." Between early July and August 17, 1995, O'Donohue continued to have frequent meetings with Capello, in preparation for the coming school year. O'Donohue also had periodic contact with

Carol Perry (Perry), attended a meeting with Blackburn regarding various contracts previously entered into by the Board, had some contact with the Comptroller's office, and was requested by "State people" to write a "special contract." (O'Donohue's direct testimony.)

On or about July 17, 1995, petitioners received letters from the Commissioner dated July 17, 1995, which were sent to all employees of the District. The letters stated, in part, that:

> The administrators, teachers, and noninstructional employees of the Newark School District have a very special role to play in turning the district around quickly so that students can sense immediately that their future will be brighter. It is not the intention of the state to replace employees. Displaced administrators will have their tenure rights recognized within the district and those employees who are performing their duties satisfactorily for the students of Newark will remain employed.
>
> Improving the schools in Newark will be an extremely challenging task. I am a firm believer that the first and most important step in pursuing that success is the creation of a partnership among the state, the employees of the Newark School District, parents, and community leaders in the city.
>
> [Ex. P-1, pp. 1-2.]

Craig felt "even more comfortable" regarding his status upon receipt of that letter. (Craig's direct testimony.) Craig subsequently met with Hope Blackburn (Blackburn), a "casual" meeting. Blackburn was the Acting District General Counsel. They discussed Craig's hearing schedule and the number of hearings conducted. There were no discussions regarding any "reorganization" of the office of hearing examiner, nor of changes in Craig's status. Nor was Craig's prior job performance addressed. (*Ibid.*)

O'Donohue was "happy to receive the Commissioner's July 17, 1995 letter and felt that if he performed his job responsibilities satisfactorily, he had a "reasonably good chance of staying." (O'Donohue's direct testimony.)

On August 17, 1995, at approximately 11:00 a.m., Block was summoned to the Office of the Acting District Superintendent. Blackburn and Perry, the Acting District Chief of Staff, were present. Hall informed Block that she was accepting his letter of resignation. Hall indicated that Block had to vacate his office by 5 p.m. that day and that he would be entitled to any accrued vacation pay in lieu of days off. Block was "a little angry" when told his resignation was accepted. He queried what had transpired regarding "prior representations" pertinent to evaluations. Hall responded that "we decided to go in another direction." (Block's direct testimony.) Block left her office at that point.

Gonzalez received a letter from Hall, dated August 17, 1995, on August 17, 1995. That letter read as follows:

> This is to inform you that your letter of resignation dated July 13, 1995, from the position of Assistant Executive Superintendent has been accepted effective immediately. You are advised that you are entitled to assert a claim to any position or to placement upon a preferred eligibility list for any position to which you may be entitled within the district. District records indicate that you have no claim to any other position in the district. If you disagree, please advise me in writing no later than August 21, 1995, as to the position to which you claim an entitlement and the basis of that claim.
>
> Accordingly you are directed to vacate your office by the end of business today. You should report to Michael Popovitch to arrange to return all district property you currently possess. Please remove all of your personal belongings from the building.
>
> Be advised that you will be compensated for any unused accumulated vacation time. Thank you for your service to the district.
>
> [Ex. P-8.3.]

O'Donohue, Craig, and Block received similar letters on August 17, 1995.

On August 17, 1995, O'Donohue was told to report to Hall's office. Blackburn and Perry were present. Hall gave O'Donohue a letter accepting his resignation, advising that they "were going to go with their own teams." Hall told O'Donohue that he

had to vacate the building that day. Noticing that his name was spelled incorrectly on the letter, he "threw" it on Hall's desk. (O'Donohue's direct testimony.)

O'Donohue returned to his office and summoned the four individuals who reported to him, intending to speak with them regarding the matter. However, a State trooper entered his office and told him that he had to leave immediately but that he could pack items he wanted to take. At approximately 11:30 a.m., a policeman "escorted" O'Donohue from the building. (*Ibid.*)

On August 17, 1995, Gonzalez met with Blackburn, Hall, and Perry. Hall advised that she was accepting his letter of resignation and indicated that he would have the remainder of the day to vacate his office and that he could take his personal belongings with him. Hall did not state why his letter had been accepted, and Gonzalez did not ask her.

On August 23, 1995, as he was preparing for a hearing, Craig was told by a secretary to report to Hall's office. Blackburn and Perry were also present. There was a "stack" of letters on Hall's desk. She retrieved one and indicated that she had accepted Craig's letter of resignation. Craig queried whether he could "ask why," and Hall responded: "Nothing personal. We're just going in a different direction." Craig did not respond further because he was "shocked." (Craig's direct testimony.) Craig was advised that his employment would terminate the end of that day and that he had to vacate his office by that time.

Petitioners were never advised, neither prior nor subsequent to the takeover, that they did not perform their duties satisfactorily.

Kittrels was the executive superintendent of the Newark school district from 1977 until June of 1981. He was part of central administrative staff and supervised employees. Kittrels was in charge of the hiring and termination of employees. Some of the individuals reporting to Kittrels had civil service status or tenure, but not all. The

latter were part of a group of unclassified employees pursuant to the civil service system.

Prior to the takeover, unclassified employees were recruited by the Board's Department of Personnel, which made recommendations to Kittrels, who was responsible for ultimately making recommendations to the Board, which had authority to approve or disapprove his recommendations. Kittrels also made recommendations regarding terminations of employees to the Board, providing reasons for such recommendations. Board determinations in that respect were reached at Board meetings. Individuals affected could request a hearing before the Board. Employees were often given opportunities to resign, with the dates of resignations agreed upon by the Board and the employees.

Kittrels had a "contractual" relationship with the Board for the 1988/89 school year and until July 12, 1995. (Kittrels' direct testimony.) Upon the takeover of the District, on July 12, 1995, Kittrels was "escorted" from his place of employment. (Kittrels' testimony on cross-examination).

Eugene Campbell (Campbell) was an executive superintendent employed by the Board from December 1984 until 1995. He was involved in the employment and termination of individuals on the administrative and supervisory staff. He supervised petitioners and was involved in hiring them.

Campbell's experience with the employment and termination of individuals was similar to that of Kittrels. Recruiting activities were under the auspices of the Board's department of personnel. Campbell made recommendations to the Board regarding both employment and termination of individuals. However, the Board had the authority to make such determinations. The Board often reached agreements with individuals subject to termination for resignations upon a certain date. Subsequent to their initial hiring, Campbell made recommendations to the Board, on an annual basis, to "carry over" certain employees, including petitioners, to the next school year. (Campbell's

testimony on redirect examination.) Campbell never served as a supervisor in a State-operated school district.

At about the time of the takeover, Campbell attended meetings with DOE employees, including Catini and Anderson. They discussed the fact that individuals employed in curriculum, business and finance, and personnel were subject to Section 44a of the Takeover Statute (category a). Campbell believed that petitioners' positions were not deemed to be in Category a. To Campbell's knowledge, however, there were no written determinations of any conclusions reached in that respect by DOE personnel at the time. To Campbell's knowledge, individuals deemed to be in category a were not requested to file letters of resignation but " . . . were told to leave." (Campbell's supplemental direct testimony.) They were told that they would subsequently receive letters of termination. At some point, however, Campbell did submit a letter of resignation.

Randell Kator (Kator) commenced employment with the District on May 28, 1996 as an assistant superintendent for human relations. He was responsible for personnel administration, including benefits, labor relations, hiring, and disciplinary matters, pertinent to individuals in unclassified positions, non-instructional staff governed by civil service regulations.

At the time of Kator's employment by the District, there was no "traditional" board of education in the Newark school district. To his understanding, there were no requirements that the superintendent make recommendations to a board for termination of "at-will" employees, but that such employment could be terminated at the superintendent's "pleasure." (Kator's direct testimony.)

To Kator's understanding, "at-will" employees are higher-level management individuals employed by the District without the requirement of a competitive examination nor civil service review. Such individuals, also to his understanding, serve at the "pleasure" of the superintendent. Their employment can be terminated without notice and without reasons provided. (Kator's direct testimony.)

In July of 1996, the District engaged in reorganization of the central office. There was a "considerable review" of existing positions and how such would be reallocated after the reorganization. (*Ibid.*). The reorganization was implemented on July 19, 1996.

The title of director of purchasing no longer exists in the District. A new, unclassified, title was created, that of director of support services and transportation. The title encompasses responsibilities regarding purchasing, transportation, and mail services. Purchasing and transportation functions were consolidated during 1997. Subsequent to O'Donohue's termination, he was temporarily replaced by two State employees from the Division of the Treasury, who were assigned to the District. One functioned as the acting executive director of purchasing; and the other, as the acting executive assistant of purchasing. No individual permanently replaced O'Donohue, although the District was interviewing candidates during the pendency of the current matter.

Executive assistant superintendents are assigned to clusters of schools. Gonzalez was temporarily replaced by Lidia Silva, acting assistant executive superintendent, in September 1995. The structure of the school clusters was changed with the reorganization on July 19, 1996.

Subsequent to Craig's termination, the hearing officer position was temporarily filled by independent contractors. Subsequent to the reorganization, the functions of the position were divided among the director of labor relations and two independent contractors.

The position of director of the office of accountability and quality issuance no longer exists. It was eliminated at the time of the takeover. No individual replaced Block subsequent to his termination.

At the time of the termination of his employment, O'Donohue needed two additional years in the pension system to vest his pension. He subsequently unsuccessfully attempted to obtain employment with the State of New Jersey, which efforts were hindered, at least in part, by the fact that he did not meet certain residency requirements. O'Donohue resides in the State of New York.

Block is currently employed as the director of special projects at the Education Law Center (Center) in New Jersey. He is involved with continuing litigation against the State of New Jersey pertaining to school financing and educational reform at the local level, generally in urban school districts. Block initially sought employment subsequent to his termination by respondent but did not find the "perfect fit." (Block's direct testimony.) He received unemployment benefits for a period of time. Block had previously been employed by the Center, in approximately 1980, "on and off" for more than a year. (*Ibid.*) He recommenced employment with the Center in January of 1996.

At the time of the takeover, Block's annual salary was $77,000. He also received health insurance and pension benefits. His initial compensation with the Center was $60,000 annually. His annual salary as of July 1998 was $66,000.

Subsequent to his termination by respondent, Gonzalez engaged in some consulting activities. Although he executed "numerous" applications for employment, Gonzalez was essentially unemployed until 1998. He believes that his efforts to find employment were hindered because of an inability to provide documentation of evaluations of prior supervisors, which were, in his view, "confiscated" when the takeover occurred, and by an inability to explain his dismissal. (Gonzalez's direct testimony.)

At the time of the termination, Gonzalez's annual salary was $89,000. He also received pension and health insurance benefits. Gonzalez commenced employment with the New Brunswick Board of Education in February 1998. His annual salary is $85,000.

Craig had several employment-related interviews after his termination but believes that difficulties in explaining why he was terminated were a "detriment" to obtaining other employment. Before his employment was terminated, Craig formed a corporation to facilitate efforts to conduct a consulting business. He obtained a "couple of minor contracts." (Craig's direct testimony.)

Craig's pension from the school district was vested after ten years of employment. After twenty-five years of service, and upon obtaining the age of fifty-five, he would have been able to obtain "a full pension" based upon the average of his three highest years' salaries. At the time of his termination, Craig needed two additional years in the pension system to obtain a full pension, a goal for which he "had been working toward." He withdrew $55,00 in his pension fund "in order to survive." (*Ibid.*) He is therefore not eligible to receive a pension. No individual required that Craig withdraw monies from his pension fund as a condition of filing a letter of resignation with the district.

Craig's annual salary at the time of his termination by respondent was $65,000. He too received pension and health insurance benefits. Craig commenced employment with the Newark Housing Authority on September 30, 1997. His annual salary is $50,000.

At the time of the termination of his employment, O'Donohue was 59 years old, and his annual salary was $88,776. He received health insurance and pension benefits.

DISCUSSION

The Takeover Statute provides that whenever the Commissioner determines, after the issuance of an administrative order, that a local school district has failed to assure a thorough and efficient system of education, the State Board may issue an administrative order removing the local district board of education and creating a State-

operated school district. Such school district shall become effective immediately upon issuance of the State Board's order. *N.J.S.A.* 18A:7A-34.

The schools of a State-operated school district shall be conducted by and under supervision of a State District Superintendent of schools, appointed by the State Board upon recommendation of the Commissioner. The State District Superintendent shall perform all duties and possess all powers previously and thereafter assigned in Title 18 of the New Jersey Statutes, to central administrative and supervisory staff, instructional and noninstructional, including, but not limited to, the superintendent of schools, secretary of the board of education, school business administrator, school business manager, and assistants and clerks thereto. *Id.* at §35d (Supp. 1998). The State District Superintendent also generally has the power to perform all acts and do all things necessary for the proper conduct, maintenance, and supervision of schools in the district. *Id.* at §e. The State District Superintendent may also make, amend, and repeal district rules, policies, and guidelines for the proper conduct, maintenance, and supervision of the schools in the district. *Id.* at §f.

When a State-operated district is established, collective bargaining agreements entered into by the school district shall remain in force, except as otherwise provided. *N.J.S.A.* 18A:7A-40a. Also except where otherwise provided, all teaching staff members and other employees of a State-operated district shall retain and continue to acquire all rights and privileges acquired pursuant to Title 18A of the New Jersey Statutes. *Id.* at §b.

All officers, employees, and consultants, professional and nonprofessional, certified and noncertified, shall be employed or retained, transferred and removed as provided in the Takeover Statute. *Id.* at §42a. The State District Superintendent may appoint, transfer, and remove clerks, pursuant to pertinent civil service and educational statutes. *Id.* at §(1). Subject to the approval of the Commissioner, the State District Superintendent shall appoint and set the salaries of such State assistant superintendents as the superintendent deems necessary and assign their duties and responsibilities. No State assistant superintendent shall acquire tenure. *Id.* at §(2).

Also subject to the Commissioner's approval, the State District Superintendent, or his/her designee, shall make all personnel determinations regarding employment, transfer, and removal of all officers, employees, professional and nonprofessional, except that the services of the district's auditor or auditors, and attorney or attorneys, shall be immediately terminated by creation of a State-operated school district. *Id.* at §(3). The State Superintendent may delegate any of his/her powers and duties. *Id.* at §b.

Except as otherwise provided, any individual serving under tenure or permanent civil service status shall retain all tenure rights and may continue to serve in the district pursuant to applicable statutory provisions. Such individuals shall perform only such duties prescribed or delegated by the State District Superintendent and for which he/she may be appropriately certified. *Id.* at §43.

The Takeover Statute also specifically addresses the employment status of central administrative and supervisory staff. *N.J.S.A.* 18A:7A-44, effective July 11, 1995, provides:

> a. Notwithstanding any other provision of law or contract, the positions of the district's chief school administrator and those executive administrators responsible for curriculum, business and finance, and personnel shall be abolished upon creation of the State-operated school district. The affected individuals shall be given 60 days' notice of termination or 60 days' pay. The notice or payment shall be in lieu of any other claim or recourse against the employing board or the school district based on law or contract. Any individual whose position is abolished by operation of this subsection shall be entitled to assert a claim to any position or to placement upon a preferred eligibility list for any position to which the individual may be entitled by virtue of tenure or seniority within the district. No individual whose position is abolished by operation of this subsection shall retain any right to tenure or seniority in the positions abolished herein.
>
> b. Within one year of the establishment of the State-operated school district, the State district superintendent shall prepare a reorganization of the district's central administrative and supervisory staff and shall evaluate all individuals employed in central administrative and supervisory staff positions. The State district superintendent shall implement the reorganization on the July 1 next following its preparation, unless otherwise directed by the commissioner.

> c. Notwithstanding any other provision of law or contract, the positions of the central administrative and supervisory staff, instructional and noninstructional, other than those positions abolished pursuant to subsection a of this section, shall be abolished upon the reorganization of the State-operated school district's staff. The State district superintendent may hire an individual whose position is so abolished, based upon the evaluation of the individual and the staffing needs of the reorganized district staff. These individuals shall be hired with tenure if they had tenure in their prior position. If they did not have tenure in their prior position, they may obtain tenure pursuant to the provisions of N.J.S.A. 18A:28-6. Individuals hired as State assistant superintendents shall not be hired with tenure and shall not acquire tenure. Employees or officers not hired for the reorganized staff shall be given 60 days' notice of termination or 60 days' pay. The notice or payment shall be in lieu of any other claim or recourse against the employing board or the school district based on law or contract. Notwithstanding this limitation, nothing herein shall preclude an individual from asserting upon separation from service any legal contractual right to health care coverage, annuities, accrued vacation days, accrued sick leave, insurance and approved tuition costs. Any employee whose position is abolished by operation of this subsection shall be entitled to assert a claim to any position or to placement upon a preferred eligibility list for any position to which the employee may be entitled by virtue of tenure or seniority within the district. No employee whose position is abolished by operation of this subsection shall retain any right to tenure or seniority in the positions abolished herein.
>
> [*Id.* at §44 (Supp. 1998).]

This judge found, in the order issued on January 10, 1997, that Section 44 of the Takeover Statute does not, as respondent argued, apply only to individuals having tenure prior to a reorganization. Although agreeing that *N.J.S.A.* 18A:7A-44 applies to both tenured and untenured employees, the Commissioner, on interlocutory review, held that if petitioners' positions were not abolished pursuant to *N.J.S.A.* 18A:7A-44a nor 44c, but that if their individual employment were terminated by the discretionary action of the State Superintendent, they would be entitled to no relief in the current matter:

> Upon consideration, the Commissioner concurs with the ALJ that *N.J.S.A.* 18A:7A-44 applies to both tenured and nontenured employees. He clarifies, however, that it applies *only to those employees whose positions are abolished upon the establishment, or as a result of the reorganization of,* a State-operated district; it does not apply to individual

> decisions to terminate employment where the underlying position is not abolished. Abolishment of a position and termination of employment are not synonymous and, in the latter circumstance, which is neither expressly addressed nor implicitly encompassed in the special statutory scheme governing establishment and operation of State-operated school districts, the terminated employee is afforded all the protections to which he or she would ordinarily be entitled by contract, tenure or civil service status, no more and no less.
>
> Because the record herein is insufficient to establish whether petitioners' employment was terminated or their positions abolished and, if the latter, whether by operation of law (*N.J.S.A.* 18A:7A-44a) or district reorganization (*N.J.S.A.* 18A:7A-44c), it remains necessary for this matter to proceed to further fact-finding as recommended by the ALJ. The Commissioner stresses, however, that should such fact-finding reveal that petitioners' positions were not abolished pursuant to these "takeover" statutes but, rather, that their individual employment was terminated by the lawful discretionary action of the State superintendent, as at-will employees they would be entitled to no relief in the instant proceedings.
>
> [Decision on Motion, Feb. 11, 1997, pp. 1-2.]

It is noted that an administrative agency's interpretation of a statute it is charged with enforcing is entitled to great weight. *Nelson v. Bd. of Educ. of Tp. of Old Bridge,* 148 *N.J.* 358 (App. Div. 1997).

As alluded to hereinabove, this judge's prior determination that petitioners were essentially administrative and supervisory staff of the Board was not disturbed upon interlocutory review by the Commissioner. A review of petitioners' responsibilities prior to the takeover persuades me that they were not executive administrators responsible for curriculum, business and finance, and personnel and that their positions were therefore not abolished upon creation of the District, pursuant to *N.J.S.A.* 18A:7A-44a. Campbell's communications with DEP personnel prior to the takeover recognized that fact. The crux of the issue, therefore, is whether petitioners fell within *N.J.S.A.* 18A:7A-44c.

As respondent argues, petitioners have not demonstrated that their positions were abolished upon reorganization of the District. Although O'Donohue's and Block's positions were abolished, and Craig's position was effectively abolished, petitioners

were terminated approximately one year prior to the reorganization. Petitioners have therefore not demonstrated that they are entitled to relief pursuant to *N.J.A.C.* 18A:7A-44c. Parenthetically, it is not clear if Gonzalez's position was abolished.

As the Commissioner recognized in his February 11, 1997 decision, the Takeover Statute does not specifically address the status of employees in positions which are abolished as a result of the reorganization of a State-operated district, which certain specified exceptions not applicable in this case.

I am not persuaded by petitioners' reliance on the fact that they were apparently treated as a group, that none were offered explanations for their terminations, and that there is no evidence that they were evaluated in any manner. As the District argues, such do not establish that petitioners' positions were abolished upon the reorganization of the District. It is reasonable to conclude that petitioners were terminated by discretionary acts of Hall.

Petitioners also argue that even if employees of a school district can be discharged without cause, such can only be accomplished after providing the employees with a statement of the reasons for the discharge and an opportunity to convince the school district to offer continued employment, pursuant to *N.J.S.A.* 18A:27-4.1. That provision provides, in pertinent part, as follows:

> Notwithstanding the provisions of any law, rule or regulation to the contrary,
>
> a. A board of education shall appoint, transfer or remove a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. The board shall not withhold its approval for arbitrary and capricious reasons.
>
> b. A board of education shall renew the employment contract of a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. The board shall not withhold its approval for arbitrary and

> capricious reasons. A nontenured officer or employee who is not recommended for renewal by the chief school administrator shall be deemed nonrenewed. Prior to notifying the officer or employee of the nonrenewal, the chief school administrator shall notify the board of the recommendation not to renew the officer's or employee's contract and the reasons for the recommendation. An officer or employee whose employment contract is not renewed shall have the right to a written statement of reasons for nonrenewal pursuant to section 2 of *P.L.* 1975, *c.* 132 (C. 18A:27-3.2) and to an informal appearance before the board. The purpose of the appearance shall be to permit the staff member to convince the members of the board to offer reemployment. The chief school administrator shall notify the officer or employee of the nonrenewal pursuant, where applicable, to the provisions of section 1 of *P.L.* 1971, c. 436 (C. 18A:27-10).
>
> [*N.J.S.A.* 18A:27-4.1 (Supp. 1998).]

I am not persuaded by petitioners' argument. A local board of education is removed upon the creation of a State-operated school district. *N.J.S.A.* 18A:27A-34. *See also*, *N.J.S.A.* 18A:7A-37. In light of the powers granted a State district superintendent, it is reasonable to conclude that *N.J.S.A.* 18A:27-4.1 is not applicable to State-operated school districts, but only to local school districts not subject to the Takeover Statute.[1] The Board's practices prior to the takeover are not material. As the Commissioner determined in his February 11, 1997 decision on motion, if petitioners positions were not abolished pursuant to the takeover statute, but their individual employment was terminated by the discretionary action of the State superintendent, as at-will employees, they are not entitled to relief in the current matter.

[1] Within 60 days of a takeover, the Commissioner shall establish a board of education consisting of not more than fifteen persons from among residents of the district. Thirteen of the members shall be appointed by the Commissioner, and two shall be appointed by the local governing body of the municipality in which the school district is located. Members of the board of education shall serve at the pleasure of the appointing authority. The State district superintendent shall meet with the board of education at least once monthly, and the State district superintendent shall determine the agenda. The State district superintendent shall report on all actions taken and on pending actions and provide an opportunity for discussion by the board and by the public. *N.J.S.A.* 18A:7A-37. However, there is nothing in the Takeover Statute conferring powers on the board relating to the supervision and operation of the school district, generally, nor regarding appointments and terminations of employees, specifically.

Petitioners impressed me as sincere individuals who felt aggrieved, understandably, by the manner in which they were discharged. However, petitioners' expectations in that respect are not determinative. For the reasons discussed, I am persuaded that they are not entitled to the relief requested. It is not necessary to address petitioners' positions regarding alternative methods for calculating any monetary relief to which they would be entitled if they prevailed on the merits.

CONCLUSIONS

I **CONCLUDE** that petitioners are not entitled to relief pursuant to *N.J.S.A.*. 18A:7A-44 nor pursuant to *N.J.S.A.* 18A:27-4.1 and that their petitions should be dismissed.

ORDER

It is hereby **ORDERED** that the petitions filed by Gonzalez, O'Donohue, Block and Craig with the Department of Education on November 15, 1995 be and are hereby **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9/1/11
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

4/14/99
DATE

Debbie Tantanatto
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 16 1999
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

Witnesses

For Petitioners:

Ruben Gonzalez

Paul J. O'Donohue

Claude Craig

Steven Block

Alonzo Kittrels

Eugene Campbell

For Respondent:

Randall Kator

Exhibits in Evidence

P-1	Letter, dated July 17, 1995
P-2	Respondent's answers to interrogatories
P-3	Letter, dated July 13, 1995
P-4	List of Board employees with addresses[2]
P-5	Confidential memorandum, dated June 29, 1995
P-6	Memorandum, dated June 29, 1995
P-7	Letter, dated July 13, 1995
P-8	Letter, dated August 17, 1995
P-9	Petitioners' certifications and Costs for Selected Employee Benefits

[2] Respondent states in its reply brief that Exhibits P-4 through P-6 were not moved into evidence. However, this judge's notes indicate that those documents were moved into evidence.

OAL DKT. NOS. EDU 12388-95, 12390-95, 12391-95 & 12394-95 (CONSOLIDATED)
AGENCY DKT. NOS. 444-11/95; 441-11/95, 442-11/95 & 443-11/95

RUBEN GONZALEZ, PAUL J. O'DONOHUE, CLAUDE CRAIG AND STEVEN G. BLOCK,

PETITIONERS,

V.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon careful and independent review of the record in this consolidated matter, the Commissioner concurs with the findings and conclusions in the initial decision.[1] Accordingly, the initial decision is adopted as the final decision in this matter, for the reasons expressed therein. The within matter is dismissed.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] In the Initial Decision, the Administrative Law Judge (ALJ) indicates that the Commissioner's February 11, 1997 interlocutory decision recognized that the pertinent statute "does not specifically address the status of employees in positions which are abolished as a result of the reorganization of a State-operated district ***." (Initial Decision at p. 21) However, the Commissioner herein clarifies that the aforementioned decision distinguished between employees whose positions were *abolished* upon the establishment of a state-operated school district, or as a result of reorganization, and those whose employment is terminated upon state-operation. The Commissioner therein noted that the *latter circumstance*, termination of employment, "is neither expressly addressed nor implicitly encompassed in the special statutory scheme governing establishment and operation of State-operated school districts ***." (*Ruben Gonzalez et al. v. State-Operated School District of the City of Newark*, Essex County, Commissioner Decision 69-97M, slip. op. at p. 16) However, in her analysis, the ALJ mistakenly indicates that the aforementioned decision recognized that the pertinent statute "does not specifically address the status of employees in positions which are abolished as a result of the reorganization of a State-operated district ***." (Initial Decision at p. 21)

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.* within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

June 1, 1999
Date of Mailing, June 1, 1999

172-99

EDU # 12388-95, 12390-95, 12391-95 and 12394-95 (consolidated)
C # 172-99
SB # 29-99

RUBEN GONZALEZ, PAUL J. O'DONOHUE, CLAUDE CRAIG AND STEVEN G. BLOCK,	:	
PETITIONERS-APPELLANTS,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, June 1, 1999

For the Petitioners-Appellants, Medvin & Elberg (Philip Elberg, Esq., of Counsel)

For the Respondent-Respondent, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Perry L. Lattiboudere, Esq., of Counsel)

This is a consolidated case involving the claims of four individuals who were employed by the Board of Education of the City of Newark at the time of the creation of a State-operated school district pursuant (hereinafter "District" or "State-operated District") to N.J.S.A. 18A:7A-34 et seq. The petitioners claimed that they were terminated without notice contrary to N.J.S.A. 18A:7A-44 and N.J.S.A. 18A:27-4.1. They sought relief in the form of reinstatement with back pay.

The District countered that these individuals were "at-will" employees both before and after the creation of the State-operated District and, as such, had not been entitled to notice.

May 3, 2000

The Administrative Law Judge ("ALJ") agreed with the District, holding that N.J.S.A. 18A:27-4.1 was not applicable to State-operated school districts and that N.J.S.A. 18A:7A-44 did not entitle them to relief because their terminations had occurred as the result of discretionary acts by the State Superintendent. The ALJ based his second conclusion on an interlocutory ruling, which had not been disturbed by the Commissioner. That ruling held that the petitioners would not be entitled to relief under N.J.S.A. 18A:7A-44(c) if their positions had not been abolished pursuant to a reorganization of the District.

The Commissioner adopted the ALJ's initial decision. Consequently, he dismissed the petitions.

After careful review of the record and the pertinent law, we affirm the conclusion that N.J.S.A. 18A:27-4.1 is not applicable to this matter. However, we reverse the Commissioner's determination that the petitioners are not entitled to relief under N.J.S.A. 18A:7A-44. Nonetheless, for the reasons expressed herein, we conclude that such relief is limited to the salary that each would have earned from the time of termination until effectuation of the reorganization, plus 60 days' pay.

All four petitioners were central administrative or supervisory employees. All were terminated on August 17, 1995, when the State District Superintendent, Beverly Hall, accepted resignation letters which each had been asked to provide. As set forth in the ALJ's initial decision, petitioners were treated as a group and there were no individualized reasons for their terminations. However, they were terminated before the reorganization of the District mandated by statute was effectuated.

As set forth above, these employees were terminated because the new State Superintendent wanted to "go with her own team" after her appointment to the position

rather than retain these employees while the newly created State-operated District underwent the statutorily mandated reorganization process. In addition, the record shows that none of the positions held by the petitioners existed after they were terminated.

The crux of the question is whether the State District Superintendent had the discretion to terminate these individual employees under these particular circumstances. We hold that she did not.

N.J.S.A. 18A:7A-44 provides in pertinent part that:

> a. Notwithstanding any other provision of law or contract, the positions of the district's chief school administrator and those executive administrators responsible for curriculum, business and finance, and personnel shall be abolished upon creation of the State-operated school district. The affected individuals shall be given 60 days' notice of termination or 60 days' pay....
>
> b. Within one year of the establishment of the State-operated school district, the State district superintendent shall prepare a reorganization of the district's central administrative and supervisory staff and shall evaluate all individuals employed in central administrative and supervisory staff positions. The State district superintendent shall implement the reorganization on the July 1 next following its preparation, unless otherwise directed by the commissioner.
>
> c. Notwithstanding any other provision of law or contract, the positions of the central administrative and supervisory staff, instructional and noninstructional, other than those positions abolished pursuant to subsection a of this section, shall be abolished upon the reorganization of the State-operated school district's staff. The State district superintendent may hire an individual whose position is so abolished, based upon the evaluation of the individual and the staffing needs of the reorganized district staff.... Employees or officers not hired for the reorganized staff shall be given 60 days' notice of termination or 60 days' pay. The notice or payment shall be in lieu of any other claim or recourse against the employing board or the school district based on law or contract....No employee whose position is abolished by

> operation of this subsection shall retain any right to tenure or seniority in the positions abolished herein.

As explicated by the Statement which accompanied both the Senate and Assembly versions of the bill, this statute establishes the procedures for the governance of State-operated school districts. As embodied in the law, the Legislature intended that:

> If a State-operated school district is established, the local board of education and the chief executive officers of the district will be dismissed and a State district superintendent will be appointed with all the authority of a board of education.
>
> The State district superintendent will evaluate all other central administration staff and reorganize the district's central administration. At that time, all remaining central administration staff positions will be abolished. Affected employees will be given 60 days notice or 60 days pay and will retain "bumping rights" for other positions in the district for which they may have seniority.

Statement accompanying Senate Bill No. 3766 of 1987 and Assembly bill No. 4643 of 1987.

Thus, it is clear that the Legislature envisioned a process of reorganization that would commence with the evaluation of all central administrative staff whose positions were not abolished by operation of law upon creation of a State-operated school district. If the Commissioner did not determine otherwise, the reorganization would be effectuated the following July. At that time, individuals who were not being retained would be terminated with 60 days' notice or 60 days' pay.

The reorganization process was not intended to authorize group terminations for reorganizational purposes except upon effectuation of the statutorily prescribed reorganization. In this respect, it is abundantly clear from the record that the petitioners

were not terminated for any individualized reason. Nor were the resignations submitted by the petitioners voluntary. Rather, we find that the petitioners were, in fact, terminated for purposes of reorganization, but that such terminations were effected outside of the statutorily mandated process.

The statutes at issue do not confer on the State Superintendent carte blanche authority to effectuate blanket dismissals without regard to the statutory reorganization process. Rather, the statutory framework applicable here precludes dismissals that would circumvent the reorganization process.[1]

Therefore, for the reasons stated, we find that the petitioners were not properly terminated and are entitled to relief. Because their positions did not exist after they were terminated, and in view of our finding that such terminations were in fact part of the reorganization process, the petitioners are not entitled to reinstatement. Rather, they are entitled to their salaries from the effective date of their termination to the date of effectuation of the reorganization, plus 60 days' pay.

Attorney exceptions are noted.

May 3, 2000

Date of mailing MAY 05 2000

[1] In its exceptions to our Legal Committee's Report, the State-operated District argues that the terminations were permissible since the petitioners were "at-will" employees. As set forth above, we reject this contention because we find that the terminations were within the purview of N.J.S.A. 18A:7A-44. We note, however, that even if this had not been the case, the District's right to terminate petitioners might not have been without limitation. See generally, Woolley v. Hoffmann-LaRoche, 99 N.J. 284, modified, 101 N.J. 10 (1985).

172-99

EDU # 12388-95, 12390-95, 12391-95 and 12394-95 (consolidated)
C # 172-99
SB # 29-99
App. Div. # A-5434-99T5
App. Div. # M-1209-00

RUBEN GONZALEZ, PAUL J. O'DONOHUE, CLAUDE CRAIG AND STEVEN G. BLOCK, PETITIONERS-APPELLANTS, V. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY, RESPONDENT-RESPONDENT.	STATE BOARD OF EDUCATION DECISION ON REMAND

Decided by the Commissioner of Education, June 1, 1999

Decided by the State Board of Education, May 3, 2000

Remanded by the Appellate Division, December 8, 2000

For the Petitioners-Appellants, Medvin & Elberg (Philip Elberg, Esq., of Counsel)

For the Respondent-Respondent, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Cherie L. Maxwell, Esq., of Counsel)

This matter involved the claims of four individuals who were employed by the Board of Education of the City of Newark at the time of the creation of a State-operated school district (hereinafter "District" or "State-operated District") pursuant to N.J.S.A. 18A:7A-34 et seq. The petitioners claimed that they were terminated without notice contrary to N.J.S.A. 18A:7A-44 and N.J.S.A. 18A:27-4.1, and they sought relief from the

2/7/01

Commissioner in the form of reinstatement with back pay. The Commissioner denied the claims and dismissed the petitions.

On May 3, 2000, the State Board reversed the Commissioner's determination that petitioners were not entitled to relief under N.J.S.A. 18A:7A-44. The State Board, however, concluded that such relief was limited to the salary that each would have earned from the time of termination until effectuation of the reorganization, plus 60 days' pay. Implicit in our decision was that, as is ordinarily the case, the computation of such damages would include mitigation.

On June 12, 2000, the State-operated District appealed our decision to the Appellate Division. On November 1, 2000, the District filed a motion with the Appellate Division seeking a stay of our decision.

On December 8, 2000, the Appellate Division stayed the payment of damages pending determination of the appeal or further order of the Court. While not delaying the processing of the appeal by the Appellate Division, the Court also remanded the matter for a computation of damages or submission of an agreed calculation thereof.[1]

On December 18, 2000, the Director of the State Board Appeals Office initiated a conference call with the parties to effectuate the Appellate Division's order. Although it was the hope of the State Board that the parties would be able to arrive at an agreed calculation of damages, a schedule was established for the submission of a proposal by counsel for petitioners and for a response by the District. Apparently, as reflected by their submissions, the parties were not able to reach any agreement.

[1] The Appellate Division also ordered that the remand be completed within thirty days. By letter of January 8, 2001, Deputy Attorney General Michelle Lyn Miller advised the Court on behalf of the State Board of the status of the matter and the fact that we anticipated taking action on it today. Thereafter, on

As set forth in their proposal, petitioners contend that, as a matter of law, the damages in this case should be decided solely on the basis of the record that was developed before the Office of Administrative Law. According to petitioners, on that basis, they would be entitled to be paid at least the difference between what they actually earned prior to September 17, 1996, which was sixty days after the reorganization became "official," and what they would have earned had they not been terminated. Such amounts should also include the amount of fringe benefits calculated at 25% of salary loss. Petitioners are also seeking pre-judgment interest.

It is the District's position that the issue of damages was not settled during the proceedings before the Administrative Law Judge ("ALJ"). Although the District does not take issue with the annual salaries earned by petitioners at the time of their termination as set forth in the record that has been developed thus far, it does dispute whether there has been mitigation. It is the District's position that calculation of damages must include consideration of all alternative income received, as evidenced by tax returns and supporting documentation, and that because the record does not include the necessary information, it must be expanded in order to justify an award of any relief beyond payment in lieu of sixty days' notice. The District also opposes any award of pre-judgment interest.

Initially, we deny petitioners' request for pre-judgment interest. As set forth in N.J.S.A. 18A:6-25, the Commissioner's decision denying relief in this case was binding on the parties until May 3, 2000, when the State Board rendered its decision reversing the Commissioner's determination. Hence, petitioners had no entitlement to any relief

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January 12, 2001, a formal motion for extension of time to calculate damages was filed by the Deputy on behalf of the State Board. The Court has not yet ruled on that motion.

before we rendered our decision, and we can find no justification for awarding them pre-judgment interest.

Further, review of the record that was developed during the proceedings before the ALJ shows that it does not provide a sufficient basis upon which to calculate the damages that are due petitioners. Tr. 5/9/97 at 86-24 through 89-15; Tr. 7/7/98 at 99-21 through 102-19. Although the record indicates that petitioners did receive other income during the relevant period before they secured permanent employment, tr. 5/9/97 at 86-12, 88-16, 89-6; tr. 7/7/98 at 101-6, it does not include the information necessary to establish the total amount of income each received following his termination. In this respect, we stress that although the certification submitted by each petitioner after the close of hearing sets forth the amount of his salary prior to termination and the date and the salary of any permanent employment, none of the certifications include any information pertaining to other income, such as amounts received in the form of unemployment benefits.[2] Consequently, although we did not specifically order petitioners to produce their tax returns when they submitted their proposal, we anticipated that counsel for petitioners would include this information along with some form of supporting documentation to evidence the accuracy of the information. Counsel, however, did not do so, and included instead only the certifications that were put into the record in September 1998 and his letter of November 20, 1998 to the ALJ setting forth his calculation of damages based on those certifications.

[2] We note that counsel for petitioners did question Steven Block at hearing concerning other employment, tr. 5/9/97 at 86-9, and that his response indicates that he did collect unemployment benefits. Id. at 86-12. However, the amount of such benefits and other income was not established by testimony or otherwise. See id. at 88-13 through 88-23. Nor, as indicated above, does the record include information about any such income received by the other petitioners. See id. at 89-5 through 89-8.

In short, the submissions of the parties reflect that there is a dispute between them concerning whether petitioners received income during the pertinent period in addition to the salary amounts set forth in their certifications that must be considered in calculating any damages. We find that the record establishes that petitioners did receive such income and conclude that the amounts that they received must be considered in calculating the damages to which they are entitled. Goodman v. London Metals Exchange, Inc., 86 N.J. 19 (1981). We further find that because the record before us does not establish the amount of additional income that each petitioner received, we are unable to calculate the damages without further development of the record. Given the factual nature of this inquiry, we remand the matter to the Commissioner with the direction that he determine the amount of mitigation for each petitioner and calculate the damages due each of them. In view of the Court's directive to us, we direct the Commissioner to resolve the matter as expeditiously as possible.

February 7, 2001

Date of mailing FEB 09 2001

173-99

PEQUANNOCK TOWNSHIP EDUCATION ASSOCIATION AND ROBERT JONES, on behalf of minor child, J.J.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioners contended that Board's elimination of woodshop courses from the curriculum without formal Board action violated *N.J.S.A.* 18A:33-1, *N.J.A.C.* 6:8-2.5 and Board policy.

ALJ granted Board's motion for summary decision, ruling that the Pequannock Township Education Association lacked standing to pursue this action before the Commissioner since it could not demonstrate a reasonable likelihood of direct harm either to the association as an entity or to one of its members. In addition, the ALJ found the process chosen by the Board with respect to core curriculum changes, including the elimination of woodshop in this case, was proper.

Commissioner affirmed the summary decision for the reasons expressed by the ALJ. Petition was dismissed.

June 1, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT

ORAL INITIAL DECISION

OAL DKT. NO. EDU 5523-98

AGENCY REF. NO. 137-5/98

PEQUANNOCK TOWNSHIP EDUCATION ASSOCIATION AND ROBERT JONES ON BEHALF OF MINOR CHILD, J.J.

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,

Respondent.

Kathleen A. Naprstek, Esq., for petitioner

(Zazzali, Zazzali, Fagella & Nowak, attorneys)

Anthony P. Sciarrillo, Esq., for respondent

(Lindabury, McCormick & Estabrook, attorneys)

Record Closed: March 29, 1999 Decided: March 29, 1999

BEFORE **STEPHEN G. WEISS**, ALJ:

This is a transcript of the administrative law judge's oral initial decision rendered pursuant to *N.J.A.C.* 1:1-18.2.

This matter was transmitted to the Office of Administrative Law (hereinafter "OAL") by the Department of Education in mid-June 1998 as a result of the filing of a

verified petition of appeal on May 14, 1999 by the Pequannock Township Education Association (hereinafter "PEA") and by the parent of a student in the district; R.J., the father of J.J. An answer was filed by the Board and as a result of the issues then being joined the matter, as I indicated, was transmitted to the OAL. Basically, the petition alleges that the respondent's elimination of woodshop from its curriculum as of the 1998-99 school year had been made without compliance with the applicable statute and regulations; specifically, *N.J.S.A.* 18A-33-1 and *N.J.A.C.* 6:8-4.5 (which is now codified as *N.J.A.C.* 6:8-2.5). Board policy also is alleged to have been violated. After the matter was transmitted to the OAL I conducted a telephone prehearing conference and plenary hearing dates were scheduled for March 29 and March 30, 1999. However, the prehearing order provided, in addition, that either side could, by October 1998, move for summary decision. I'm not sure that that deadline was met - but there was a motion made by the Board for summary decision pursuant to *N.J.A.C.* 1:1-12.5. In addition, briefs were filed and I conducted oral argument today.

Basically two arguments are made by the Board in support of its motion for summary decision. First, that there exist no genuine issue of material fact reasonably in dispute and therefore the Board is entitled to a summary determination as a matter of law. And, secondly, with respect to the PEA regardless of whether any disputed issue of fact exists it has no "standing" to pursue the matter since no substantial harm was threatened to be visited upon it or any one of its members.

Based upon my review and consideration of the briefs filed by the parties, and following my additional consideration of the points made during the oral argument which I have just conducted, I have determined that the Board is correct in both of its arguments and therefore summary decision in the Board's favor should be granted.

First, I would like to address the question of the PEA's standing. There seems to me to be little doubt that an education association, *per se,* has no independent standing to pursue an action before the Commissioner unless it can demonstrate the reasonable likelihood of direct harm threatened either to the association as an entity or to one of its members whom it represents. As I indicated I believe that in this case that

predicate is absent. In my view, obviously, the elimination of the woodshop course from the curriculum causes no threat as such to the PEA, nor does it even seem to me to make that claim. Rather, the contention seems to be that as a result of the elimination of that course the future employment rights of the teacher involved potentially were put into jeopardy. The basis seems to be that since the elimination of the course resulted in that teacher's reassignment to another position, as the PEA stated in its brief, this " . . . could result in a reduction of that teacher's position". I believe that such a speculative assertion is not an adequate predicate for me to find that the requisite standing exists. I do not believe that it approaches the standard articulated on several occasions by the courts, especially and most recently in the case of the *Ridgewood Education Association v. Ridgewood Board of Education*, 284 *N.J. Super.* 427 (App. Div. 1995) which determined that only a substantial likelihood of harm threatened toward an association member would provide an adequate underpinning for the requisite standing. The facts in that case clearly are inapposite to the present set of circumstances.

In *Ridgewood* case the issue had to do with the very real possibility of limiting the term of employment of two prospective association members and the consequent direct impact upon the association itself because of the potential denial of those teachers' opportunity to acquire tenure. No similar circumstances exist here. Rather, there is only conjecture regarding future potential employment problems that the woodshop teacher might have as a result of the Board's action and my understanding is that there has been no adverse action with respect to him as a result of the Board's decision to eliminate woodshop. Accordingly, for that reason, alone the motion for summary decision dismissing the petition insofar as the PEA is concerned should be granted.

I also agree with the Board that despite efforts by the PEA to attempt to identify areas or potential areas of meaningful factual dispute none, even if they exist, are so material as to constitute a basis for me to deny summary decision. Although Ms. Zablocki's certification raises a variety of concerns with respect to information either imparted or not imparted to the PEA representatives with respect to the Board's

intended action concerning elimination of woodshop, the fact is, as the Board correctly points out, that the material facts respecting that issue are not in dispute. First, the elimination of woodshop and the reasons therefor were discussed at a January 8, 1998 special workshop meeting as set forth in Ms. Clover's certification. Second, the agenda for the May 4, 1998 reorganization meeting of the Board included specifically adoption of a curriculum which included elimination of the woodshop course. Any member of the public, not to mention PEA members, could have informed him or herself about that action or proposed action before that meeting took place. Also, in respect to the specific language of 18A:33-1, there was a unanimous vote by the full Board on the resolution adopting the curriculum which included elimination of woodshop. I do not believe the law requires, and I'm aware of no case law to the contrary, that each specific course to be eliminated or modified has to be the subject of separate identification in a resolution. I believe a generic resolution adopting a curriculum and having that curriculum available for the public to comment upon is all that the law requires and it is my understanding that both of those situations existed on May 4. Nor do I see anything in this case that would have violated the requirements of *N.J.A.C.* 6:8-2.5, nor any Board policy. As the Board aptly notes in its reply to the PEA's brief, there has been no authority cited to support the proposition that the petitioners somehow were shut out from the decision-making process in a way that gives rise to a cause of action in this case. Indeed, much of the contents of Ms. Clover's certification are to the contrary. While, as I indicated, Ms. Zablocki recited a series of workshop and/or other meetings that took place during the first half of 1998 that involved elimination of woodshop without any specific discussion of that item, such potential action was thoroughly discussed at the January 8 meeting (at which Ms. Zablocki was not present) and was on the agenda as part of the curriculum resolution on May 4. As I further indicated, any person, association member, association officer or any citizen of Pequannock otherwise interested easily could have informed him or herself about elimination of the woodshop course and could have addressed the Board concerning it. Again, I'm aware of no statutory or regulatory authority or case law which required the Board to specifically articulate that woodshop was to be eliminated. It was enough that the proposal to modify the curriculum contained elimination of that course and there was no effort as far as I can ascertain, deliberately or otherwise, to conceal or

otherwise make that a big secret. Indeed, the Zablocki certification itself reveals to me a consistent expression of interest by the PEA with respect to the prospect that woodshop would be eliminated. Also, the fact that the specific action eventually taken might have been somewhat at odds with discussions that were taking place from time-to-time over that issue, and was not specifically highlighted on the agenda, does not make the action improper. As a matter of sound educational policy any Board, not to mention Pequannock, could have been more forthcoming with specifics during the discussion phase. But that phase is not pertinent here and, really, neither side addressed that issue to any great extent. Simply put, the process chosen by the Board with respect to core curriculum changes, including the elimination of woodshop in the circumstances of this case, in my view passes muster as a matter of law.

Accordingly, for those reasons, and following my review of the file, the briefs and my consideration of the oral argument, I have determined to grant the Board's motion for summary decision. Pursuant to *N.J.A.C.* 1:1-18.3(c)(12) I add the following statement to my oral decision:

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

END OF TRANSCRIPT

I, Marie V. Hackett, certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Stephen G. Weiss' oral decision rendered in the above matter on March 26, 1999.

April 8, 1999
DATE

Marie V. Hackett
MARIE V. HACKETT

April 8, 1999
DATE

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

4/19/99
DATE

Debbie Antonates/ps
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 16 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

OAL DKT. NO. EDU 5523-98
AGENCY DKT. NO. 137-5/98

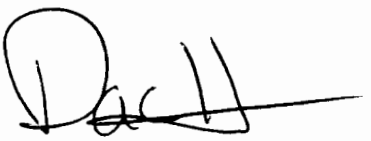
PEQUANNOCK TOWNSHIP EDUCATION ASSOCIATION AND ROBERT JONES, on behalf of minor child, J.J.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon his independent and careful review of the record, the Commissioner agrees with the conclusion of the Administrative Law Judge that summary decision is appropriately granted to the Board in this matter.

Accordingly, the Initial Decision of the OAL granting the Board's Motion for Summary Decision is affirmed for the reasons expressed therein. The Petition of Appeal is, therefore, dismissed.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

June 1, 1999
Date of Mailing, June 1, 1999

174-99

J.M. and D.M., on behalf of minor child, J.L.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners appealed the Board's failure to bestow upon minor child Most Valuable Player awards for the 1995 and 1996 cross-country seasons, contending such action was arbitrary, capricious, unreasonable and discriminatory. Respondent Board filed a motion for summary decision pursuant to *N.J.A.C.* 1:1-12.5, asserting petitioners' petition was untimely filed pursuant to *N.J.A.C.* 6:24-1.2(c).

The ALJ found the petition was filed beyond the 90-day time limitation of *N.J.A.C.* 6:24-1.2(c) and granted the Board's motion, dismissing the petition.

The Commissioner adopted the findings and determinations of the initial decision as his own, noting that the 90-day time period, which begins to run on the date notice is received of the action taken, is mandatory, and attempts to resolve a claim through negotiation with the board do not toll the time limit for filing a petition of appeal. Relaxation of the time limit was not warranted here because the case did not present constitutional or significant public interest issues. Petition was dismissed.

June 1, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING SUMMARY DECISION

OAL DKT. NO. EDU 3937-98
Agency Dkt. No. 76-3/98

J.M. and D.M. on behalf of minor child J.L.M.
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION COUNTY,
Respondent.

J.M. for his minor child J.L.M., *pro se*

Brenda C. Liss, Esq. and **Dawn Marmo**, Esq., for respondents
(McCarter and English, attorneys)

Record Closed: March 5, 1999 Decided: April 14 , 1999

BEFORE **SEBASTIAN GAETA, JR.**, ALJ:

Statement of Case and Procedural History

Petitioners assert before the Commissioner of Education that the failure of the respondent, Board of Education of the City of Summit to award the child, J.L.M. Most Valuable Player (MVP) awards for the Summit High School Cross Country seasons of

1995 and 1996 was arbitrary, capricious, unreasonable and discriminatory and should be overturned.

After extensive discussions with various school officials, petitioners presented their grievance before the City of Summit Board of Education Committee. The Education Committee recommended to the Board of Education that the grievance appeal should be denied. By letter dated September 12, 1997, the Board of Education Secretary informed petitioners that the Board of Education decided to accept that recommendation and that their appeal was denied.

By letter of October 16, 1997, the Union County Superintendent of Schools provided petitioners with a copy of *N.J.A.C.* 6:24-1.1 *et seq.*, to file a petition when a person alleges a board of education acted in violation of education law.

On November 13, 1997, petitioners sent a letter to Iliana Okum, Director, Office of Bilingual Education and Equity Issues, Department of Education. That letter sought to appeal the Board of Education denial of their grievance.

Ms. Okum responded by her letter, dated January 5, 1998, in which she advised petitioners of the right to appeal to the Commissioner pursuant to *N.J.A.C.* 6:4-1.9. She also enclosed a copy of the procedures for appeal, *N.J.A.C.* 6:24-1.1, *et seq.* and recommended that they contact the Office of Controversies and Disputes at the address and telephone numbers provided.

The petition requesting the Commissioner of Education to consider the controversy was filed on or about March 16, 1998.

Respondent filed a Motion for Summary Decision, *N.J.A.C.* 1:1-12.5, asserting, *inter alia*, that petitioners' petition failed to conform with the time requirements of

N.J.A.C. 6:24-1.2(c):

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

Petitioners, in their responsive papers, contend that their November 13, 1997 letter to Director Okum substantially met the timely filing requirements of *N.J.A.C.* 6:24-1.2(c) and that, pursuant to the decision in *Driggins v. Newark Bd. Of Edu.*, 93 *N.J.A.R.* 2d (EDU) 317, their petition must be accepted by the Commissioner of Education.

During oral argument on the motion, petitioners stated that they always wanted to pursue their appeal. They were unable to find the law and, as they contended in their November 13, 1997 letter to Director Okum, the Union County Superintendent of Schools, in her October 16, 1997 letter gave them "erroneous information on how to proceed."[1]

DISCUSSION

There are no disputed issues of fact. This matter is appropriate for summary decision, *See Brill v. Guardian Life Ins. Co. Of America*, 142 *N.J.* 520 (1995), and is granted.

Petitioner's letter to Director Okum was an attempt to have their appeal heard. No action was taken by her except to direct them to the Commissioner. When the

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[1] The operative text of the County Superintendent's letter is:

> You are concerned because your daughter, the number 1 runner for the 1995 and 1996 seasons, was not awarded the Most Valuable Player award. Your appeal to the Summit Board of Education was denied. As we discussed, I am attaching a copy of *N.J.A.C.* 6:24-1.1 *et seq.* The procedures outlined therein are to be used for filing a petition when a person alleges that the local board of education has acted in violation of education law and the board disputes the entitlement claimed by the person.
>
> Before filing a petition, you may wish to contact the New Jersey State Interscholastic Athletic Association at 609-259-2776. Their guidelines may address criteria for determining MVP status. Their advice could prove helpful in determining whether or not to initiate this case.

petition was received by the Commissioner, no action was taken to dismiss the petition, pursuant to that authority under *N.J.A.C.* 6:24-1.9,[2] instead the appeal was transmitted to the Office of Administrative Law.

In *Driggins*, which petitioners rely upon as supporting their position that the petition was timely filed, concerned a tenured school employee who claimed entitlement to back pay, following his acquittal on criminal charges. On January 23, 1990, the respondent Board of Education denied his claim and, on February 13, 1990, Driggins filed a complaint against the Board in Superior Court. The Superior Court transferred the case to the Commissioner of Education, who transmitted the matter to the Office of Administrative Law for consideration whether the petition should be dismissed for failure to meet the ninety day requirement of *N.J.A.C.* 6:24-1.2. Driggins, of course, had filed his complaint before Superior Court well within ninety days.

The administrative law judge noted that the New Jersey Court Rules, regarding transfer of actions to a proper court or administrative agency, provided that the matter would proceed as if originally brought before that court or administrative agency. Therefore, the administrative law judge concluded that, since the action before Superior Court was brought within ninety days, the requirements of *N.J.A.C.* 6:24-1.2 were satisfied. The initial decision was adopted by the Commissioner of Education.

Although petitioners wanted to pursue their complaint and were seeking resolution through Ms. Okum, the ruling in *Driggins* does not avail them relief from the time requirements of *N.J.A.C.* 6:24-1.2. Those requirements have been generally strictly enforced. *Kaprow v. Board of Educ. Of Berkley Tp.,* 131 *N.J.* 572 (1993); *Nissman v. Board of Educ. Of Tp. Of Long Beach Island, Ocean County*, 272 *N.J. Super.* 373 (App. Div. 1994), *cert. denied*, 137 *N.J.* 315 (1994); *Scelha v. Bd. Of Ed. Town of Montclair, Essex Cty.*, 2 *N.J.A.R.* 70 (1981).

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[2] *N.J.A.C.* provides that the "Commissioner in his or her discretion may dismiss the petition on the grounds that no sufficient cause for determination has been advanced, lack of jurisdiction, failure to prosecute or other good reason." The authority of the Commissioner to take such action is permissive, not mandatory. *See No Illegal Points v. Florio*, 264 *N.J. Super.* 318 (1993).

Pursuant to *N.J.A.C.* 6:24-1.19 the Commissioner of Education has the discretionary authority to relax or dispense with such a rule "in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." *See Shokey v. Bd. Of Ed., Cinnamenson Twp., Burlington Cty.*, 1978 *S.L.D.* 919, 1979 *S.L.D.* 869. (improper denial of accumulated sick leave for pregnancy, constituted discrimination on account of sex.)

Relaxation of the rule, however, requires compelling circumstances such as were found for one of the petitioners in *Boles v. Bergen County Vocational Schools Board of Education,* 92 *N.J.A.R.* 2d (EDU) 554, 558. (petitioner vigorously attempted to assert claim which was prevented on procedural grounds.)

In this matter the action by the Board of Education, communicated to petitioners by the Board Secretary, clearly represented the final decision.

I **FIND** that the petition was filed outside the time limitations of *N.J.A.C.* 6:24-1.2(c) and is properly dismissed.

ORDER

Respondent's Motion for Summary Decision is **GRANTED** and petitioners' petition is **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 14, 1999
DATE

Sebastian Gaeta
SEBASTIAN GAETA, JR., ALJ

Receipt Acknowledged:

4/16/99
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 20 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Exhibits:

Respondent's Notice of Motion for Summary Decision, Brief and Attendant Papers

Respondent's Reply to Petitioners' Brief and Attendant papers Opposing the Motion

Petitioners' Brief and Attendant Papers Opposing Respondent's Motion

OAL DKT. NO. EDU 3937-98
AGENCY DKT. NO. 76-3/98

J.M. and D.M., on behalf of minor child, J.L.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision issued by the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions and the Board's reply exceptions were timely filed pursuant to the requirements of *N.J.A.C.* 1:1-18.4.

In their exceptions petitioners agree with the Administrative Law Judge (ALJ) that there are no disputed issues of fact in this matter, but they object to the ALJ's recommendation to dismiss the petition solely on the time factor. Petitioners contend, *inter alia*, that the Commissioner could have dismissed the petition as untimely but instead sent the matter to OAL. They further contend that all documentation affirms their daughter's claim that respondent's decision-making process in this matter was arbitrary, capricious, unreasonable and discriminatory and set forth their basis for why they should prevail on the merits of the matter.

Upon review of the record, the Commissioner agrees with and adopts as his own the recommended decision of the ALJ dismissing the petition because it was untimely filed

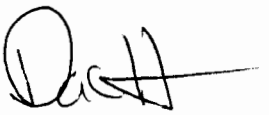
pursuant to the provisions of *N.J.A.C.* 6:24-1.2 (c).[1] Numerous decisions concerning the 90-day time limit have been litigated, and the Courts have consistently held that the rule is mandatory and that the 90-day period begins to run on the date notice is received of the action taken. *Kaprow, supra; Riely v. Hunterdon Central High Bd. of Ed.*, 173 *N.J. Super.* 109 (App. Div. 1980); *Nissman v. Bd. of Educ. of the Twp. of Long Beach Island*, 272 *N.J. Super.* 373, 380 (App. Div.), *certif. denied* 137 *N.J.* 315 (1994). As stated by the New Jersey Supreme Court in *Kaprow, supra,* attempts to resolve a claim through negotiation with the local board of education are irrelevant. Such efforts do not negate the fact of receipt of adequate notice nor do they toll the running of the time limits for filing a petition of appeal. Furthermore, the record establishes that by letter dated October 16, 1997, Dr. Frances Lobman, Union County Superintendent of Schools, provided petitioners with a copy of *N.J.A.C.* 6:24–1.1 *et seq.* and explained that "[t]he procedures outlined therein are to be used for filing a petition when a person alleges that the local board of education has acted in violation of education law and the board disputes the entitlement claimed by the person." (Petitioners' Brief in Support of Denying Summary Decision, Document 11) That petitioners chose to write to Dr. Iliana Okum, Director, Office of Bilingual Education and Equity Issues, State Department of Education, rather than to follow the procedures for filing a petition of appeal as set forth in the copy of the regulations provided to them by Dr. Lobman does not toll the time for timely filing a petition of appeal with the Commissioner. Moreover, for the reasons well stated by the ALJ in the initial decision, the Commissioner is in full agreement with the ALJ that *Driggins, supra,* does not avail petitioners of the relief they seek.

[1] The Commissioner notes for the record that transmittal of a petition to the Office of Administrative Law does not in any way signify that the petition is deemed to be timely filed pursuant to *N.J.A.C.* 6:24-1.2(c) or that a respondent is precluded from pursuing an affirmative defense of untimeliness.

Lastly, upon comprehensive review of the record, the Commissioner finds, as did the ALJ, that relaxation of the 90-day timeline is not warranted under the circumstances of the matter as it presents neither substantial constitutional issues nor issues of significant public interest. *LeMee v. Board of Education of the Village of Ridgewood, 1990 S.L.D.* 663, 672-673; *Bey v. Newark Board of Education*, 93 *N.J.A.R.*2d (EDU) 288.

Accordingly, the Petition of Appeal is hereby dismissed.[2]

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

June 1, 1999
Date of Mailing, June 1, 1999

174-99

EDU #3937-98
C # 174-99
SB # 27-99

J.M. AND D.M., on behalf of minor child, J.L.M.,

PETITIONERS-APPELLANTS,

V.

BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, June 1, 1999

For the Petitioners-Appellants, J.M. and D.M., pro se

For the Respondent-Respondent, McCarter & English (Brenda C. Liss, Esq. and Dawn Marmo, Esq., of Counsel)

J.M. and D.M. (hereinafter "petitioners"), acting pro se, filed a petition of appeal with the Commissioner of Education alleging that the Board of Education of the City of Summit (hereinafter "Board") had acted in an arbitrary and capricious manner in failing to give their child, J.L.M., the Most Valuable Player awards for the Summit High School cross-country track seasons of 1995 and 1996. The Board filed a motion for summary decision, contending, inter alia, that the petition was not filed within 90 days of the challenged action as required by N.J.A.C. 6:24-1.2(c).[1] On April 14, 1999, an

[1] N.J.A.C. 6:24-1.2(c) provides that:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

Nov. 3, 1999

Administrative Law Judge ("ALJ") recommended granting the Board's motion and dismissing the petition. On June 1, 1999, the Commissioner adopted the ALJ's findings and conclusions and dismissed the petition as untimely. Petitioners filed the instant appeal to the State Board.

After a careful review of the record, we reverse the decision of the Commissioner and remand this matter to him for further proceedings. Under the particular circumstances presented by this case, we conclude that the petition was filed in a timely manner.

The record indicates that petitioners were notified by letter dated September 12, 1997 that the Board had denied their grievance concerning the Most Valuable Player awards at its meeting of September 11. On November 13, 1997, within 90 days of that notice, the petitioners sent a letter to the Director of the Office of Bilingual Education and Equity Services in the State Department of Education "to appeal the Summit Board of Education's denial of our March 10, 1997 Grievance...." By letter dated January 5, 1998, nearly eight weeks later, the Director of the Office of Bilingual Education and Equity Issues acknowledged receipt of the petitioners' November 13 letter and recommended that they contact the Department's Bureau of Controversies and Disputes regarding "whether the legal premises upon which you have based your complaint are valid, and perhaps, the next steps you should take in pursuit of a satisfactory resolution."

On January 20, 1998, the petitioners wrote to the Director of the Bureau of Controversies and Disputes regarding their challenge to the Board's action and included

"supporting evidence" for their claim. They requested that the Director "review the enclosed materials and expeditiously arrive at a decision within the next two weeks."

By letter dated January 26, 1998, the Director of the Bureau of Controversies and Disputes advised the petitioners that they "must file a petition of appeal in conformance with the operative regulations....We are returning to you herewith the materials submitted with your letter, as, while they may be included with your petition, they may not serve as a substitute for it."

On or about March 24, 1998, the petitioners filed a formal petition of appeal with the Bureau of Controversies and Disputes.

Upon review of the particular circumstances herein, including the petitioners' status as pro se litigants, we conclude that their November 13, 1997 letter to the Director of the Department's Office of Bilingual Education and Equity Services constituted a petition of appeal for purposes of complying with the filing requirements of N.J.A.C. 6:24-1.2(c). That letter, which specifically indicated that the petitioners were appealing the Board's denial of their grievance, was filed approximately two months after the Board had notified petitioners of its action, well within the 90-day filing period. The petitioners were not advised that they had filed their papers in the wrong office of the Department of Education until January 5, 1998, nearly eight weeks later, after the 90-day period had expired. They then wrote to the Director of the Bureau of Controversies and Disputes and subsequently, upon her advice, filed a formal petition of appeal. Under these circumstances, we find that it would be inequitable to hold that the petitioners had failed to file a petition in a timely manner.

Accordingly, we reverse the determination of the Commissioner to dismiss the petition as untimely and remand this matter to him for further proceedings consistent with our decision.[2]

Attorney exceptions are noted.

S. David Brandt opposed.

November 3, 1999

Date of mailing NOV 05 1999

[2] We note in so doing that the Board had also argued in its motion for summary decision that this case should be dismissed as a matter of law, contending that the petitioners had failed to state any legal basis to support their claim. In dismissing the petition as untimely, neither the ALJ nor the Commissioner addressed this argument, which the Board has reiterated in response to the instant appeal. Under the circumstances, we decline to address such contention in the first instance. Consequently, our decision herein does not preclude the Board from reasserting this claim during the proceedings on remand.

175-99

IN THE MATTER OF THE TENURE	:	
HEARING OF REGIS IDEC,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF ROSELLE,	:	DECISION
UNION COUNTY.	:	
	:	

June 7, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7081-98
AGENCY DKT. NO. 206-6/98

IN THE MATTER OF THE TENURE HEARING OF REGIS IDEC, BOARD OF EDUCATION OF THE BOROUGH OF ROSELL, UNION COUNTY

Neil M. Cohen, Esq., for petitioner
(Gill & Cohen, P.C.)

Sheldon H. Pincus, Esq. for respondent
(Bucceri & Pincus, attorneys)

Record Closed: March 30, 1999 Decided: April 16, 1999

BEFORE **IRENE JONES**, ALJ:

This matter was transmitted to the Office of Administrative Law on July 23, 1998, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

A hearing in this matter was scheduled for February 19, 1999 and adjuorned at the request of the parties. The parties engaged in settlement discussions and they agreed to settle the matter before a new hearing date was set. A signed copy of the Stipulation of Settlement is attached hereto.

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

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

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

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

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

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

4/16/99
DATE

IRENE JONES, ALJ

Receipt Acknowledged:

4/23/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 26 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

BUCCERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2440
(973) 773-5665
Counsel for Respondent

IN THE MATTER OF THE TENURE	:	BEFORE COMMISSIONER OF EDUCATION/OFFICE OF
HEARING OF REGIS IDEC,	:	ADMINISTRATIVE LAW
ROSELLE BOARD OF EDUCATION	:	AGENCY DOCKET NO. 206-6/98
		O.A.L. DOCKET NO. EDU 7081-98

STIPULATION OF SETTLEMENT

This Stipulation of Settlement is made by and between Regis Idec (hereinafter "Mr. Idec"), who resides at 59 Amboy Road, Matawan, New Jersey 07747, and the Roselle Board of Education (hereinafter "the Board"). In consideration of the mutual promises and undertakings contained in this Agreement, and for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned state:

WHEREAS, Mr. Idec has been employed as a maintenance/ custodial employee for ten (10) years; and

WHEREAS, the Board certified tenure charges against Mr. Idec to the Commissioner of Education by resolution of June 15, 1998; and

WHEREAS, the tenure charges against Mr. Idec allege conduct unbecoming, insubordination and other just cause for dismissal; and

WHEREAS, in lieu of further processing of the tenure charges in accordance with the Tenure Employees Hearing Law, the parties desire to enter into an agreement stipulating the terms of Mr. Idec's separation from his employment with the Board; and

WHEREAS, Mr. Idec has indicated his desire to resign from all employment with the Board effective at the close of business on July 31, 1999,

IT IS on this 14 day of February, 1999, agreed that:

1. Mr. Idec has signed and tendered an irrevocable and permanent letter of resignation in the form annexed hereto as Schedule A, to be effective with the close of business on July 31, 1999, or on such later date as may be ordered by the Commissioner of Education, at the Commissioner's discretion. Mr. Idec understands that by signing this resignation letter and this Agreement, he is permanently ending all of his rights to tenure, seniority and employment in the Roselle School District, as well as all rights to contractual benefits or salary payments as of the close of business on July 31, 1999. Nothing herein, however, shall constitute a waiver, release or relinquishment of any rights Mr. Idec has to continue pursuing a workers' compensation action which he has pending and which bears docket number 97-034050. Mr. Idec's resignation will be null and void

if this Agreement is not approved by the Board, the Administrative Law Judge and the Commissioner of Education.

2. The Board agrees to withdraw its tenure charges against Mr. Idec with prejudice. This withdrawal is premised upon Mr. Idec's resignation from employment.

3. The Board shall place Mr. Idec on a leave of absence with full pay effect with the date of this Agreement through July 31, 1999.

4. The Board agrees to continue to pay Mr. Idec his full salary in the normal course of business, net of normal payroll deductions for State and Federal income taxes and pension contribution, through and including July 31, 1999.

5. The Board agrees to continue to provide Mr. Idec with all insurance coverages presently provided to other maintenance/custodial staff members, through and including July 31, 1999.

6. The Board agrees to pay Mr. Idec for five (5) weeks of accumulated vacation days. Payment shall be made by the Board to Mr. Idec in the next payroll after the approval of this Agreement by the commissioner of Education.

7. The parties agree that their respective entry into this Agreement does not constitute any admissions of wrongdoing or guilt on the part of either party.

8. The parties agree that the resolution of this matter upon the terms set forth herein is both in their interests and in the public interest for the following reasons:

(a) to avoid disruption of the school district and other districts currently employing individuals who would be called upon to testify in these proceedings; and

(b) to avoid a lengthy, expensive hearing on the charges and any possible appeals.

9. Mr. Idec acknowledges that he has been advised that he has the right to consult with an attorney or a representative of his own choosing prior to signing this Agreement, and has done so, and that he signs this Agreement as his own voluntary act and deed, and that he fully understands the duties and obligations enumerated herein.

10. The undersigned representatives of the Board hereby acknowledge that they agree to the terms and conditions of this Agreement subject to final ratification by the Board.

11. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

12. Both parties acknowledge that their agreement to dismiss the tenure charges is subject to the approval of the Office of Administrative Law and the Commissioner of Education. If such approval is not given, this Agreement and all of the

stipulations, releases and acknowledgments, as well as Mr. Idec's resignation, whether contained herein or attached hereto, shall be rendered null and void and the parties shall be returned to the status quo existing prior to this Agreement.

13. By entering this Agreement, each party releases and discharges the other with respect to all claims or rights that either party may have against the other. This includes all claims, including those of which either party is not aware and those not mentioned herein. Nothing herein shall constitute a waiver, release or relinquishment of any rights Mr. Idec has to continue pursuing a workers' compensation action which he has pending and which bears docket number 97-034050. Said releases, in the form annexed, shall be signed at the time of the signing of this Agreement by each party.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

WITNESS: _____

Regis Idec

Dated:

WITNESS: _____

ROSELLE BOARD OF EDUCATION

By: _____

Board President

Dated: 3/22/99

_____

Board Secretary

REGIS IDEC
59 AMBOY ROAD
MATAWAN, NEW JERSEY 07747

Roselle Board of Education
710 Locust Street
Roselle, NJ 07203

Re: Letter of Resignation

Dear Board Members:

I hereby resign my tenured position as a maintenance custodial employee of the Roselle School District effective with the close of business on July 31, 1999 pursuant to the terms of the Agreement to which this is attached.

Respectfully submitted,

Regis Idec

/lg

OAL DKT. NO. EDU 7081-98
AGENCY DKT. NO. 206-6/98

IN THE MATTER OF THE TENURE	:	
HEARING OF REGIS IDEC,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF ROSELLE,	:	DECISION
UNION COUNTY.	:	
	:	

The record of this matter and the initial decision incorporating a joint stipulation of settlement issued by the Office of Administrative Law (OAL) have been reviewed.

The Commissioner is unable to accept the written settlement agreement in its present form in that the language of such agreement, on its face (Terms 1 and 10), specifies that the settlement, although signed by the Board President and Board Secretary, requires final ratification by the Board. In the absence of any indication in the record that ratification had been accomplished, such language, making settlement contingent upon ratification of the Board reveals that the settlement is not "fully dispositive of all issues in controversy" as required under *N.J.A.C.* 1:1-19.1(b). In that the Commissioner's approval would render this agreement a final decision pursuant to *N.J.A.C.* 1:1-19.1(d), the Commissioner finds that accord to its terms by all necessary entities must be accomplished prior to the Commissioner's approval of the settlement.[1]

[1]In that the parties' settlement agreement in this matter was acceptable, apart from the absence of any indication in the record of its ratification by the Board, the Bureau of Controversies and Disputes on two occasions (May 7, 1999 and May 19, 1999) contacted the office of counsel for the Board and requested that counsel submit a short note to the record indicating that such ratification had been accomplished. Counsel neither returned the calls nor supplied the necessary document, thereby necessitating remand of this matter.

Accordingly, this matter is remanded to the OAL for revision of the settlement terms or other appropriate action in light of this decision.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[2]This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

June 7, 1999
Date of Mailing, June 7, 1999

RONALD MOREEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

June 7, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2924-98

AGENCY DKT. NO. 45-2/98

RONALD MOREEN,

Petitioner

v.

BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,

Respondent.

Merick H. Limsky, Esq., for petitioner (Balk, Oxfeld, Mandell & Cohen, attorneys)

George F. Hendricks, Esq., for respondent (Hendricks & Hendricks, attorneys)

Record Closed: April 13, 1999 Decided: April 15, 1999

BEFORE **KATHRYN A. CLARK**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on April 16, 1998, for determination as a contested cases, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

April 15, 1999
DATE

Kathryn A. Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 22 1999
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

es

BALK, OXFELD, MANDELL & COHEN, P.A.
50 Commerce Street
Newark, New Jersey 07102
Attorneys for Appellant

RECEIVED
1999 APR 13 P 3:49

RONALD MOREEN,	: OFFICE OF ADMINISTRATIVE LAW O.A.L. DOCKET NO.: EDUOA 02924-98S
Petitioner,	:
v.	: SETTLEMENT AGREEMENT
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK,	:
Respondent.	:

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement which fully disposes of all issues in controversy between the Petitioner and Respondent:

1. Ronald Moreen, Petitioner, withdraws his petition and request for a hearing, and the Respondent agrees to pay the sum of twenty thousand dollars ($20,000.00) to Petitioner as soon after the July, 1999 Board Meeting as is possible.

2. The Respondent agrees that the Petitioner's personnel records will reflect a Resignation in Good Standing.

3. The Petitioner waives all further claims against the Respondent with regard to this matter, including counsel fees or other monetary relief in return for the payment of the sum of twenty thousand dollars ($20,000.00).

4. Nothing in this agreement shall be deemed to be an admission of liability on behalf of either party.

5. This agreement shall not constitute a precedent in any matters involving other employees of the Respondent.

6. This agreement is subject to the approval of the New Brunswick Board of Education.

MERICK H. LIMSKY, ESQ.
Attorney for Ronald Moreen

DATED: 3/23/99

RONALD MOREEN
Petitioner

DATED: 3-23-99

GEORGE F. HENDRICKS, ESQ.
Attorney for Respondent

DATED: 3/23/99

CERTIFICATION

I, RONALD MOREEN, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and my acceptance of the terms of this Agreement. I am satisfied with my legal representation, and the representation of my union, and I enter into this agreement voluntarily.

It is also my understanding that if the Settlement Agreement is approved by the New Brunswick Board of Education, my claim will terminate against the Respondent.

Ronald L. Moreen

RONDALD MOREEN

DATED: 3-23-99

OAL DKT. NO. EDU 2924-98
AGENCY DKT. NO. 45-2/98

RONALD MOREEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter, the settlement agreement and the initial decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner finds that he cannot accept the proposed settlement in its present form. Notwithstanding that the parties have spread the terms of the settlement on the record pursuant to *N.J.A.C.* 1:1-19.1, the Commissioner finds that he is unable to provide a meaningful review of these terms, where the record is devoid of any factual context within which to consider them. Additionally, the Commissioner notes that term 6, on its face, indicates that the settlement may not have been approved by the Board, and there is no indication of such approval elsewhere in the record. This circumstance could prevent the settlement from being "fully dispositive of all issues in controversy" as required by *N.J.A.C.* 1:1-19.1(b). In that the Commissioner's approval would render this agreement a final decision pursuant to *N.J.A.C.* 1:1-19.1(d)2, the Commissioner finds that accord to its terms by all necessary entities must be accomplished prior to his approval of the settlement.

Accordingly, the proposed settlement is rejected, and the Commissioner remands this matter to the Office of Administrative Law for revision of the documents and expansion of the record, consistent with the concerns herein expressed. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, this matter shall proceed to a plenary hearing on the merits.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

June 7, 1999
Date of Mailing, June 7, 1999

178-99

JEFFREY MILLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF NEWTON, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

June 7, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO.: EDU 9184-97
AGENCY DKT. NO. 259-7/97

JEFFREY MILLER,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF NEWTON,

Respondent.

Merick H. Limsky, Esq., represented petitioner
(Balk, Oxfeld, Mandell & Cohen, P.A, attorneys)

Phillip E. Stern, Esq., represented respondent
(Sills Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: April 15, 1999 Decided: April 16, 1999

BEFORE **JEFFREY A. GERSON**, ALJ

This matter was transmitted to the Office of Administrative Law (OAL) on September 16, 1997, for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Settlement Agreement.

Having reviewed the contents of the attached Settlement Agreement, I **FIND**: (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, **I CONCLUDE** that the attached Settlement Agreement meets the requirements of *N.J.A.C. 1:1-19.1.1*, and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **DISMISSED**.

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

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

4/15/99
DATE

JEFFREY A. GERSON, ALJ

Receipt Acknowledged:

4/23/99
DATE

Debbie Antanaitis/PP
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 26 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

BALK, OXFELD, MANDELL & COHEN, P.A.
50 Commerce Street
Newark, New Jersey 07102
Attorneys for Appellant

JEFFREY MILLER,	: OFFICE OF ADMINISTRATIVE LAW O.A.L. DOCKET NO.: EDUOA 09184-97N
Petitioner,	:
v.	: SETTLEMENT AGREEMENT
BOARD OF EDUCATION OF THE TOWN OF NEWTON,	:
Respondent.	:

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement which fully disposes of all issues in controversy, with regard to the above matter, between the Petitioner and Respondent:

1. Jeffrey Miller, Petitioner, withdraws his petition and request for a hearing, and the Respondent agrees to pay the sum of five thousand three hundred two dollars ($5,302.00) to Petitioner as soon as is reasonably possible. This amount represents total disability benefits from April 15, 1997 to June 30, 1997 at a weekly rate of four hundred eighty-two dollars ($482.00).

2. The Respondent will amend the Petitioner's personnel records to conform to the terms of the settlement.

3. Except as noted above, the Petitioner waives all further claims against the Respondent with regard to this matter, including any award of back pay, counsel fees, or other monetary relief.

4. Nothing in this agreement shall be deemed to be an admission of liability on behalf of either party.

5. This agreement shall not constitute a precedent in any matters involving other employees of the Respondent.

MERICK H. LIMSKY, ESQ.
Attorney for Jeffrey Miller

DATED: 3/29/99

JEFFREY MILLER
Petitioner

DATED: 4/7/99

PHILIP E. STERN, ESQ.
Attorney for Respondent

DATED:

OAL DKT. NO. EDU 9184-97
AGENCY DKT. NO. 259-7/97

JEFFREY MILLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF NEWTON, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, settlement agreement and initial decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.
June 7,1999
Date of Mailing, June 7, 1999

BOARD OF EDUCATION OF THE BOROUGH OF SPOTSWOOD, MIDDLESEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MILLTOWN, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Board alleged respondent Board failed to make tuition payments in accordance with their sending-receiving relationship. In cross-petition, respondent challenged petitioner's tuition calculations. Original petition and cross-petition issues were resolved between the parties. Remaining issues were the proper method of calculation for building use charges as a component of tuition, the correct amount of tuition due for certain school years and for which years building use charges might be applied.

ALJ granted petitioner's motion for summary decision and denied respondent's cross-motion for summary decision. ALJ noted the terms of the contract were dictated by regulation and the provisions were pre-printed on a form prepared by the Commissioner and required to be used by the parties. Moreover, ALJ determined that petitioner sought only to be compensated for the services it provided in an amount equal to its actual per pupil costs and it was not unreasonable to expect respondent to pay the full cost of educating its own students. ALJ found respondent suffered no prejudice whatsoever from the omission of the building use charge in the estimated calculations since respondent had the time value of the additional monies.

Commissioner adopted findings and determination in initial decision as his own, including the approval of the parties' settlement agreement with respect to certain issues raised by the petition.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 197-98

AGENCY DKT. NO. 446-11/97

BOARD OF EDUCATION OF THE BOROUGH OF SPOTSWOOD,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF MILLTOWN,

Respondent-Cross Petitioner.

Philip H. Shore, Esq., for petitioner (Shore & Zahn, attorneys)

Anthony B. Vignuolo, Esq., for respondent-cross petitioner (Borrus, Goldin, Foley, Vignuolo, Hyman, Stahl & Clarkin, attorneys)

Record Closed: October 21, 1998 Decided: March 5, 1999*

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter commenced on November 12, 1997, when the Board of Education of the Borough of Spotswood (hereinafter petitioner) filed a petition of appeal seeking an order from the Commissioner of Education that the Board of Education of the Borough of Milltown (hereinafter

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* Extensions of time were requested and granted pursuant to N.J.S.A. 52:14B-10(c).

respondent) failed to make tuition payments in accordance with the sending/receiving relationship in violation of law. On November 19, 1997, respondent filed an answer, cross-petition and third-party complaint against the Commissioner of Education. The cross-petition challenged petitioner's tuition calculations. Petitioner filed an answer to the cross-petition on December 18, 1997. By ruling entered January 8, 1998, then Assistant Commissioner David C. Hespe granted the motion of Deputy Attorney General Arlene Lutz to dismiss the Commissioner as a third-party respondent, and on January 16, 1998, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 to -13.

A prehearing conference was conducted on May 13, 1998 at which time it was noted that most of the issues raised in the original petition and cross-petition had been resolved between the parties and identified the following remaining issues for determination:

1. What is the proper method of calculation for building use charges as a component of tuition?

2. What is the correct amount of tuition due for school years 1994-95,* 1995-96, 1996-97, 1997-98 and 1998-99?

    (a) For which years may building use charges be applied?

On July 14, 1998, the parties filed a joint stipulation of facts, included in which was their executed settlement agreement with the regard to the issues which had been resolved. That agreement is attached hereto and incorporated herein as if set forth herein at length. The parties filed cross-motions for summary decision on or about July 29, 1998. Petitioner's reply brief was filed on August 18, 1998. Respondent's reply brief was filed on August 20, 1998. By letter dated August 26, 1998, petitioner objected to certain comments in respondent's reply which appeared to reply to petitioner's reply brief rather than to petitioner's initial brief and filed a separate reply on its own behalf also dated August 26, 1998. Oral argument was conducted by telephone conference

* After the prehearing conference, the parties reached a settlement agreement with respect to the 1994-95 school year. See signed agreement attached hereto.

call on October 20, 1998. An additional document which had been missing from the joint stipulations previously filed was forwarded and was received on October 21, 1998, whereupon the record closed.

FINDINGS OF FACT

The parties have provided the following joint stipulation of facts:

1. The Board of Education of the Borough of Spotswood ("Spotswood") is the body politic responsible for the operation of public schools in the Borough of Spotswood.

2. The Board of Education of the Borough of Milltown ("Milltown") is the body politic responsible for the operation of public schools in the Borough of Milltown.

3. Milltown and Spotswood have maintained a sending/receiving relationship pursuant to which Milltown sends and Spotswood receives high school students, grades 9 through 12, inclusive. The sending/receiving relationship has been in existence for approximately 20 years.

4. During the school year 1994/1995, the estimated tuition rate for the Milltown students, as calculated by Spotswood, did not include a component for a building use charge calculated in accordance with N.J.A.C. 6:20-3.1(d)(6).

5. During the school year 1995/1996, the estimated tuition rate for the Milltown students, as calculated by Spotswood, did not include a component for a building use charge calculated in accordance with N.J.A.C. 6:20-3.1(d)(6).

6. During the school year 1996/1997, the estimated tuition rate for the Milltown students, as calculated by Spotswood, did not include a component for a building use charge calculated in accordance with N.J.A.C. 6:20-3.1(d)(6).

7. During the school year 1997/1998, the estimated tuition rate for the Milltown students, as calculated by Spotswood, did not include a component for a building use charge calculated in accordance with N.J.A.C. 6:20-3.1(d)(6).

8. During the school year 1998/1999, the estimated tuition rate for the Milltown students, as calculated by Spotswood, did include a component for a building use charge calculated in accordance with N.J.A.C. 6:20-3.1(d)(6).

9. Building use charge represents the amount of interest not covered by State aid (i.e., the amount paid from the local tax levy) and is determined according to N.J.A.C. 6:20-3.1(d)(6).

10. Attached are the following tuition contract agreements between Spotswood and Milltown:

Exhibit 1 = 1994-1995 tuition contract agreement for Milltown students grades 9-12.

Exhibit 2 - 1994-1995 tuition contract agreement for Milltown's neurologically impaired students.

Exhibit 3 = 1995-1996 tuition contract agreement for Milltown students grades 9-12.

Exhibit 4 = 1995-1996 tuition contract agreement for Milltown's neurologically impaired students.

Exhibit 5 = 1996-1997 tuition contract agreement for Milltown students grades 9-12.

Exhibit 6 = 1996-1997 tuition contract agreement for Milltown's neurologically impaired students.

11. The Commissioner of Education certified the 1994-1995 actual per pupil costs in Spotswood pursuant to N.J.A.C. 6:20-3.1. See Exhibit 7.

12. The Commissioner of Education certified the 1995-1996 actual per pupil costs in Spotswood pursuant to N.J.A.C. 6:20-3.1. See Exhibit 8.

13. Exhibit 9 is the Settlement Agreement between the parties resolving certain aspects of this case.

14. Exhibit 10 is the Department of Education worksheet and instructions for estimating costs per pupil for tuition purposes for 1998-1999.

15. Exhibit 11 is the Department of Education instructions for completing the 1995-1996 ACTUAL COST PER PUPIL REPORT.

16. Exhibit 12 is the Department of Education instructions for completing the 1996-1997 ACTUAL COST PER PUPIL REPORT.

17. Spotswood has incurred interest on debt service not supported by State aid.

18. Exhibit 13 are forms A4-1, A4-2, accompanying Allocation Method Support Document and Instructions for completing these forms for 1995-1996. These forms were submitted to the Department of Education in August of 1997.

19. Exhibit 14 are forms A4-1, A4-2 and accompanying Allocation Method Support Documents for 1996-1997.

Actual per pupil costs as certified by the Commissioner have exceeded tentative or estimated costs per pupil. Tentative costs vs. actual costs for the year which has already been calculated were as follows: Grades 9-12, 1995-96, $7900/$8282; Neurologically Impaired Students, 1995-96, $10,175/17,850. Each of the executed contracts contains the same provisions with respect to reimbursement or additional payments:

4a. In the event that it is later determined that the tentative tuition charge was greater than the "actual cost per pupil" as certified by the commissioner multiplied by the actual average daily enrollment received, the RECEIVING DISTRICT will return the excess amount to the SENDING DISTRICT no later than the end of the third school year following this contract year. The RECEIVING DISTRICT has the option to pay such excess amount or to credit such excess amount to the SENDING DISTRICT in accordance with the following payment schedule: *(Insert day and month payment or credit is due) and (insert percentage of payment or credit due).*

4b. In the event that it is later determined that the tentative tuition charge was less than the "actual cost per pupil" as certified by the commissioner multiplied by the actual daily enrollment received, the RECEIVING DISTRICT will

charge the SENDING DISTRICT no later than the end of the third school year following the contract year the amount owed as follows:

CHECK ONE ONLY

☐ All of the amount owed.

☐ None of the amount owed.

☒ Part of the amount owed as indicated in this space. **50% September 1998 & February 1999.**
The SENDING DISTRICT will pay any amount owed to the RECEIVING DISTRICT in accordance with the following payment schedule: *(Insert day and month payment is due) and (insert percentage of payment due).*

Printed directions issued by the New Jersey Department of Education for calculating estimated tuition charges contain a specific reference to a building use charge and provide in pertinent part:

> A building use charge should be included, if applicable, which represents the interest portion of debt services not supported by state aid. Determine the percentage of state aid to total debt service (principal and interest), multiply the total debt service interest by the % of state aid and subtract the product from the total debt service interest to determine the building use charge. This amount should be included on an actual or equitable basis of allocation of your choice to the affected categories or use the ratios on line 2b to distribute this total in columns (A) through (K).

APPLICABLE LAW AND DISCUSSION

The once classic statement of the standard for granting or denying summary judgment set forth in Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954), was recently modified in Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995). Therein the Court held that the standard to be applied is now the same as the standard for determining motions for

involuntary dismissal under R. 4:37-2(b) and for determining motions for judgment under R. 4:40-1 and R. 4:40-2. Trial courts considering motions for summary judgment are now required to engage in the same type of evaluation, analysis or sifting of evidential materials in light of the burden of persuasion that applies if the matter goes to trial. The Court explained:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.". . . Credibility determinations will continue to be made by a jury and not a judge. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2. . . . The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law, . . ., the trial court should not hesitate to grant summary judgment. (citations omitted) Id. at 540.

The Court noted that to send a case to trial knowing that a rational decision-maker could reach but one conclusion was indeed "worthless" and would "serve no useful purpose." The purpose of this new standard, the decision explained, was to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves.

In the present matter, the parties stipulate that none of the material facts are in dispute and accordingly, this matter is ripe for summary decision.

N.J.S.A. 18A:38-19, the statute relevant to a determination in this matter, makes it perfectly clear that respondent is required to pay tuition to petitioner in:

> . . . an amount not in excess of the actual cost per pupil as determined under rules prescribed by the Commissioner and approved by the State Board . . .

The rules for determining tuition rates for regular public schools appear at N.J.A.C. 6:20-3.1 to 3.4. These rules provide for the receiving district to establish a tentative charge for budgetary purposes by written contractual agreement between the receiving district board and the sending district board. Such charges are not to exceed the receiving district's estimated cost per pupil for the ensuing school year for the purpose or purposes for which tuition is being charged, and the written contract is required to be on a form prepared by the Commissioner. N.J.A.C. 6:20-3.1(e). The rules and regulations do not instruct boards concerning how to go about setting the tentative tuition charge or estimating the cost per pupil for the ensuing school year. The regulations do provide for a copy of the receiving district's calculations to determine the estimated cost per pupil to be sent to the sending district on a form prepared by the Commissioner. In accordance with this regulatory scheme, after the conclusion of the school year in question the Commissioner determines the "actual cost per pupil." Two methods for calculating the "actual cost per pupil" are set forth in the regulations. Both methods include building use charges as a component. When the Commissioner's later determination reveals that the tentative tuition charge established by the written contractual agreement was greater than the actual cost per pupil during the school year, "the receiving district board of education shall return to the sending district board of education in the third school year following the contract year the amount by which the tentative charge exceeded the actual charge. . . ." N.J.A.C. 6:20-3.1(e)3. The regulations also provide that if the Commissioner later determines that the tentative charge established by written contractual agreement was less than the actual cost per pupil during the school year, "the receiving district board of education may charge the sending district board of education all or part of the amount owed by the sending district board of education, to be paid during the third school year following the school year for which the tentative charge was paid." N.J.A.C. 6:20-3.1(e)4.

It is respondent's position herein that it should not have to pay to petitioner the difference between the tentative tuition charge in the contract and the actual cost per pupil because petitioner failed to include in its estimated calculations the building use charge which the Commissioner, in accordance with the regulation, included in the actual cost per pupil. Respondent asserts that it relied upon the absence of a building use charge in the estimated cost

calculations and petitioner should therefore be estopped from requiring payment for the difference attributable to utilization by the Commissioner of a building use charge in his calculations. Respondent also notes the difference between the mandatory language "shall return" in N.J.A.C. 6:20-3.1(e)3 and the discretionary language "may charge" in N.J.A.C. 6:20-3.1(e)4, and argues, "In this language the Commissioner clearly recognizes a distinction between the underestimation and the overestimation of tentative tuition."

The main problem with any of these arguments, however, is the mandatory nature of the language utilized in the contract paragraph quoted hereinabove in the findings of fact section which provides that the receiving district (petitioner) "will charge" the sending district (respondent) in the third school year following the contract year the amount owed, and in each instance the contract has box three checked which indicates that the charges will be for part of the amount owed, 50% in September and 50% the following February. None of the contracts for the relevant time periods in this matter indicate box two, "none of the amount owed" as the option.

Petitioner objects to the comments in respondent's initial brief that prior to the 1997-98 school year there were no contract discussions related to building use charge as a component of the tuition. Such allegations are outside the record of stipulated facts, petitioner argues. The allegation of no discussion or disclosure, however, does not benefit respondent or advance respondent's estoppel argument, however. If there had been discussions concerning building use charges and the charges had nevertheless then been omitted from the estimated cost, there might be some argument that petitioner should later be estopped from collecting for differences attributable to building use charges in the actual per pupil cost. Although respondent asserts that this was a deliberate omission on petitioner's part, and one upon which respondent had the right to rely, what possible reason petitioner could have had for intentionally deciding to be paid later rather than sooner for the services it was providing, escapes me. As the record stands, however, it is not possible to determine whether the omission in the estimated cost calculations was intentional or unintentional, nor does it matter to the ultimate determination of the issue, because the clear terms of the written contract provide that petitioner will charge and respondent will pay in the third calendar year after the contract year the difference between estimated and actual.

Although respondent complains that it relied to its detriment on the absence of the building use charge in the estimated calculations, in fact the omission actually worked to respondent's benefit in that respondent did not have to pay the full cost of educating its children in petitioner's schools until three years after the fact. Respondent's arguments that petitioner unlawfully seeks to modify an existing contract by the inclusion of a material economic term retroactively are likewise without merit. The terms of the contract are dictated by law and the provisions are pre-printed on a form prepared by the Commissioner and required to be used by the parties. Petitioner herein seeks only to be compensated for the services it provided in an amount equal to its actual per pupil costs. Not only is it not unreasonable to expect respondent to pay the full cost of educating its own students, but respondent has suffered no prejudice whatsoever from the omission of the building use charge in the estimated calculations. As noted, respondent has had the time value of the additional monies.

For all of the foregoing reasons, petitioner's motion for summary decision is **GRANTED.** Respondent's cross-motion for summary decision is **DENIED** and the within proceedings are hereby concluded.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P. O. Box 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 5, 1999
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

3/9/99
DATE

Debbie Bontempo
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 10 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cc

SETTLEMENT AGREEMENT

WHEREAS, the Board of Education of the Borough of Spotswood (hereafter "SPOTSWOOD") has had with the Board of Education of the Borough of Milltown (hereafter "MILLTOWN"), and with the Board of Education of the Borough of Helmetta (hereafter "HELMETTA") long-term sending-receiving relationships, wherein MILLTOWN has sent its students for grades 9 through 12 to SPOTSWOOD and HELMETTA has sent its students for grades K through 12 to SPOTSWOOD; and

WHEREAS, certain disputes regarding tuition have arisen between the respective Boards; and

WHEREAS, SPOTSWOOD commenced litigation against MILLTOWN, with the matter bearing Commissioner of Education Docket No. 446-11/97 and Office of Administrative Law Docket No.: EDUOT 0197-98S, with respect to tuition payments due for the 1997-1998 school year, execution of appropriate tuition contract agreements, tuition adjustment payments for the 1994-1995 school year and related matters; and

WHEREAS, MILLTOWN filed an Answer, Cross Petition and Third Party Complaint; and

WHEREAS, in the above-referenced matter, MILLTOWN filed a Notice of Motion seeking to restrain SPOTSWOOD from utilizing its 1997-1998 tuition calculation formula for the 1998-1999 school year; and

WHEREAS, the parties wish to settle their differences;

IT IS, THEREFORE, on this day of May, 1998, for and in consideration of the mutual promises, covenants and agreements contained herein, agreed by and between SPOTSWOOD, MILLTOWN and HELMETTA as follows:

1. SPOTSWOOD's Petition shall be dismissed with prejudice.

2. The MILLTOWN Cross-Petition shall be dismissed with prejudice with respect to all aspects, except those underlying the pending Notice of Motion regarding the calculation of the 1998-1999 school year tentative tuition rate, filed by MILLTOWN insofar as it relates to the inclusion of building use charges in the calculation of tuition rates for the school years 1995-1996 through 1998-1999 inclusive.

3. The 1995-1996 tuition rate for Milltown regular education students attending Spotswood High School is established at $8,234.00, inclusive of building use charges, and $15,143.00, inclusive of building use charges for neurologically impaired students.

4. The 1995-1996 tuition rate(s) for HELMETTA students attending the SPOTSWOOD schools is:

Preschool Handicapped Students	$ 2,724
Neurologically Impaired Students	$15,143
Perceptually Impaired Students	$11,138
Kindergarten Students	$ 5,619
Grades 1 - 5 Students	$ 5,988
Grades 6 - 8 Students	$ 7,125
Grades 9 - 12 Students	$ 8,234

5. MILLTOWN sent 220.9 students and 5.1 neurologically impaired students to Spotswood High School during the 1995-1996 school year. MILLTOWN has paid for the 1995-1996 school year the sum of $1,917,500.00 and, thus, it is agreed that MILLTOWN is entitled to a refund from SPOTSWOOD of $21,430.10, inclusive of building use charges.

6. The 1998-1999 budgets for the Spotswood and Milltown school districts will reflect a payment due from SPOTSWOOD to MILLTOWN in the amount of $21,430.10 representing the refund referenced in the preceding paragraph.

7. HELMETTA sent to SPOTSWOOD during the 1995-1996 school year:

Preschool Handicapped Students	1.1
Neurologically Impaired Students	2.7
Perceptually Impaired Students	2.0
Kindergarten Students	15.1
Grades 1 - 5 Students	88.8
Grades 6 - 8 Students	36.5
Grades 9 - 12 Students	51.8

HELMETTA has paid for the 1995-1996 school year $1,421,445.00 and it is agreed that HELMETTA is entitled to a refund from SPOTSWOOD of $52,121.50, inclusive of building use charges.

8. SPOTSWOOD and MILLTOWN attorneys will seek, in the pending proceeding, a determination from the Office of Administrative Law and Commissioner of Education as to whether SPOTSWOOD properly charged MILLTOWN a building use charge in the amount of $184 per

student for the 1995-1996 school year. Should the determination be that a building use charge was not permitted, SPOTSWOOD will repay to MILLTOWN the sum of $41,584.00, after entry of final decision and any applicable appeals. Should it be determined that SPOTSWOOD was entitled to collect the aforesaid building use charge, there will be no further refund for the 1995-1996 school year, except for the $21,430.10 refund set forth in paragraphs 5 and 6 above.

9. In arriving at the within settlement, the Business Administrators of SPOTSWOOD and MILLTOWN, and the HELMETTA Board Secretary distributed actual 1995-1996 costs and reviewed vouchers to support expenditures and distribution to proper accounts, salary lists (by name) and health benefits (by name), verified job assignments, grade assignments and year-end student registration.

10. The SPOTSWOOD and MILLTOWN and Business Administrators and the HELMETTA Board Secretary will meet as soon as feasible (but no later than two weeks from signing of this Agreement by all parties) to establish the actual tuition rate to be charged by SPOTSWOOD to MILLTOWN and HELMETTA and the number of students sent by MILLTOWN and HELMETTA to SPOTSWOOD for the 1996-1997 school year. In establishing the tuition rate, the districts will use the same methods and procedures that were used in resolving the agreed upon tuition rate for the 1995-1996 school year, as set forth above. This tuition rate shall be subject to certification by the Commissioner of Education.

nd

11. The SPOTSWOOD and MILLTOWN, Business Administrators and the HELMETTA Board Secretary, will meet each year, at least three (3) weeks before the date established for County approval of initial budget submission, to determine estimated tuition rates using the information that is to be provided pursuant to the following paragraph 12, as well as the same ratios and allowances set forth in the immediately preceding school year's Commissioner of Education forms A4-1/A4-2 (or equivalent Commissioner of Education promulgated forms).

12. At least three (3) weeks before the date established for County approval of initial budget submission, SPOTSWOOD will provide to MILLTOWN and HELMETTA a list (by name) with job assignments, annual salary, and health benefits, with the exception of those employees about whose positions such information may not be provided in accordance with statute, regulation, or Executive Order, for the currently proposed budget, and the SPOTSWOOD and MILLTOWN Business Administrators and the HELMETTA Board Secretary will agree upon the pupil count (for MILLTOWN, HELMETTA and SPOTSWOOD students) on or before January 15 of each year.

13. The procedures outlined above are intended to create an amicable basis from which tuition calculations can be estimated on an annual basis. The procedures are subject to modification as required by statutory, regulatory or case law changes (including tuition calculation formulae).

14. The Commissioner of Education shall have jurisdiction to hear and determine any controversies or disputes which may arise with respect to the aforesaid procedures or any other aspect of this Agreement.

15. The above referenced case (Commissioner of Education Docket No. 446-11/97 and Office of Administrative Law Docket No.: EDUOT 0197-98S) shall continue for the purposes of obtaining an administrative determination concerning the validity of building use charges being applied by SPOTSWOOD in calculating MILLTOWN tuition for the 1995-1996, 1996-1997, and the 1997-1998 school years, as well as a similar determination for building use charges for the 1998-1999 school year and all succeeding school years.

16. SPOTSWOOD has advised MILLTOWN and HELMETTA, and MILLTOWN and HELMETTA acknowledge, that SPOTSWOOD has included an estimated building use charge in the 1998-1999 school year tuition estimate.

17. MILLTOWN will promptly pay to SPOTSWOOD the sums that have been withheld from SPOTSWOOD for the 1997-1998 school year tuition, as calculated by SPOTSWOOD following the MILLTOWN April 7, 1998 Board meeting. The balance of 1997-1998 tuition will be paid in regular installments, in accord with current practices, and adjusted as needed, so that MILLTOWN will pay for the 1997-1998 school year to SPOTSWOOD the sum of $8,043.00 for regular education students and $11,874.00 for neurologically impaired students.

18. The parties, for the 1996-1997 year, achieved agreement as to the allocation of expenditures for Program #219 of the "UNIFORM MINIMUM CHART OF ACCOUNTS" promulgated by the Commissioner of Education. The parties agree to use the same method for the allocation of expenditures for all succeeding school years for Program #219 of the "UNIFORM MINIMUM CHART OF ACCOUNTS", or such amendments or modifications as may be directed from time to time by the Commissioner of Education.

19. Immediately upon signing of this Agreement, SPOTSWOOD and MILLTOWN will execute, on forms prepared by the Commissioner of Education, as supplemented by this Agreement, written contractual agreements for tentative tuition charges required pursuant to NJAC 6:20-3.1(e) for the 1996-1997, 1997-1998, and 1998-1999 school years.

BOARD OF EDUCATION OF THE BOROUGH OF SPOTSWOOD

By Frank Palino
FRANK PALINO, President

STATE OF NEW JERSEY)
) ss:
COUNTY OF MIDDLESEX)

Be it Remembered, that on this 27th day of May, 1998, before me the subscriber, Frank V. Palino, personally appeared FRANK PALINO, who, being by me duly sworn on his oath, deposes and makes proof to my satisfaction, that he is the President of the

Board of Education of the Borough of Spotswood, the Board named in the within instrument; that BRIAN DeLUCIA is the Secretary of said Board; that the execution, as well as the making of this Instrument, has been duly authorized by a proper resolution of the members of the said Board; that deponent well knows the seal of the said Board; and that the seal affixed to said Instrument is the proper Board seal and was thereto affixed and said Instrument signed and delivered by said President as and for the voluntary act and deed of said Board in the presence of deponent, who thereupon subscribed his name as attesting witness.

BOARD OF EDUCATION OF THE BOROUGH OF SPOTSWOOD

By _____
BRIAN DeLUCIA, Board Secretary

Sworn and subscribed to before me
this day of May, 1998

_____
Notary Public

JOAN V. POLON
NOTARY PUBLIC - NEW JERSEY
MIDDLESEX COUNTY
My Comm. Expires July 25, 2002

BOARD OF EDUCATION OF THE BOROUGH OF MILLTOWN

By _____
ROBERT SEGUIN, President

STATE OF NEW JERSEY)
) ss:
COUNTY OF MIDDLESEX)

Be it Remembered, that on this 21th day of May, 1998, before me the subscriber, _____, personally appeared ROBERT SEGUIN, who, being by me duly sworn on his oath, deposes and makes proof to my satisfaction, that he is the President of the Board of Education of the Borough of Milltown, the Board named in the within instrument; that CAROLYN B. JOSEPH is the Secretary of said Board; that the execution, as well as the making of this

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Instrument, has been duly authorized by a proper resolution of the members of the said Board; that deponent well knows the seal of the said Board; and that the seal affixed to said Instrument is the proper Board seal and was thereto affixed and said Instrument signed and delivered by said President as and for the voluntary act and deed of said Board in the presence of deponent, who thereupon subscribed his name as attesting witness.

BOARD OF EDUCATION OF THE BOROUGH OF MILLTOWN

By Carolyn B. Joseph
CAROLYN B. JOSEPH, Board Secretary

Sworn and subscribed to before me
this 27th day of May, 1998

Dorothy M. Olesinski
Notary Public

DOROTHY M. OLESINSKI
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Jan. 26, 2001

BOARD OF EDUCATION OF THE BOROUGH OF HELMETTA

By Barbara Raczynski
BARBARA RACZYNSKI, President

STATE OF NEW JERSEY)
) ss:
COUNTY OF MIDDLESEX)

Be it Remembered, that on this day of May, 1998, before me the subscriber, , personally appeared BARBARA RACZYNSKI, who, being by me duly sworn on her oath, deposes and makes proof to my satisfaction, that she is the President of the Board of Education of the Borough of Helmetta, the Board named in the within instrument; that PETER McPARTLAND is the Secretary of said Board; that the execution, as well as the making of this Instrument, has been duly authorized by a proper resolution of the members of the said Board; that deponent well knows the seal of the

SHORE & ZAHN
5F Auer Court
P.O. Box 755
East Brunswick, NJ 08816
(732) 254-5500
Attorneys for Petitioner

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

1998 JUL -2 A 10:28

BOARD OF EDUCATION OF THE BOROUGH OF SPOTSWOOD, Petitioner, -v- BOARD OF EDUCATION OF THE BOROUGH OF MILLTOWN, Respondent-Cross-Petitioner.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY DOCKET NO. 446-11/97 OAL DOCKET NO.: EDUOT00197-98S Civil Action **PARTIAL** STIPULATION OF DISMISSAL WITH PREJUDICE

Certain of the matters in difference in the above-entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the PETITION be and it is hereby dismissed with prejudice; and the CROSS-PETITION be and it is hereby dismissed, with prejudice, except for those allegations dealing with the inclusion of building use charges in the tuition charged by Spotswood to Milltown and to be charged in the future by Spotswood to Milltown, without costs against either party.

Dated: June 15, 1998

BORRUS, GOLDIN, FOLEY, VIGNUOLO, HYMAN, STAHL & CLARKIN

BY: _____
ANTHONY B. VIGNUOLO, ESQ.
Attorneys for Respondent, Cross-Petitioner

SHORE & ZAHN

BY: _____
PHILIP H. SHORE, ESQ.
Attorneys for Petitioner

said Board; and that the seal affixed to said Instrument is the proper Board seal and was thereto affixed and said Instrument signed and delivered by said President as and for the voluntary act and deed of said Board in the presence of deponent, who thereupon subscribed his name as attesting witness.

BOARD OF EDUCATION OF THE BOROUGH OF HELMETTA

By _____
PETER McPARTLAND, Board Secretary

Sworn and subscribed to before me
this 9th day of JUNE 1998

_____
Notary Public
NANCY A. METZ
NOTARY PUBLIC OF NEW JERSEY
COMMISSION EXPIRES Dec 7, 2000

11 R

BOARD OF EDUCATION OF THE BOROUGH OF SPOTSWOOD, MIDDLESEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MILLTOWN, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. The exceptions filed by respondent Board of Education of the Borough of Milltown (hereinafter, "Milltown") and the reply of petitioner Board of Education of the Borough of Spotswood (hereinafter, "Spotswood") were submitted in accordance with *N.J.A.C.* 1:1-18.4.

Milltown initially excepts to the Administrative Law Judge's (ALJ) finding that the contract(s) signed by the parties "mandated the inclusion of a building use charge in the parties' tuition agreement, at page 9 of [the initial] decision." (Milltown's Exceptions at p. 1) Milltown argues that it was erroneous for the ALJ to conclude that the language in the contract indicating that Spotswood "will charge" the sending district for underestimated costs should supersede "the practice and conduct of Spotswood in omitting the building use charge***." (*Id.* at p. 2) Rather, Milltown maintains that this repayment provision

> ***relates to those component elements of the initial tuition identified and contained in the estimated tuition rate and not to

> additional components not even identified in the estimated rate charge.*** (*Id.*)

Milltown reasons that the ALJ's broadening of Spotswood's legal ability to charge for components which were not identified in the tentative tuition charge violates elementary contract law principles. (*Id.*) In this regard, Milltown argues that the parties' failure to include a category for building use charges within tuition calculations "was a significant omission," and Spotswood should, therefore, be estopped from later adding this charge. (*Id.* at p. 3)

Milltown next asserts that the ALJ improperly dismissed, as nonmaterial, the issue of whether Spotswood's omission of the building use charges in its estimated costs was intentional. (*Id.* at p. 4) Here, it underscores that the parties' stipulations did not include facts as to Spotswood's intention with regard to these charges. Milltown argues that

> ***[i]f Spotswood in fact deliberately omitted the building use charge from its initial tuition calculation in order to entice Milltown to continue its sending/receiving relationship based upon misrepresented and understated tuition figures, the state of mind of Spotswood was a relevant and material issue which should have legally compelled a hearing.*** (*Id.* at p. 4)

Thus, Milltown reasons that the ALJ's finding at page nine of the initial decision that such intent was actually without consequence in this matter is erroneous. It asserts, to the contrary, that its estoppel argument would be strengthened by a finding that Spotswood deliberately misrepresented its estimated costs. (*Id.*)

Finally, Milltown contends that the ALJ improperly found that the mandatory contractual language supersedes the permissive language found in the regulations at *N.J.A.C.* 6:20-3.1(e)4 with respect to a receiving district's authority to charge a sending district for underestimated costs. Milltown argues that, as a matter of public policy, a contract should not modify the terms of the administrative code. (*Id.* at p. 7)

In its reply, Spotswood counters that it should not be estopped from seeking payment for the building use charges at issue, underscoring that equitable estoppel is rarely applied to public bodies, so as not to frustrate legislative policy. (Spotswood's Reply at p. 5) Spotswood also argues that the application of equitable estoppel requires a finding that Milltown reasonably relied, to its prejudice, on Spotswood's conduct, a standard which does not apply herein. (*Id.* at p. 6) Milltown does not allege, according to Spotswood, that Spotswood took any action which would form the basis of an estoppel argument. To the extent Spotswood was silent on the issue of building use charges, and its silence might form the basis of an estoppel argument, Spotswood argues:

> ***There is no duty imposed by the sending-receiving tuition statutes or regulations that required Spotswood to identify with specificity the items comprising the tentative tuition charge Milltown agreed to pay. Indeed, the very designation of the tuition charge as *tentative* is inconsistent with such a duty. (*Id.*; emphasis in text)

Moreover, Spotswood warrants that there is nothing in the Stipulated Set of Facts to support Milltown's assertion that it has suffered or changed its course of conduct based on Spotswood's action or inaction. (*Id.* at p. 7)

With respect to Milltown's contention that the ALJ improperly dismissed its argument that Spotswood's omission of the building use charge in its estimated tuition rates was a deliberate misrepresentation, Spotswood argues that Milltown's Cross-Petition never raised such an allegation; neither was the allegation raised at the prehearing conference. Further, since the allegation was not contained in the Stipulation of Facts, Spotswood urges that it cannot now form the basis of an exception. (*Id.* at p. 11) Spotswood views Milltown's claims in this regard as "unsubstantiated and unsworn assertions ***" which cannot defeat a motion for summary judgment. (*Id.* at pp. 11-12) Since Spotswood maintains that equitable estoppel is inapplicable, it concludes that Milltown's "intent" claim is legally immaterial.

Finally, Spotswood counters that the initial decision does not permit the parties' tuition contracts to modify the New Jersey Administrative Code, as Milltown so urges, stating:

> It is irrelevant that Spotswood is not required by law to charge Milltown the difference between the tuition Milltown paid and the correct tuition amount based upon actual costs per pupil. There is nothing in the regulatory scheme that prohibits Spotswood from collecting proper tuition amounts for Milltown's students. *** A sending district may be required by the receiving district to pay tuition charges up to the actual cost per pupil certified by the Commissioner of Education. The tuition contracts memorialized this arrangement.*** (*Id.* at p. 15)

Spotswood contends that, while the law requires districts in sending-receiving relationships to negotiate a tentative tuition charge, it does not specify the components of that charge. Nor does the law compel a receiving district to set the highest estimated tuition charge possible. (*Id.* at p. 16) Thus, Spotswood concludes that Milltown has underpaid its tuition, and now seeks a windfall. (*Id.* at p. 15)

Upon careful and independent review, the Commissioner determines to affirm the initial decision of the ALJ, with amplification as set forth herein. Initially, the Commissioner notes that a tentative tuition charge shall be established by written contractual agreement between a receiving district board of education and a sending district board of education; the tentative charge shall equal the district's estimated cost per pupil for the ensuing year. *N.J.A.C.* 6:20-3.1(e). Additionally, the pertinent regulations permit, but do not require, a receiving district to charge a sending district for either all or part of the money owed when it is determined that the tentative charge established by written contractual agreement was *less* than the actual cost per pupil during the school year. *N.J.A.C.* 6:20-3.1(e)4.

On a form prepared by the Commissioner, *N.J.A.C.* 6:20-3.1(e), the parties herein agreed that, in the event it is determined that the tentative tuition charge was less than the actual cost per pupil, as certified by the Commissioner, Spotswood *will charge* Milltown in the third year

following the contract year, the amount owed, and Milltown *will pay* the full amount in accordance with a specified payment schedule. (Initial Decision at pp. 5-6, 9) As the ALJ noted, the contract permits the parties the option to check the second box under paragraph 4b, indicating that a sending district *would not* be charged with any tuition differential, *or* to insert language beside and/or under the third box of paragraph 4b, which provides for repayment of *part of* the money owed. (*Id.* at p. 6) However, in the contracts at issue, the third box was checked and Milltown agreed it "will pay" the full amount in two equal payments.[1] (Exhibits 3 and 5[2]) The Commissioner, therefore, rejects Milltown's assertion that the initial decision signifies that the terms of the contract supersede the administrative code. Clearly, the applicable regulations *permit* Spotswood to forego charging Milltown where tentative costs are found to be underestimated; the parties, however, agreed to terms which provided otherwise.

As for Milltown's contention that Spotswood should now be estopped from including in its tuition charge a component expense which had not been included in its tuition calculations for the 1994-95, 1995-96, 1996-97 and 1997-98 school years, the Commissioner recognizes that

> Equitable estoppel is generally defined as "the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who has in good faith relied upon such conduct, and has been led thereby to *change his position for the worse*, and who on his part acquires some corresponding right, either of property, of contract, or of remedy." *Miller v. Teachers' Pension & Annuity Fund*, 179 *N.J. Super.* 473, 476 (App. Div.), *certif. denied* 88 *N.J.* 502 (1981). (emphasis added)

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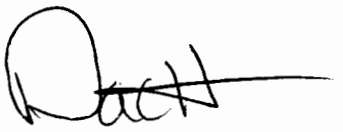
[1] It is herein noted that, for the 1995-96 school year, the parties signed an agreement which provided that the amount owed would be paid as follows: "50% Spetember (sic) 1998 & February 1999." (Exhibit 3) Although this language may be read to provide only for a 50% recoupment for Spotswood, Milltown never asserts that the language should be so read, and never disputes the ALJ's interpretation on page nine of the initial decision that there would be a 50% payment in September of 1998 *and* a 50% payment in February 1999.

[2] The tuition contracts for Milltown's neurologically impaired students are slightly different from those for the students in grades 9-12. There, the repayment language and options for repayment are found at paragraph 4d.

Although Milltown asserts that it was entitled to reasonably rely upon the absence of a building use charge as a component of the tuition (Milltown's Exceptions at p. 2), nowhere does Milltown identify *how* it was harmed by such reliance, or how it "changed its position for the worse" by relying upon the absence of building use charges in prior calculations. In this regard, as the ALJ properly stated, "***respondent has suffered no prejudice whatsoever from the omission of the building use charge in the estimated calculations. As noted, respondent has had the time value of the additional monies." (Initial Decision at p. 10) Under these circumstances, the Commissioner, like the ALJ, finds no cause to invoke principles of equitable estoppel, or to compel further fact-finding with respect to Milltown's claim that Spotswood deliberately omitted the building use charges from its calculations.

Accordingly, respondent's cross-petition is dismissed for the reasons expressed therein and amplified above. Additionally, the parties' settlement agreement, incorporated therein, is deemed a final decision with respect to those issues raised by the Petition of Appeal, pursuant to *N.J.A.C.* 1:1-19.1, except that said agreement shall not be construed to confer jurisdiction upon the Commissioner with respect to any matter he would not otherwise maintain the authority to review and adjudicate.[3]

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

[3] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

June 7, 1999
Date of Mailing, June 7,1999

180-99

IN THE MATTER OF THE TENURE	:	
HEARING OF MICHAEL COVELLO,	:	
STATE-OPERATED SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
THE CITY OF NEWARK, ESSEX COUNTY.	:	DECISION
_____	:	

June 7, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9980-97

AGENCY DKT. NO. 341-9/97

STATE-OPERATED SCHOOL DISTRICT

OF THE CITY OF NEWARK, ESSEX COUNTY,

Petitioner,

v.

MICHAEL COVELLO,

Respondent.

Cherie L. Maxwell, Esq., for Petitioner
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Robert H. Greenwood, Esq., for Respondent
(Williams, Caliri, Miller & Otley, attorneys)

Record Closed: April 6, 1999 Decided: April 13, 1999

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on October 29, 1997, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

Settlement discussions were held and a settlement was reached.

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

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

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

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

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

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

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

April 13, 1999
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

4/23/99
DATE

Debbie Antanaitis/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 26 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

jb

SILLS CUMMIS ZUCKERMAN RADIN
TISCHMAN EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(973) 643-7000
Attorneys for State Operated
School District of the City of Newark

COMMISSIONER OF EDUCATION
OAL Docket No. EDUTH 05980-97N

In the Matter of the
Tenure Hearing of

MICHAEL COVELLO

VOLUNTARY SETTLEMENT AGREEMENT, WAIVER AND RELEASE

The State-Operated School District of the City of Newark ("Newark" or "District") and Michael Covello ("Covello"), agree to the following terms in full resolution of this matter:

WHEREAS, Covello disputes the allegations of the tenures charges, and

WHEREAS, investigation of the charges does not support a claim of fraudulent conduct by Covello, as he was performing those duties assigned by his building principal, and

WHEREAS, the charges of unbecoming conduct are disputed by Covello and independent corroboration of the allegations is unavailable; and

WHEREAS, the parties agree that it is in the public interest to enter into this agreement in resolution of said charges in order to avoid the uncertainty and expense of litigation, and

WHEREAS, the parties further agree that the terms of this agreement will not present any risk of harm to students and/or the safe operation of the school district,

NOW, THEREFORE, the parties agree as follows:

1. Covello agrees to submit to the District, in writing and upon approval of this Agreement by the State District Superintendent and the Commissioner of Education, a resignation from his employment effective June 30, 1999. Upon his resignation, Covello shall be entitled to payment for his accrued leave time to the extent provided for in the collective bargaining agreement governing Covello's employment.

2. Covello shall be placed on paid administrative leave for the period from the effective date of this Settlement Agreement through June 30, 1999.

3. If and when Covello files an application for retirement with the Division on Pensions, the District shall assist in completing the necessary paperwork to process said application. However, the District makes no representations with respect to how Covello's pension shall be handled by the Division on Pensions and action on said pension shall not affect the resignation referenced in paragraph 1. In addition, the District shall not be liable to Covello and Covello holds the District harmless with respect to any pension benefits which Covello does or does not receive at any time in the future.

4. Covello acknowledges that the payments reflected in this agreement constitute the full financial obligation of the District and that he shall receive no additional payments. In exchange for the above consideration, Covello, on behalf of himself, his heirs, successors and assigns, hereby fully releases and forever discharges the District, its representatives, agents, officers and employees, for any and all actions, claims and liabilities of whatsoever kind in character, that he has had or may now have against any of them, including without limitation, any and all claims related to his

employment with the District or the termination of that employment. Correspondingly, the Dis' t hereby releases and forever discharges Covello for any and all actions, claims and liabilities of whatsoever kind or character that it has had or may now have against him, excepting only cross-claims generated by virtue of claims made against the District based solely on the past conduct of Covello and for which the District may otherwise be held liable.

5. Covello acknowledges as required under *In re Cardonick*, that despite the approval of this agreement, the issue of possible revocation of his teaching certificate may be considered by the State Board of Examiners.

6. This agreement is subject to the approval of the State District Superintendent and the Commissioner of Education. Upon approval of this agreement, the District agrees that the tenure charges against Covello shall be withdrawn.

7. The parties agree to keep this litigation and its settlement confidential. Neither party shall reveal (unless otherwise ordered by a Court of competent jurisdiction) either orally or in writing, the existence of the filed charges or their contents or the terms of settlement of them. In addition, the District shall respond to all inquiries concerning Covello and/or his employment in the District by stating (only to legitimate inquirers) only that he was employed in the District as an elementary teacher and a basic skills teacher and an athletic coach for such period as he was so employed and that, during school year 1997-98 he was accorded a paid administrative leave. Information about his salary level may also be supplied if asked for by a prospective employer. All inquiries concerning Covello shall be channeled to the District Superintendent and copies of all written responses to any such inquiries shall be supplied to Covello and information as to oral statements shall also be supplied to Covello on a timely basis.

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8. The parties enter this agreement voluntarily and without coercion, after consultation with their respective counsel.

State-Operated School District of the City of Newark

Michael Covello
Michael Covello

By:

Dated: March 15, 1999

Dated: March 26, 1999

~~Dated: December _____, 1998.~~

OAL DKT. NO EDU 9980-97
AGENCY DKT. NO. 341-9/97

IN THE MATTER OF THE TENURE	:	
HEARING OF MICHAEL COVELLO,	:	
STATE-OPERATED SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
THE CITY OF NEWARK, ESSEX COUNTY.	:	DECISION
	:	

The record, voluntary settlement agreement/waiver/release and initial decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms, except as clarified herein, as they comport with the *Cardonick* standards for review of settlements in tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

With respect to the disclosure of proceedings, term number 7 reads in pertinent part

> The parties agree to keep this litigation and its settlement confidential. Neither party shall reveal (unless otherwise ordered by a Court of competent jurisdiction) either orally or in writing, the existence of the filed charges or their contents or the terms of settlement of them.***

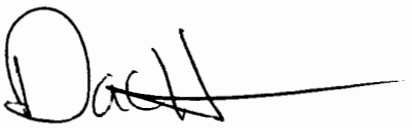
The Commissioner emphasizes to the parties that only their own disclosures are bound by this settlement term. The certification of tenure charges to the Commissioner is a matter of public record. Moreover, pursuant to *N.J.A.C.* 1:1-14.1(a), records of all hearings shall be open for public inspection unless, for good cause shown, an order is issued to seal the record,

or any part thereof. Upon review of the record, the Commissioner finds that there are no compelling reasons to seal the record in this tenure matter.

Term 7 goes on to stipulate various conditions for disclosure by the District of employment information regarding respondent. The Commissioner accepts this aspect of term 7 with the express qualification that the District fully comply with the conditions for public disclosure of employment information as set forth in Executive Order 11.

Accordingly, the Commissioner adopts the settlement as the final decision in this matter as clarified above. The matter is hereby dismissed, subject to compliance with the terms of the settlement.* A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

June 7,1999
Date of Mailing, June 7, 1999

181-99

IN THE MATTER OF THE TENURE	:	
HEARING OF GREGORY VEREEN,	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	
OF LAWRENCE, MERCER COUNTY.	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
IN THE MATTER OF THE TENURE	:	
HEARING OF THEODORE PRUSAKOWSKI,	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	
OF LAWRENCE, MERCER COUNTY.	:	

SYNOPSIS

Board certified tenure charges of incapacity and excessive absenteeism against respondent custodians.

The ALJ found that the stipulated absences of respondents have adversely affected the Board's ability to provide sanitary, clean and secure facilities and created a morale problem for other custodial staff who are subject to reassignment or demands for overtime or both. ALJ further found that respondents were incapacitated from performing their duties.

The Commissioner affirmed the initial decision of the ALJ. Respondents were dismissed from their positions as tenured custodians.

June 9, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. EDU 8969-98
AND EDU 10489-98
AGENCY DKT. NOS. 464-10/98
AND 463-10/98

IN THE MATTER OF THE TENURE HEARING OF GREGORY VEREEN, SCHOOL DISTRICT OF LAWRENCE TOWNSHIP

and

IN THE MATTER OF THE TENURE HEARING OF THEODORE PRUSAKOWSKI, SCHOOL DISTRICT OF LAWRENCE TOWNSHIP

James F. Schwerin, Esq., for petitioner (Carroll, Weiss & Josephson, attorneys)

Michael T. Barrett, Esq., for respondents (Bergman & Barrett, attorneys)

Record Closed: March 11, 1999 Decided: April 23, 1999

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

The Lawrence Township Board of Education (petitioner) has preferred tenure charges against Gregory Vereen and Theodore Prusakowski. The charges in each case are identical. Each employee is charged with incapacity and excessive absenteeism. These matters were opened

before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as contested cases, pursuant to *N.J.S.A.* 52:14F-1 through -13. After notice, a prehearing conference was held and, among other things, it was agreed that counsel would supply a joint stipulation of facts and that stipulation was timely filed.

The parties stipulate that Vereen has been employed by the Board as a custodian since October 22, 1979; that on or about June 6, 1996, Vereen suffered injuries to both knees while on the job; he has not performed any of his duties for the Board since that time; Vereen remained under active medical treatment authorized by the Board's Workers' Compensation carrier; Vereen's absences are related to the Workers' Compensation matter and Vereen's absence has affected the Board's ability to provide sanitary and secure physical facilities.

As to Prusakowski, the facts are similar, varying only in the dates and specifics of the injuries. Prusakowski has been employed since October 26, 1985 and was injured on December 5, 1994.

The Board asserts that the only issue remaining on the charges of excessive absenteeism is whether or not the stipulated extended absences of Vereen and Prusakowski have had a negative effect on the Board's ability to provide sanitary and secure facilities. The Board submits that it has demonstrated just such an effect through the testimony of Board Secretary/Business Administrator Nicholas Puleio and Director of Facilities and Property Bouldin Hitchcock.

The cases in which custodians have been terminated for excessive absenteeism reveal that only a minimal showing of effect on the district is sufficient to support dismissal under the standard established in *Passaic Board of Education v. Vianni*, 91 *S.L.D.* 2386, 2397. For example, in *State-Operated School District of Paterson v. Watson,* 93 *N.J.A.R.*2d (EDU) 362, the school district's statement that the absences "made it difficult to keep the building clean and further jeopardized the health and safety of the staff and student members of the school" sufficed without more. *Id.* at 366.

The Board's witnesses testified to the effect on the morale of the rest of the custodial staff from the frequent transfers of assignments created by the length of Vereen's absence. This blow

to morale has previously been recognized as grounds for dismissal. In *North Bergen Board of Education v. Siano*, 97 *N.J.A.R.*2d (EDU) 631, the testimony was that the extended absence required use of other custodians to cover the area assigned to Siano or, if no one wanted to work overtime, another custodian would have to do the job, destroying morale. Further, the overtime custodian does not do the same job as the regularly scheduled person, who "has built a relationship with the teachers." *Id.* at 634. Sustaining the charges, the administrative law judge (ALJ) stated

> Respondent's absences adversely affected the school's ability to provide sanitary, clean and secure facilities as required, and created a morale problem for the other custodial staff. That being so, respondent's absences jeopardized the health and safety of the students and staff. *Id.* at 638

The Commissioner adopted the initial decision.

In *Board of Education of Irvington v. Pearson*, 97 *N.J.A.R.*2d (EDU) 329, testimony revealed that Pearson's absences required frequent modification of the schedules of other custodians resulting in the failure to have proper maintenance. There was also a significant amount of time devoted to rescheduling by the Head Custodian. *Id.* at 333.

> The record also clearly demonstrates that Pearson's absences have had a direct adverse impact on the cleanliness and safety of the High School, resulting in some custodial tasks not being performed on a regular basis. In addition, the schedule of other custodians had to be constantly modified because of Pearson's absences. *Id.* at 334.

In the present case, Hitchcock testified concerning the need to rearrange schedules of other custodians and to the fact that the performance level did not equal that of a regularly scheduled custodian who would take a more personal interest in the cleanliness of "his" school. Hitchcock also indicated cleanliness citations had been received from local authorities. The parallel to *Pearson* is obvious.

In response to the witness' testimony, the respondents offered no witnesses of their own. Cross-examination of the Board's witnesses revealed only that there was not a complete breakdown of custodial services, which the district need not prove in any case.

As to respondent Prusakowski, Hitchcock testified about the effect of not having someone with Prusakowski's qualifications available. The district was unable to perform preventive maintenance on heating and other systems, and could only react to problems instead of preventing them. There was a district-wide effect as Prusakowski was not assigned to a particular school as was Vereen. The effect of Prusakowski's absence on the district has been more than demonstrated.

On the incapacity charges, the Board has indicated that it relies on the stipulations of fact documenting the multi-year absences of both custodians as establishing a *prima facie* case of incapacity, reserving the right to offer rebuttal testimony/evidence if respondents meet their burden of going forward with evidence contesting their incapacity. It is the Board's position that absence of over a year is sufficient to establish incapacity within the meaning of the school laws.

First, the Board relies on *N.J.S.A.* 18A:30-2.1. That statute provides that teaching staff members or other employees of the school district who suffer job-related injuries are immune for one year from increment withholdings arising out of any attendance problems caused by such injury. It is submitted that the one-year limit of such protection is significant, representing the Legislature's considered judgment that one year is an appropriate maximum time to allow an employee to recuperate from such an injury without job security or salary repercussions.

Further, the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 through -18.1, does not specify an amount of time missed due to a work-related injury that would constitute incapacity. The Board urges that, at least as to absences due to a work-related injury, an absence of one year should create a presumption of incapacity perhaps subject to rebuttal by a showing of an ability to return to work within a specified, short period. It is suggested that in light of the fact stipulations already presented, the burden now lies with the respondents to establish that they are able to return to work in the immediate future, with the Board having the right to counter any such evidence offered by the respondents.

The respondents argue that respondent Vereen is back at work now, on a modified or "work hardening" schedule, to determine whether he will be able to return to his full-time duties. Prusakowski remains out of work and continues to receive medical treatment.

The Board seems to believe that the absences themselves are sufficient to justify termination. The Board has submitted no medical evidence to support the claim of incapacity. Rather, it relies only upon the duration of the absences.

The evidence the Board has offered to support this claim consists of testimony from two individual administrators. The sum and substance of the testimony is the claim that the absences of these respondents has affected the ability of the school to provide "adequately equipped, sanitary and secure physical facilities and adequate materials and supplies." *N.J.S.A.* 18A:7A-5.

The Board's witnesses testified only in general terms that whenever there are absences, substitutes need to be found and this process itself negatively affects the Board. Other than the theoretical possibility that custodial absences would result in citing by local health officials and perhaps relate to the Board's statutory responsibility under *N.J.S.A.* 18A:7A-5, there was no hard evidence of any citations for inadequate facilities or anything else. The testimony made clear that providing substitutes is difficult administratively. However, there was no direct correlation between the absences of the respondents and the ability of the Board to satisfy *N.J.S.A.* 18A:7A-5.

The only documentary evidence the Board submitted was in the form of three weekly logs showing rolling substitutions. What is most striking about these documents is that Vereen and Prusakowski are two of about ten or twelve daily absences week after week. The point is clear. Absences, whether short-term or long-term, are a way of life in any school district including Lawrence Township. While the Board argues that there is a difference between short-term and long-term absences, the latter being more difficult to deal with, the opposite argument could easily be made. From a planning standpoint, there is some value in knowing that an employee will be absent for an extended period so that substitutes can be arranged. In any event, while logic dictates that extended absences will have an effect upon administration, there has been no clear

and convincing evidence that the absences of these individuals has specifically affected the Board's ability to deliver services.

From a medical standpoint, the respondents submit that it is not legally possible to conclude incapacity merely from absence. Some medical evidence must be presented to determine that the respondents or either of them are incapable of performing their duties and that medical treatment cannot be reasonably expected to change that. In the present case, Vereen is now back at work with a real prospect of returning permanently. Prusakowski still is being treated and by the very definition of treatment under Workers' Compensation law, his condition is improving. It is not yet possible to determine whether the condition will improve sufficiently to permit him to return to work. The medical treatment that is being provided is being provided by the Board's authorized physician. Obviously, there is no difference of medical opinion in this case. Medical opinion favors continued treatment to determine whether a return to work is possible.

It must be understood that the Board is not paying any salary to either respondent and has not done so for some time. They are being paid under Workers' Compensation procedures. Thus, there is no fiscal effect on the public.

DETERMINATION

The stipulations recited above are adopted as **FACT**. As Judge Reiner observed in *Passaic Board of Education v. James Vianni*,

> It is well-settled that excessive absenteeism may constitute grounds for the removal or suspension of a tenured employee. *In the Matter of the Tenure Hearing of Marcus Miller, School District of the City of Trenton*, OAL DKT. EDU 8409-86 (Mar. 6, 1987), adopted Comm'r of Ed. (Mar. 31, 1987). In *Miller*, a tenured assistant custodian was dismissed for excessive absenteeism and abandoning his position. The assistant custodian was absent from work during the period of July 4 to July 18 due to medical reasons. A doctor's note supplied by Mr. Miller indicated that he could return to work on July 21. However, Mr. Miller never returned to his position. The ALJ dismissed the assistant custodian on the grounds that his absences from July 4 to July 18 constituted excessive absenteeism and that he had abandoned his position.

The Commissioner has stated that he would not hesitate to dismiss a tenured employee for chronic, persistent absenteeism even when there is no charge of illegitimate use of sick leave. *In the Matter of the Tenure Hearing of Patricia Marsden, School District of Toms River*, OAL DKT. EDU 1188-84 (Aug. 26, 1985), adopted Comm'r of Ed. (Oct. 10, 1985).

In the Commissioner's adoption of *Vianni*, above, the Commissioner noted that a board's burden in a case seeking dismissal of a tenured janitor because of alleged excessive absenteeism is to demonstrate the extent of harm such performance of a custodial employee has on the provision of a thorough and efficient education in an adequately equipped, sanitary and secure physical facility. 97 *S.L.D.* at 2397. In the present case, the Board directed its testimony precisely at this notion. The Board Secretary/Business Administrator and the Director of Facilities and Property tended to show that Vereen's and Prusakowski's absences made it difficult to schedule adequate custodial coverage in each building in the district. They also gave testimony, which I find credible, to the effect that the morale of the rest of the custodial staff from frequent transfers of assignment to cover the continuing gaps left by Vereen's and Prusakowski's absences was adversely affected.

The Commissioner has recognized the position of school custodial as an important one.

> A school janitor occupies a position of trust and responsibility necessitating high standards of dependability and morality. His functions far exceed opening and closing the school house and keeping it clean and tidy. The safety and welfare of the children may depend on the proper discharge of his duties. *In the Matter of the Tenure Hearing of Joseph McDougall*, 1974 *S.L.D.* 170, 178.

Under the present circumstances, notwithstanding that they are not receiving pay, Vereen and Prusakowski are in effect holding the assignment of custodians in uncertainty. Until they return or are removed, those responsible for assignment and, ultimately, the condition of buildings, cannot know either that the work will be done to the necessary degree, or that it cannot but that two new custodial personnel may be hired toward the end that the work will be so accomplished.

As the stipulated facts indicate, Vereen has not performed his regular duties on full schedule since June 6, 1996 and Prusakowski has not performed any duties since December 5, 1994. The tenure laws are designed to protect employees from unwarranted political interference and from arbitrary and capricious treatment. They are not, however, infinitely elastic. Research does not reveal any statutory definition or classification of "excessive absenteeism." However, there have been decisions rendered by the Commissioner that indicate excessive absenteeism may support a charge of unbecoming conduct. In *In the Matter of the Tenure Hearing of Edith Trautwein,* OAL DKT. EDU 9692-82 (Nov. 15, 1983), the Board certified five charges to the Commissioner against a tenured teacher. The first charge was that the respondent's continuous excessive absenteeism constituted conduct unbecoming a teacher or other good cause to terminate her employment or to reduce her salary. The respondent contended that the numbers of absences was an invalid ground upon which to seek her removal and moved for a dismissal. The administrative law judge denied the respondent's motion to dismiss the first count. The judge found that the local Board had the right to impose some discipline upon respondent because of her absences and the Board must be given the opportunity to present at hearing, through admissible evidence, the truth of the charge that respondent had adopted and maintained a pattern of excessive absences which constituted unbecoming conduct. The Commissioner affirmed the retention of that count. The administrative hearing on the matter did not reach the merits of the issue of unbecoming conduct, but held that the charge brought against the respondent by the Board was in retaliation for the respondent's exercise of free speech and thus the complaint was dismissed. It must be noted that the decision was on a basis other than excessive absenteeism and that the Commissioner decided that excessive absenteeism can constitute a tenure charge. On the basis of *Trautwein*, the Commissioner's policy is not to let cases of excessive absenteeism go unpunished. His affirmation of the retention of a charge of unbecoming conduct based on excessive absenteeism in that case lends strong support to the subsequent use of that charge for similar conduct.

Having reviewed all the evidence, I **FIND** that:

1. A tenure charge of unbecoming conduct based on excessive absenteeism, substantiated by adequate proofs, is cause for removal;

2. The ability of the Lawrence Township Board of Education to maintain its schools has been adversely affected by the long absences stipulated here;

3. In addition to a negative effect on the ability to provide sanitary, clean and secure facilities as required, the long absences present here have created a morale problem for other custodial staff who are subject to reassignment or demands for overtime or both.

In consideration of these findings, I **CONCLUDE** that the stipulated absences of Vereen and Prusakowski have had negative effects on the operation of the Lawrence public schools above and beyond the criteria discussed in *Vianni* and *Siano* above. Here, as in *Pearson*, the absences require frequent modification of other custodians' schedules which, in addition to having a negative effect on morale, requires the Head Custodian and his immediate superiors to devote time to the reassignments that might better be used otherwise. While this decision does not go so far as to say that cleanliness citations received from local authorities can be placed squarely at the doorstep of Vereen and Prusakowski, it does note that their absences can only exacerbate the circumstances leading to cleanliness citations.

Accordingly, I **CONCLUDE** that the Lawrence Township Board of Education has shown by a preponderance of the credible evidence in the record that the extended absences of Gregory Vereen and Theodore Prusakowski rise to the level of unbecoming conduct and I further **CONCLUDE** that the appropriate penalty for that unbecoming conduct is removal.

Finally, the Board argues that, in the alternative, the respondents' incapacity has been established as a matter of law by their absences and they should be dismissed on these grounds unless they come forward with evidence of their ability to return to work in the immediate future. In *In the Matter of the Tenure Hearing of Phyllis Stanley, Board of Education of the Freehold Regional High School District*, 95 *N.J.A.R.*2d (EDU) 495, the Commissioner adopted the ALJ's initial decision that incapacity related to the inability to perform a duty despite the cause of the inability. In *Stanley*, the ALJ concluded that the Board had met its burden and established by a

preponderance of the credible evidence that Stanley was incapacitated from performing her duties. The ALJ found that dismissal was the appropriate penalty and the Commissioner concurred. *Id.* at 499.

In the present case, I **FIND** and **CONCLUDE** that, unless they can demonstrate to the contrary in the immediate future, the respondents herein are incapacitated as the Commissioner contemplated that term in *Stanley*. Nothing in this decision should be construed as interfering with Vereen's modified work schedule to determine whether he will be able to return to his full-time duties.

For the reasons stated, the removal of Gregory Vereen and the removal of Theodore Prusakowski from their custodial positions in the employ of the Lawrence Township Board of Education is **ORDERED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 23, 1999
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

4/26/99
DATE

Debbie Antanaitis /rr
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 27 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

ml

182-99

IN THE MATTER OF ERNESTINE HARRIS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
EAST ORANGE, ESSEX COUNTY.	:	
	:	

June 10, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT

OAL DKT. NO. EEC 1693-98

SCHOOL ETHICS COMMISSION,

Petitioner,

v.

ERNESTINE HARRIS,

EAST ORANGE BOARD OF EDUCATION

Respondent.

Arlene Goldfus-Lutz, Deputy Attorney General, for petitioner
(Peter Verniero, Attorney General of New Jersey, attorney)

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

Record Closed: April 21, 1999 Decided: April 22, 1999

BEFORE **STEPHEN G. WEISS,** ALJ:

PROCEDURAL HISTORY

This matter was transferred to the Office of Administrative Law by the School Ethics Commission as a contested case in February 1998 as a result of an appeal by respondent from a finding of probable cause by the Commission that she had violated certain provisions of the School Ethics Act. Plenary hearings were scheduled to commence before the undersigned administrative law judge on March 22, 1999 However, in advance of that date I was advised by the deputy attorney general on

behalf of the parties that the matter had been settled and that a Stipulation of Settlement shortly would be forwarded to me.

A Stipulation of Settlement containing the terms and conditions of the agreement reached by the parties has now been submitted and which document is signed by the petitioner and by counsel for the School Ethics Commission. That stipulation provides, in part, that it shall not become final until it is reviewed and approved by the Commissioner of Education. *See, N.J.S.A.* 18A:12-29(c). Accordingly, the stipulation now will be submitted to the Commissioner for his review.

Having reviewed the terms of the Stipulation of Settlement which is attached hereto and made part hereof I **FIND** as follows:

1. The parties voluntarily have agreed to the terms and conditions of the settlement as evidenced by the signatures contained thereon.

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

Therefore, I **ORDER** that the parties comply with the terms of the settlement and that these proceedings be and are hereby **CONCLUDED**.

I hereby **FILE** my initial decision with the **SCHOOL ETHICS COMMISSION**. Pursuant to *N.J.S.A.* 18A:12-29, the School Ethics Commission has jurisdiction to determine whether a violation of the School Ethics Act occurred. If it concludes that the conduct constitutes a violation of the School Ethics Act, it shall recommend an appropriate penalty to the Commissioner of Education. The Commissioner of Education shall issue the final decision in this matter.

The recommendations of this decision as to whether the conduct constitutes a violation of the School Ethics Act may be adopted, modified or rejected by the **SCHOOL ETHICS COMMISSION**. If the School Ethics Commission does not adopt,

modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision.

If the School Ethics Commission determines that a violation has occurred, it shall issue a written decision recommending to the Commissioner of Education an appropriate penalty and shall forward the record, including this recommended decision and its decision, to the Commissioner of Education. The Commissioner of Education may subsequently render a final decision as to the appropriate penalty. If the Commissioner of Education does not render a final decision within forty-five (45) days of its receipt of this initial decision, and unless such time period is otherwise extended, the recommended decision of the School Ethics Commission shall become the final decision.

April 22, 1999
DATE

Stephen Weiss
STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

4/27/99
DATE

L. J-B /lr
SCHOOL ETHICS COMMISSION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

\mvh

PETER VERNIERO
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Petitioner
School Ethics Commission
Richard J. Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625

By: Arlene Goldfus Lutz
Deputy Attorney General
(609) 984-7650

Before the Office of
Administrative Law
Docket No. EEC 1693-98

IN THE MATTER OF ERNESTINE HARRIS, EAST ORANGE BOARD OF EDUCATION

STIPULATION OF SETTLEMENT

WHEREAS Ernestine Harris is a member of the Board of Education of East Orange (Board); and

WHEREAS Dennis Harris, the husband of Ernestine Harris, is an employee of the Board; and

WHEREAS the Board paid $307.21 for plane fare for Dennis Harris when he accompanied his wife to school board conferences; and

WHEREAS Ernestine Harris is alleged to have failed to reimburse the Board for the cost of the plane fare; and

WHEREAS Ernestine Harris several times voted on employment matters that governed the employment, salary, and conditions of employment of Dennis Harris; and

WHEREAS a complaint was filed alleging that Ernestine Harris had violated the School Ethics Act; and

WHEREAS upon review of the matter the Commission made a determination from the complaint filed against Ernestine Harris that probable cause existed to credit the allegations that the conduct of Ernestine Harris in having the Board pay for the travel costs of her husband was a violation of N.J.S.A. 18A:12-24(b) and that her votes regard her husband's employment with the Board was in violation of N.J.S.A. 18A:12-24(c); and

WHEREAS Ernestine Harris has, since the commencement of this matter, reimbursed the Board $390.00, which covers the cost of her husband's travel expenses, as well as for personal expenses she incurred while at school board conferences; and

WHEREAS the parties desire to settle this matter amicably,

IT IS therefore agreed that:

1. The Commission finds that Ernestine Harris was required to reimburse the Board for the costs of her husband's travel expenses when he accompanied her to school board conferences.

2. The Commission finds that Ernestine Harris five times failed to recuse herself when matters touching on her husband's employment with the Board were considered by the Board.

3. In order to resolve this matter, Ernestine Harris agrees to accept a three month suspension from her position as a member of the East Orange Board of Education.

4. The settlement shall become effective April 1, 1999, and shall terminate on July 1, 1999.

5. After both parties have executed this agreement, the Commission will withdraw the matter from the Office of Administrative Law.

6. This agreement shall not serve as a precedent in any other matter.

7. This agreement shall not become final until it is approved by the Commissioner of Education.

ERNESTINE HARRIS

April 13, 1999
Date

Arlene Goldfus Lutz
Deputy Attorney General
Attorney for Petitioner,
School Ethics Commission

March 11, 1999
Date

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: C06-96**
ERNESTINE HARRIS,	:	
EAST ORANGE BD. OF EDUCATION	:	**DECISION ACCEPTING**
ESSEX COUNTY	:	**SETTLEMENT**

The finding of probable cause and the settlement transmitted by the Office of Administrative Law have been reviewed. The School Ethics Commission at its meeting of May 26, 1999 approved the settlement. Because the Commission only recommends a sanction to the Commissioner of Education, pursuant to N.J.S.A. 18A:12-29, this settlement will become final upon approval of the Commissioner of Education.

Paul C. Garbarini/ZHS

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C06-96

Whereas, the School Ethics Commission has considered the pleadings, documents and testimony before it; and

Whereas, the Commission found probable cause to credit the allegation that respondents violated N.J.S.A. 18A:12-24(c) of the School Ethics Act and transmitted the matter to the Office of Administrative Law for a hearing; and

Whereas, prior to the hearing the respondent offered to settle this matter; and

Whereas, after negotiations, the Commission agrees with the proposed settlement;

Now Therefore Be It Resolved that the Commission finds that a three-month suspension is appropriate in this matter and recommends that sanction to the Commissioner of Education; and

Be It Further Resolved that the Commission adopts the enclosed settlement referenced as its decision in this matter.

Paul C. Garbarini/dlb

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on May 26, 1999.

Lisa James-Beavers
Executive Director

[c0696c:lisa/decisions]

OAL DKT. NO. EEC 1693-98
AGENCY DKT. NO. 135-6/99

IN THE MATTER OF ERNESTINE HARRIS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
EAST ORANGE, ESSEX COUNTY.	:	
	:	

The record of this matter has been reviewed, as have the initial decision of the Office of Administrative Law, the parties' stipulation of settlement and the decision of the School Ethics Commission recommending that, in accordance with the terms of the settlement, respondent be suspended from her position as a member of the East Orange Board of Education for the period of April 1, 1999 to July 1, 1999.

Upon such review, pursuant to the provisions of *N.J.S.A.* 18A:12-29c, the Commissioner hereby approves the penalty recommended by the Commission.

COMMISSIONER OF EDUCATION

June 10,1999
Date of Mailing, June 10, 1999

IN THE MATTER OF THE TENURE	:	
HEARING OF GREGORY VEREEN,	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	
OF LAWRENCE, MERCER COUNTY.	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
IN THE MATTER OF THE TENURE	:	
HEARING OF THEODORE PRUSAKOWSKI,	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	
OF LAWRENCE, MERCER COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondents' exceptions and the Board's reply thereto were considered by the Commissioner in his determination of this matter.

Upon review of the record in this matter, the Commissioner determines to affirm the initial decision of the Administrative Law Judge (ALJ). Initially, the Commissioner notes that Respondent Prusakowski was injured in December of 1994, has not returned to the District, and cannot forecast a return date. (Initial Decision at p. 6) The Board has also demonstrated a negative effect from Prusakowski's prolonged absence.[1] (*Id.* at p. 4) Similarly, the Commissioner notes that Respondent Vereen was injured in June of 1996, and has not returned

[1] In this regard, the Commissioner notes that Respondent Prusakowski himself stipulated that his extended absence "has affected the Board's ability to provide sanitary and secure physical facilities." (Stipulation of Facts/Prusakowski at p. 2)

to the District in full capacity, although he is, apparently, back at work, "on a modified or work hardening schedule to determine whether he will be able to return to his full time duties."[2] (Respondents' Letter Memorandum, March 10, 1999 at p. 1) There is no indication in the record when, or even whether, Respondent Vereen will be able to resume his duties in full capacity. As with Respondent Prusakowski, the Board has demonstrated a negative effect from Vereen's prolonged absence.[3] (Initial Decision at pp. 2-4) Thus, the Commissioner concurs with the ALJ that the appropriate penalty under such circumstances is dismissal for both Respondents Prusakowski and Vereen, notwithstanding that their absenteeism constituted a legitimate use of sick leave and the possibility remains that one, or both, of them might ultimately, at some point not presently foreseeable, once again become physically capable of performing their duties.[4] (Initial Decision at p. 7)

Accordingly, the initial decision of the ALJ is affirmed for the reasons expressed therein. Respondents are dismissed from their positions as tenured custodians as of the date of this decision.[5]

IT IS SO ORDERED.[6]

COMMISSIONER OF EDUCATION

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[2] Although the record does not indicate exactly when Respondent Vereen resumed some of his duties, it can be deduced from the record that he returned sometime after the parties filed their Stipulation of Facts on December 9, 1998 (which affirmed that Vereen had not performed any duties in the District since June 1996) and before March 10, 1999, the date of respondents' letter brief to the ALJ informing him of Vereen's return.

[3] The Commissioner notes that Respondent Vereen also stipulated that his extended absence "has affected the Board's ability to provide sanitary and secure physical facilities." (Stipulation of Facts/Vereen at p. 2)

[4] Although the ALJ appears to equate excessive absenteeism with unbecoming conduct (Initial Decision at p. 8), the Commissioner specifically notes that the Board did *not* charge respondents with unbecoming conduct.

[5] The Commissioner herein understands the ALJ's statement that "[n]othing in this decision should be construed as interfering with Vereen's modified work schedule to determine whether he will be able to return to his full-time duties" (Initial Decision at p. 10), to refer to the period between issuance of the initial decision and the Commissioner's final ruling in this matter.

[6] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

June 9, 1999
Date of Mailing, June 9, 1999

IN THE MATTER OF THE TENURE	:	
HEARING OF TIMOTHY FITZPATRICK,	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF	:	DECISION
HUMAN SERVICES.	:	
	:	

SYNOPSIS

Department certified tenure charges against respondent teacher for unbecoming conduct.

The ALJ dismissed the matter with prejudice, finding with respect to the disputed facts that respondent did not strike a student in his care or cause the student to strike himself and thus concluding that the charges were unfounded and untrue.

The Commissioner affirmed the ALJ's decision, finding no basis, either in the transcript or in the record as a whole, to challenge the credibility determinations of the ALJ, who had the benefit of observing the witnesses firsthand. The tenure charges were dismissed.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 604-98

AGENCY DKT. NO. 492-12/97

NEW JERSEY DEPARTMENT OF HUMAN SERVICES,

Petitioner,

v.

TIMOTHY FITZPATRICK,

Respondent.

Mary F. Rubinstein, Deputy Attorney General, for petitioner (Peter Verniero, Attorney General of New Jersey, attorney)

Sharra E. Greer, Esq., and **Colin M. Page,** Esq., for respondent (Weissman & Mintz, attorneys)

Record Closed: January 15, 1998 Decided: April 15, 1999*

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter commenced on December 29, 1997, when the New Jersey Department of Human Services (hereinafter petitioner) filed tenure charges pursuant to N.J.S.A. 18A:60-2 and 18A:6-9 against Timothy Fitzpatrick (hereinafter respondent), a tenured teacher, alleging

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* An extension of time for issuing the initial decision was requested and granted pursuant to N.J.S.A. 52:14B-10(c).

unbecoming conduct and seeking an order from the Commissioner of Education imposing a 30-day suspension as a result thereof. Respondent filed an answer on his own behalf on January 23, 1998 and on February 2, 1998, the Commissioner of Education transmitted the matter to the Office of Administrative Law for determination as a contested case.

The prehearing conference was scheduled for May 7, 1998. That date was adjourned, however, when proposed counsel on behalf of respondent failed to file a timely pro hac vice motion. The motion which was ultimately filed to admit Paul D. Muller pro hac vice required several submissions and time for consideration and determination. An order denying the motion was entered by the undersigned on July 1, 1998. An application for reconsideration was filed on July 15, 1998 and was denied on July 16, 1998. Thereafter, the prehearing conference was rescheduled and was conducted on August 13, 1998. The prehearing order which was entered on August 14, 1998, scheduled the plenary hearing for November 2, 1998. The hearing took place on November 24, 1998, at the Trenton office of the Office of Administrative Law. Following the close of testimony the record remained open for the receipt of written submissions. Simultaneous initial written memoranda were received on behalf of each party on December 24, 1998. Each party filed a reply on January 15, 1998, whereupon the record closed.

FINDINGS OF FACT

Some of the facts relevant to a determination in this matter are not in dispute and I therefore **FIND** the following as uncontested facts.

On Thursday, October 23, 1997, respondent was performing his duties as a Community Facilitation Teacher in the Department of Human Services Regional School, Ocean Campus. The Ocean Campus School is a school for severely developmentally disabled youngsters, ages 3 to 21 years. As he did on every Thursday afternoon, he was accompanying students A.M. (sometimes referred to hereinafter as T.M.) and D.M. to a training program they participated in at Brick Hospital. A.M., who was 19 or 20 years old, was non-verbal, but ambulatory. He would usually

help to push D.M.'s wheelchair through the front foyer to the bus. The students and respondent left on the bus each Thursday at 12:30 p.m. and returned back to school by 2:10 p.m.

On October 28, 1997, when she returned to her duties as Supervisor of Education at the Ocean Campus after a brief vacation which had included October 23, 1997, at about 3 p.m. Jo-Ann Colon was advised by Patricia Glonek, whose official title is "Cook" but who had been providing secretarial assistance in the supervisor's office for some period of time, that she witnessed an incident of abuse of a student by respondent occurring on October 23, 1997. Ms. Colon then questioned Cindy Travlos, Assistant Supervisor of Education, concerning her knowledge of the alleged incident. At Ms. Colon's request Cindy Travlos provided the following written memorandum, dated October 28, 1997:

> On Friday morning, 10/24/97, Patricia Glonek reported to me that on the previous day (10/23/97) she observed Timothy Fitzpatrick walking in the hallway with a student (A.M.). Mrs. Glonek reported that she saw Mr. Fitzpatrick grab the student's wrist and use A.M.'s arm and hand to hit the student in the chest. She indicated that the hit was loud enough to be heard. Reportedly, A.M. had hit Mr. Fitzpatrick prior to this event occurring.
>
> Mrs. Glonek reported this incident to me on Friday morning, 10/24/97. I requested that she write up the appropriate reporting forms and submit them to me. At that time, she refused to write Mr. Fitzpatrick up for this incident. I told her that she should reconsider writing up the forms. I also indicated that I would do verbal counseling and report this matter to Mrs. Colon. Due to a very busy day on Friday and Mrs. Glonek's refusal to write up the documents again, I did not counsel him on Friday. Mrs. Colon returned on Monday and Mrs. Glonek indicated that she would report it to her. Mrs. Glonek discussed this matter with Mrs. Colon on 10/28/97.
>
> This incident is to be considered abuse of a student. I recommend that Mrs. Glonek write up this incident on reporting forms and that appropriate disciplinary action steps be followed.

Ms. Colon also requested and received a written statement from Patricia Glonek. That statement, also dated October 28, 1997, provided:

> On Thursday, October 23, 1997 at approximately 12:30 pm, Timothy Fitzpatrick was in the front hallway with two students. I witnessed Mr. Fitzpatrick pick up A.M.'s wrist and use T.'s hand to hit this student's chest. I not only saw this action but also heard T.'s hand hit his chest with a loud thump. Mr. Fitzpatrick was unaware that I was walking behind them in the hallway.

Respondent was first notified of the allegations against him at 9:10 a.m. on Wednesday, October 29, 1997, when Ms. Colon called him into her office and told him only that another employee had made abuse charges against him. No details of the charges were provided at that time and Ms. Colon asked no questions of respondent, but rather just informed him that he could not continue to work with students and that he should just sit at his desk. On October 30, 1997, Ms. Colon again called respondent into her office and asked him to write his version of what had happened on October 23, 1997. When he replied that he could not write such a statement because he had no idea what the charges of abuse might be, Ms. Colon orally advised him that another employee (whose name she did not disclose) had accused him of abusing A.M. by hitting him in the chest. According to his own testimony and also Ms. Colon's, respondent was astounded and upset when he heard the allegations. He wrote the following statement which he provided to Ms. Colon on October 30, 1997:

> re: Allegation of physical abuse toward student A.M. on October 23, 1997 in the hallway in front of the office at 12:30 pm.
>
> On this date and time I, Timothy Fitzpatrick, was escorting T.M., ambulatory student, and D.M., wheelchair student, to the bus for their weekly job training assignment. T. was pushing the wheelchair as I held the door open. At no time did I have any physical contact with either student.

On the next school day, October 31, 1997, respondent was returned to his teaching duties and he continued to work with student A.M. and the other students without incident.

Other than the foregoing, petitioner conducted no additional investigation into the allegations. Although the alleged incident took place at 12:30 p.m., a time when many other faculty members would be having their lunch break and would therefore be in the hallways or the foyer, no other staff members were questioned concerning what they might have seen on October 23, 1997. Petitioner did not contact A.M.'s parents concerning the alleged incident. No physical examination was made of A.M. Respondent was instructed by Ms. Colon not to discuss the matter with anyone else at school and he complied with these instructions until December 1997, at which time no one with whom he spoke had any recollection of what might or might not have happened on October 23, 1997. On November 5, 1997, Janet Gilliam, Acting Employee Relations Coordinator in the Office of Education for the Department of Human Services, prepared written tenure charges against respondent. By letter dated November 6, 1997, she forwarded those charges to Donald Mangus, Assistant Director in the Office of Employee Relations, for processing pursuant to N.J.A.C. 10:11-1.8(b). In a letter addressed to respondent, dated November 10, 1997, Mr. Mangus notified respondent of his opportunity to file a response to the enclosed charges and advised respondent that if the Director of the Office of Employee Relations decided that probable cause existed to credit the charges and to suspend without pay, the matter would be transmitted to the Department of Education. By letter dated November 20, 1997, respondent forwarded to Mr. Mangus two sworn statements, both dated November 20, 1997, one entitled, "Statement of Position" and the other entitled, "Statement of Evidence." By letter dated December 24, 1997, Mr. Mangus forwarded his determination of probable cause together with accompanying documentation and proof of service upon respondent to the Commissioner of Education.

At the hearing in the within matter, all witnesses testified that student A.M. would frequently flail his arms about, particularly his right arm, in an effort to hit others. Standard instructions to all staff when students attempted to hit were to grasp and hold the student's wrist to prevent the student from striking self or others. All of the witnesses also testified that student

D.M. had a habit of hitting himself, particularly thumping his fist against his chest. Because of their developmental disabilities, neither student was competent to give a statement or testify concerning what happened on October 23, 1997, and A.M. is now deceased. This concludes the recitation of uncontested facts.

Petitioner presented two witnesses in support of its charges. Patricia Glonek testified that she was on her way to lunch on October 23, 1997, when she observed respondent take A.M. by the wrist and force the student to hit himself twice in the chest with his own hand. According to Ms. Glonek, at the time of this observation she was standing between 7 and 9 feet behind respondent, who in turn was standing behind the student in the wheelchair and was facing A.M., whose back was against the wall of the foyer. Ms. Glonek insisted that A.M.'s hand struck his chest with a force great enough for her to hear a thumping sound. She further testified that immediately thereafter she observed respondent and the two students walk out to the bus, which was just arriving. There was no one else in the lobby during the entire time period, she testified. Ms. Glonek said nothing to respondent, and she believed that respondent did not know she was there, she testified. According to Ms. Glonek's testimony, she then proceeded into the back office where she spoke to a secretary, Kathy Thompkins, who advised Ms. Glonek that she had seen A.M. strike respondent earlier. Ms. Glonek testified that she was upset about what she had seen, but that she did not wish to report a fellow employee. Upon reflection, however, the next day she decided she should report it to Cindy Travlos, the Assistant Administrator who was in charge in Ms. Colon's absence. She testified that when Ms. Travlos asked her to write it up, she declined and advised Ms. Travlos that she only wanted to have someone speak to respondent. According to Ms. Glonek, Ms. Travlos said she would try to speak with respondent that day. However, Ms. Glonek later found out that Ms. Travlos "never got around to it". She further testified that she had been forced to write up the incident by Ms. Colon, who told her that if she refused she herself would be charged with insubordination.

With respect to the nature of her relationship with respondent, Ms. Glonek testified that for five or six years the relationship had been a friendly, working relationship. She acknowledged, however, that she believed she was working in the kitchen as a cook again because respondent

had called the union in June 1998 and reported that she was working out of title. She also acknowledged that she and respondent had some disagreements concerning the manner in which respondent kept his timesheets and that respondent had objected to her performing secretarial duties, particularly her handling of his timesheets.

Jo-Ann Colon, the only other witness to testify on behalf of petitioner, indicated that she was first made aware of Ms. Glonek's allegations when she returned to work on Tuesday, October 28, 1997, when Ms. Glonek approached her and asked to speak with her. According to Ms. Colon, she asked Ms. Glonek why she had not reported the incident sooner, and Ms. Glonek replied that she had reported it to Ms. Travlos. Ms. Colon testified that she then spoke with Ms. Travlos who said she had not wanted to bother Ms. Colon during her vacation, that she had become very busy and therefore had not otherwise addressed the issue. Ms. Colon confirmed that she advised Ms. Glonek that if she did not report the incident in writing she was opening herself up to disciplinary proceedings. Ms. Colon's own supervisor also assured Ms. Glonek that there would be discipline against her if she did not cooperate. According to Ms. Colon, Ms. Glonek was very upset about having to follow through with a written report, but complied later that day. She confirmed that other than speaking with respondent who appeared to be astounded and upset and denied the allegations completely, she took no other steps to investigate the matter. She recommended that disciplinary action go forward based solely upon her acceptance of Ms. Glonek's version of the incident, she testified. She further testified that respondent was returned to his regular duties working with the students after October 30, because employee relations had so instructed her; that would not have been my decision, she testified. Ms. Colon further testified that the charges were written up to allege inappropriate contact; "We were going to call it abuse until we found out removal was required," she testified. It was her opinion that the contact was inappropriate, but she did not feel that it was malicious.

Respondent testified on his own behalf and indicated that on Thursday, October 23, 1997, he took his half hour lunch break at 12 o'clock noon as he always does on Thursdays. He testified that he ate in the "isolation room" which is also part of Ms. Colon's office. According to respondent Ms. Travlos was there, Ms. Locklear and Pat Glonek, maybe others. Ms. Glonek left

the lunch room just before respondent, stating that she was going out for a cigarette, he testified. Respondent, who is also a smoker, joined Ms. Glonek and perhaps two or three others outside the kitchen area. Just before respondent reentered the building, Ms. Glonek had walked off across the field to check on the progress of some storage sheds which were being built, he testified. He further testified that when he got to room 107, Ms. Jones's room, A.M. and D.M. were ready. They left and proceeded to the bus, he testified. Nothing unusual happened. He also testified that he did not remember stopping in the hallway. Respondent testified that the first time he was ever made aware of any allegations against him related to October 23, 1997 was 9:10 a.m. on Wednesday, October 29. All he was told at that time by Ms. Colon, he said, was that abuse charges had been filed against him. She would not tell him what student, what the charges were or who had made them. She instructed him to sit at his desk and have no contact with any students. On Thursday, October 30, 1997, when she called him into her office again, she asked him to write his version of what had happened to which he had responded that he could not do it unless she told him who had said what. She then provided the details of the allegations, but he did not know the name of his accuser for another 3 weeks. When asked whether T.M. had hit him on October 23, 1997, he responded that T.M. hit quite frequently until he became sicker; in October 1997, it was probably two or three times per day at least, and respondent could not remember whether T.M. had hit him on October 23, 1997. It was routine, I wouldn't remember, he testified. He further testified that he was very close with T.M., that T.M. was a very likable student. One of T.M.'s activities involved playing with the band at Brick Memorial High School and respondent had helped arrange to obtain a band jacket for T.M. T.M.'s family was very appreciative, and respondent was always in contact with T.M.'s mother and sister, he testified. When T.M. passed away in October of 1998, T.M.'s mother came to school and gave to respondent as a remembrance a pin which T. had been awarded for volunteering. Respondent testified that when he told T.M.'s mother about the allegations in the within matter, she was very supportive. "He was such a frail kid; that is why the allegations are so horrible. I would never touch him," respondent testified.

On cross-examination respondent testified that on Thursdays at 12 o'clock he generally ate lunch with the same people. He acknowledged that it was possible that Ms. Glonek had

changed her mind about going to check on the construction of the sheds, but he did not see her in the building after lunch that day, he testified. He also testified that the bus was always waiting for them at 12:30, parked in front of the front door unless there was a parcel-post bus there. That day I went directly to the bus, he responded. He also acknowledged that he was not aware that Ms. Travlos was told about the incident on October 24, 1997, until he was going through the files and saw her statement. Ms. Travlos never talked to him about the incident. When he was shown a copy of the statement he had prepared on November 20, 1997, wherein he had asserted that Juanita Jones, the classroom teacher from room 107, had escorted them all to the front door that day, he responded that Ms. Jones might have been there or perhaps she was not. Sometimes she did escort them, he testified. He thought that perhaps he had been sure when he wrote the statement on November 20, 1997, but on the date of the hearing he simply did not remember whether she did or not, he testified. When asked about his testimony that he did not remember stopping in the hallway, he responded that it was routine not to stop, but that he really did not recall, the whole thing was a non-incident. For a whole month he was not allowed to talk with anyone at school at all about the incident and when he finally did ask Ms. Jones about her recollection in November or December of 1997, she did not recall seeing anything unusual. He concluded that Ms. Glonek was either very mistaken about what she had seen or was deliberately lying. What she may have heard if she heard anything was D.M. slapping himself, he testified. Or perhaps her testimony was colored as a result of confrontations before October 1997 concerning his annoyance at her attempts to supervise him in regard to timesheets and other matters. He acknowledged that he had resented her supervision and had told her so. Concerning his statement that Ms. Colon had not personally served him with the charges in this matter, he testified, "I'm almost positive I got them in the mail; I got them so late I had to get it right out again."

The only other witnesses at the hearing were Patricia Smith, one of the bus drivers who transported respondent and the children on their trips, and Linda Riley, a teacher who is one of respondent's colleagues. Ms. Smith was not driving the bus on the day in question and was therefore unable to offer any pertinent facts about the incident. She testified that A.M. would flail his arms about because his sister would play with him that way; he thought it was a game. Both Ms. Smith and Ms. Riley testified that respondent was a caring and concerned teacher who

appeared to have an excellent relationship with his students, including A.M. Neither had ever seen him lose his temper or get angry. Ms. Riley described him as kind and gentle and soft-spoken.

With respect to the facts in dispute, I **FIND** that respondent's evidence was far more persuasive than petitioner's. "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances. . ." Spagnuolo v. Bonnett, 16 N.J. 546, 554-555 (1954). Contrary to petitioner's assertion, Ms. Glonek's reluctance to pursue the matter by putting her complaint in writing does not necessarily give rise to an inference of credibility. A more reasonable inference to draw from such unwillingness, in the common experience and observation of mankind, is that she was unwilling to write it down because it was untrue. Conversely the fact that respondent would try to identify reasons for Ms. Glonek's false reporting supports his credibility; he knows he did not do what she accused him of doing so why would she say he did? What probably happened here is that Ms. Glonek wished to cause respondent some distress, by having the school principal counsel him, in retaliation for the resentment he had expressed to her on more than one occasion relating to her attempts to supervise him. Undoubtedly she did not realize that the seriousness of her allegations would necessitate the filing of tenure charges. There is not one shred of credible evidence to corroborate Ms. Glonek's version of what happened. The relationship between respondent and his students was uniformly regarded as one of caring. Neither Ms. Glonek nor petitioner's other witness, Ms. Colon, could offer any suggestion of a motive for why respondent would strike a student, particularly one as frail as A.M. Petitioner attempted to suggest a motive by introducing hearsay testimony through Ms. Glonek that office secretary, Kathy Thompkins, had seen A.M. strike respondent prior to the alleged incident on October 23, 1997. However, Ms. Thompkins was never interviewed, no statement was ever given by Ms. Thompkins, nor did Ms. Thompkins testify at the within matter, notwithstanding the fact that she is still employed at the Ocean Campus School. Furthermore, Ms. Colon testified that Ms. Glonek told her there were no other witnesses to the incident. In any event, even if Ms. Thompkins had seen A.M. strike respondent, apparently that would have been nothing unusual; respondent testified that it happened frequently,

as did Ms. Smith and even Ms. Colon. The fact that all agreed that A.M.'s hitting was not of a violent nature, but rather occurred when he was agitated and would swing out or merely as an act of playfulness makes it all the more improbable that respondent would retaliate by hitting A.M. in the manner described. In addition, a reasonable inference to draw from the fact that Ms. Travlos took no action whatsoever after Ms. Glonek reported the alleged incident to her on October 24, 1997, is that Ms. Travlos did not believe her. A teacher hitting a student would be a serious incident under any circumstances and for an administrator not to even question the teacher about the incident indicates either gross incompetence or certain disbelief. Since Ms. Travlos, who is also still employed by the institution, did not testify at the hearing, she could not be questioned concerning why she had not bothered to investigate or to take any action whatsoever or even to report the incident spontaneously and promptly to Ms. Colon herself when Ms. Colon returned to work the following Monday or Tuesday. Ms. Travlos apparently did not even write up an incident report herself until she was instructed to do so by Ms. Colon on October 28, 1997. Furthermore, by its failure to conduct a prompt and thorough investigation, petitioner effectively prevented the collection of any other evidence, exculpatory or otherwise. By instructing respondent not to discuss the matter with anyone else at the school, an instruction which respondent followed for approximately a month, petitioner impaired respondent's ability to ascertain all of the facts. No one is going to remember what happened on an uneventful Thursday in October if they are not asked about it until the end of November. Furthermore, by withholding the details of the allegations from respondent until October 30, 1997, a whole week after the alleged incident, petitioner likewise impeded respondent's ability to reconstruct what his accuser, whose name was then unknown to him, might have seen, if anything.

Although it is true as petitioner's counsel points out in her post-hearing submissions that respondent's written statements filed in response to the charges contain some inconsistencies, his testimony and demeanor before me at the hearing were those of a candid, sincere and credible witness. The fact that some of respondent's written documents firmly state that Ms. Glonek was not in the building at 12:30 on October 23, 1997 and others attempt to explain what she might have seen or heard if in fact she were there, could indicate that the author was being untruthful. The more likely explanation, however, is that respondent was extremely upset and desperate to

defend himself against these serious charges which he knew to be untrue, and he was justifiably angry and confused because petitioner's delay had impaired his ability to remember in detail the events of October 23, 1997. His explanations at the hearing were more than acceptable, e.g., that he did not really know whether Ms. Jones accompanied them out to the foyer to wait for the bus on October 23, 1997, or not; since she frequently did so, she probably did, but he was not sure; perhaps he had been sure in November 1997, when he wrote his statement. The fact that Ms. Jones could not corroborate her presence or lack thereof on October 23, 1997, is meaningless since she was not asked until more than a month later. Respondent's testimony that he received the tenure charges by certified mail rather than personal service is also understandable given the passage of time. In fact, he did receive the charges sent by Mr. Mangus by certified mail a month and a half after Ms. Colon had handed him the original version. Respondent's inability to recall the precise details of this matter is completely understandable under the circumstances and is not inconsistent with the characteristics of a truthful witness. With respect to the disputed facts, I specifically **FIND** that respondent did not strike A.M. or take A.M.'s hand and cause him to strike himself on October 23, 1997.

APPLICABLE LAW AND DISCUSSION

N.J.S.A. 18A:60-2, the statute relevant to a determination of the within matter, provides, as follows:

> No such professor, associate professor, assistant professor, instructor, supervisor, registrar, teacher, or other person employed in a teaching capacity, so under tenure, shall be dismissed or subjected to a reduction in salary except for inefficiency, incapacity, conduct unbecoming a teacher, or other just cause, and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title. (N.J.S.A. 18A:6-9 et seq.)

The burden of proof for establishing claims before State agencies in contested administrative adjudications is a fair preponderance of the evidence. In re Polk License Revocation, 90 N.J. 550, 560 (1982). The facts as I have found them to be in this matter do not

support a conclusion that respondent was guilty of conduct unbecoming a teacher or any other misconduct. The simplest thing to have done in this matter would have been to say that petitioner has failed to sustain its burden of proof. However, such a ruling, absent more, would do a disservice to respondent. Once Ms. Glonek complained to the administration, petitioner had no choice but to pursue the within action. The allegations were too serious to ignore or dismiss informally. In fact, if the charges were true, in my opinion they would warrant a sanction a good deal more severe than a 30-day suspension, notwithstanding the fact that respondent has no history of other discipline. Based upon all of the foregoing, however, I **CONCLUDE** that the charges are unfounded and untrue, and accordingly, this matter is hereby **DISMISSED WITH PREJUDICE.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P. O. Box 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 15, 1999
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

4/15/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 19 1999
DATE

Barbara A Hernak
OFFICE OF ADMINISTRATIVE LAW

cc

EXHIBITS IN EVIDENCE

For petitioner:

P-1 Petitioner's document log (30 pages)

P-2 Ocean County Day Training Center memorandum re: Treatment of Students in the Day Training Program

P-3 Diagram of floor plan in Ocean County Day Training Center

P-4 Memorandum from Patricia Glonek to Jo-Ann Colon, dated October 28, 1997

P-5 Memorandum from Cindy Travlos to Jo-Ann Colon, dated October 28, 1997

P-7 Affidavit of Jo-Ann Colon, dated November 5, 1997 (2 pages)

For respondent:

None.

EXHIBITS FOR IDENTIFICATION ONLY

For petitioner:

P-6 Memorandum from Jo-Ann Colon to Janet Gillian, dated October 28, 1997

For respondent:

R-1 Document from Day Training session

WITNESSES

For petitioner:

Patricia Glonek

Jo-Ann Colon

For respondent:

Timothy Fitzpatrick

Patricia Smith

Linda Riley

OAL DKT. NO. 604-98
AGENCY DKT. NO. 492-12/97

IN THE MATTER OF THE TENURE	:	
HEARING OF TIMOTHY FITZPATRICK,	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF	:	DECISION
HUMAN SERVICES.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner New Jersey Department of Human Services ("the Department") requested an extension of time within which to file exceptions to the initial decision, reporting that it was awaiting receipt of transcripts to facilitate its preparation of such exceptions. The request was granted and the Department's exceptions and respondent's reply thereto were filed in accordance with the extended timelines.

The Department excepts to the Administrative Law Judge's (ALJ) finding that the evidence advanced by respondent in this matter was more persuasive than that proffered by the Department, thus concluding that respondent was not guilty of unbecoming conduct. (Department's Exceptions at p. 3) In this regard, it argues that, although the ALJ's findings of facts in her initial decision are essentially correct, "they fail to include information elicited from the witnesses which cast doubt on the credibility of Mr. Fitzpatrick." (*Id.* at p. 1) The Department cites to specific hearing testimony which, it avers, challenges inferences made by the ALJ with respect to the investigation in this matter being flawed and deficiencies in the decision-

making process utilized by Ms. Colon in reaching her conclusion that the charges against respondent should be documented. (*Id.* at pp. 1-3) It further alleges that the ALJ gave insufficient consideration to the fact that respondent's testimony was replete with inconsistencies in detailing his recollection of the events which transpired in this matter. (*Id.* at p. 3) As such, it reasons, "[b]ased on the testimony of the witnesses, the exhibits in evidence, the post hearing submissions, and [the Department's] exceptions," the greater weight of credible evidence supports the Department's position and, therefore, it urges that the initial decision be reversed "and the charge of unbecoming conduct with its imposition of a 30-day suspension without pay should be reinstated." (*Id.* at p. 6)

In reply, respondent contends that the ALJ's findings in this case are supported by "overwhelming evidence." (Respondent's Reply Exceptions at p. 2) Respondent addresses the conclusions which the Department's exceptions maintain should be drawn from testimony and he presents his own interpretation of these, emphasizing those particular facts which, he maintains, fully support the correctness of the ALJ's decision. Citing *State, Dept. of Health v. Tegnazian*, 194 *N.J. Super.* 435, 450 (App. Div. 1984) for the proposition that "[w]hile the commissioner is not legally bound to follow the ALJ's recommendations, he may not brush them aside[.***] This is particularly true where factual issues are the focus of attention and questions as to the weight and credibility of evidence must be treated," respondent urges:

> The resolution of this case, which pits the word of Fitzpatrick against the word of Glonek, hinges on an evaluation of credibility. Judge Duncan is a trained factfinder who had the opportunity to observe the witnesses. The administrative process described in *Tegnazian,* envisions that the Commissioner will not disturb Judge Duncan's credibility findings. Petitioner offered no good reason for the Commissioner to abandon the deference accorded to an ALJ's findings of fact. In the final analysis, there was more than enough reason for Judge Duncan to find that the allegations Glonek made against Fitzpatrick were baseless and untrue.

Therefore, the Commissioner should adopt Judge Duncan's recommended decision. (Respondent's Reply Exceptions at pp. 6-7)

Upon a careful and independent review of the record in this matter, which included a transcript of the hearing conducted at the OAL on November 24, 1998, the Commissioner agrees with the ALJ that the facts existing in this case do not support a conclusion that respondent was guilty of conduct unbecoming a teacher. In reaching his determination here, the Commissioner was fully cognizant that this matter turns almost exclusively on the credibility of witnesses and the weighing of evidence. Notwithstanding the Department's exception assertions to the contrary, the Commissioner finds no basis, either in the transcript or in the record as a whole, to challenge the credibility determinations of the ALJ, who also had the benefit of observing the witnesses firsthand. Rather, he is fully satisfied that the ALJ's recitation of testimony is both accurate and thorough, and that she carefully measured conflicts, inconsistencies, and plausibility of content in deciding which testimony to credit.

Accordingly, the initial decision of the OAL is affirmed for the reasons clearly stated therein. The tenure charges against Mr. Fitzpatrick are hereby dismissed.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

June 11, 1999
Date of Mailing June 11, 1999

SUSANA FANEGO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a nontenured teacher, alleged that she was entitled to sixty days' pay when her employment was terminated after only one week of work.

The ALJ determined that petitioner was never an employee of the District and, therefore, was not entitled to any relief.

The Commissioner affirmed the initial decision, noting that petitioner was never an employee of the District since the State District Superintendent never approved petitioner's appointment to any position with the District pursuant to *N.J.S.A.* 18A:27-1 and *N.J.S.A.* 18A:27-4.1, thereby precluding her requested relief. Petition was dismissed.

June 14, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10968-97
AGENCY DKT. NO. 453-11/97

SUSANA FANEGO,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY,
Respondent.

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

Charlotte Kitler, General Counsel, for respondent

Record Closed: April 26, 1999 Decided: April 27, 1999

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

Statement of the Case

This is an appeal by a nontenured teacher who alleges that she was entitled to sixty-days pay when her employment contract was terminated after only one week of work. Respondent State-Operated School District of Jersey City ("District") denies that it entered into an employment relationship with petitioner. Alternately, in the event that such relationship did exist, the District maintains that the Commissioner of Education ("Commissioner") lacks subject-matter jurisdiction over a contract claim.

Procedural History

On November 19, 1997, petitioner Susana Fanego ("Fanego") filed a verified petition with the Commissioner. The District filed its answer on December 4, 1997. Subsequently, on December 24, 1997, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The OAL held a hearing on April 26, 1999. Witnesses and exhibits are listed in the appendix.

Findings of Fact

All of the material facts are undisputed. I **FIND** the following facts:

Susana Fanego holds an instructional certificate endorsed as a teacher of Spanish. At the end of August 1997, she contacted the District to inquire whether there were any positions available as a language teacher. Although there were no openings in the language department, petitioner was invited to interview for a position as a General Educational Development ("GED") teacher.[1] On August 26, 1997, Fanego submitted an employment application in which she listed one year of prior employment as a Spanish teacher in West New York and three years of prior employment as a GED teacher in the Union City and West New York. However, the application failed to disclose that she had also been employed by the Jersey City public school district between 1982 and 1987.

Thereafter, Fanego was interviewed by a panel of four administrators including Dr. Joseph Ramos, the District's director of bilingual education. She brought various credentials to the interview, including a copy of her resume which referred to her

[1] GED programs are designed for high school dropouts to prepare for a test in order to qualify for a state-issued high school diploma. Instruction in various academic areas, including writing, social studies, science, literature and mathematics, "may be offered in either English, Spanish or French, subject to the availability of teaching staff." *N.J.A.C.* 6:30-2.1(a)(2).

previous employment in Jersey City. During the course of the interview, Dr. Ramos asked why she had left the district. In response, Fanego indicated that she had encountered "some friction" with her former supervisor. However, she did not volunteer the fact that the Jersey City Board of Education brought tenure charges against her for inefficiency. On her job application, she marked the box "No" in response to the question, "Have you ever been dismissed from a position or refused re-employment as an educator?" Her answer was technically correct, since she had resigned her position in good standing "instead of fighting [the tenure charges]."

Because of her prior experience as a GED teacher, the District tentatively offered her a position. However, the offer was contingent on several conditions, including the results of a pre-employment physical examination, a criminal records check and final approval by the state district superintendent. None of these conditions were satisfied prior to the District's decision to withdraw its employment offer. The pre-employment physical conducted by the district's medical staff "revealed abnormal urinalysis" and Fanego was sent to her personal physician for further testing. By letter dated September 9, 1997, the District's medical supervisor notified Fanego that, "Your hire is pending awaiting medical clearance." Similarly, the criminal clearance was still pending at the time that the District withdrew its offer. Fanego had cooperated in furnishing her fingerprints, but her prints had not been dispatched to Trenton.

Most significantly, the state-district superintendent had not yet approved the issuance of an employment contract to Fanego. Although Fanego had signed the proposed written contract, no authorized representative had signed the document on behalf of the District. Moreover, as Fanego testified at the hearing, the final salary terms had not yet been negotiated. Fanego wanted recognition of her prior work experience for salary guide purposes.

Before the contract arrangements were finalized, Fanego was assigned to an Adult Education Center operated by the District. She spent the first week of September 1997 at that facility. Insofar as the District's central administration was aware, the purpose of allowing Fanego to start early was so that she would not miss an in-service

training course. While at the Adult Center, however, Fanego participated in assessing the proficiency level of incoming students.

As soon as the District learned that Fanego had previously been brought up on tenure charges, it withdrew its offer of employment. Judi Granick, executive assistant in charge of human relations, stated that the District's policy since the takeover has been not to rehire former employees "who left without an excellent record." On or about September 8, 1997, the District advised Fanego that she was not going to be hired. Although Fanego claimed that she did not know the reason for the District's action, Granick sent a letter to petitioner's attorney on November 5, 1997 outlining the entire situation. Fanego had reported to the Adult Learning Center for only one week. Accordingly, the District paid her the gross amount of $516, representing what Fanego's services for one week were worth.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that Fanego was never an employee of the District and is not entitled to any relief.

Proofs show that an employment contract between Fanego and the District was never consummated because the District withdrew its offer before the conditions had been satisfied. A meeting of the minds occurs when there has been a common understanding and mutual assent of all the terms of a contract. *Knight v. New England Mut. Life Ins. Co.*, 220 *N.J. Super.* 560, 565 (App. Div. 1987), certif. den. 110 *N.J.* 184 (1988). *Hillsdale Nat. Bank v. Sansone,* 8 *N.J.* 497, 500 (Law Div. 1951), *aff'd* 11 *N.J. Super.* 390 (App. Div. 1951). No teaching staff member may be appointed without the formal approval of the board of education appointing him. *N.J.S.A.* 18A:27-1. *Rotondo v. Carlstadt-East Rutherford Reg. High Sch. Dist.,* 276 *N.J. Super.* 36, 39 (App. Div. 1994). In a state-operated school district, the state-district superintendent succeeds to the power of the local board and "make[s] all personnel determinations relative to employment, transfer and removal of all officers and employees, professional and

nonprofessional[.]" Since the state-district superintendent never approved the appointment of Fanego to any position with the District, petitioner does not have an enforceable contract of employment.

Furthermore, a contract must be sufficiently definite "that the performance to be rendered by each party can be ascertained with reasonable certainty." *Weichert Co. Realtors v. Ryan*, 128 *N.J.* 427, 435 (1992). Agreement on essential terms of a contract is a prerequisite to its enforceability. *Dontzin v. Myer*, 301 *N.J. Super.* 501, 507 (App. Div. 1997). By Fanego's own admission, the parties had never reached agreement on the salary to be paid for performance of her teaching duties. Thus, the most that she could expect would be to recover on a theory of *quantum merit* for whatever services she actually performed. The record shows that the District paid Fanego for her one week of work.

Even if a contract were found to have been created, Fanego would be unable to obtain a remedy before the Commissioner. In support of her claim, Fanego does not cite any controlling statute, rule or regulation. Rather, she seeks to enforce the sixty-day notice provision contained in the standard teaching contract utilized by the District. *Allen v. Newark Bd. of Educ.*, 96 *N.J.A.R.* 2d (EDU) 688 (Comm'r Nov. 30, 1994). Where the controversy does not arise under the school law, it is outside the Commissioner's jurisdiction even though it may pertain to school personnel. *East Brunswick Bd. of Educ. v. Twp. Council of East Brunswick*, 48 *N.J.* 94, 102 (1966). It is well settled that the Commissioner's jurisdiction does not extend to claims for alleged breach of contract. *Paladino v. Lacey Bd. of Educ.*, OAL Dkt. No. EDU 5589-87 (St. Bd. Feb. 1, 1989). *Larsen v. Piscataway Bd. of Educ.*, OAL Dkt. No. 1445-81 (St. Bd. Oct. 6, 1982).

Order

It is **ORDERED** that the relief requested by Fanego is denied.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 27, 1999
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

4/30/99
DATE

Debbie Antanaitis/mr
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 3 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

List of Witnesses

1. Susana Fanego

2. Judi Granick, executive assistant to the superintendent, State-Operated School District of Jersey City

List of Exhibits

No.	Description
P-1	Copy of letter to Franklin L. Williams from Susana Fanego, dated July 13, 1987
R-1	Copy of letter to Susana Fanego from Carole Sicola Warlikowski, dated September 9, 1997
R-2	Copy of application for professional employment, dated August 26, 1997
R-3	Copy of decision entitled *In re the Tenure Hearing of Susana Fanego*, OAL Dkt. No. 8410-86 (Comm'r June 9, 1987)
R-4	Copy of letter to Judi Granick from Philip, Esq., dated October 30, 1997
R-5	Copy of letter to Philip Feintuch, Esq. from Judi Granick, dated November 5, 1997

OAL DKT. NO. EDU 10968-97
AGENCY DKT. NO. 453-11/97

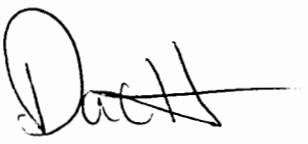
SUSANA FANEGO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon his independent and careful review of the record in this matter, the Commissioner concurs with the Administrative Law Judge that, as the State District Superintendent never approved the appointment of petitioner to any position with the District, she was never an employee of the District (see *N.J.S.A.* 18A:27-1 and *N.J.S.A.* 18A:27-4.1) and, therefore, is not entitled to any relief herein.

Accordingly, the recommended decision of the OAL is affirmed and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

June 14, 1999
Date of Mailing, June 14, 1999

185-99

R.L.C., on behalf of minor child, K.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

June 14, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11681-98
AGENCY DKT. NO. 490-11/98

RONALD LARRY CRAFT,
GUARDIAN OF KRISTEN SOL, ON
BEHALF OF KRISTEN SOL, AN INFANT,
Petitioner,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF MT. OLIVE,
MORRIS COUNTY,
Respondent.

Ronald Larry Craft, *pro se*

Nathanya G. Simon, Esq., for respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: April 12, 1999 Decided: April 28, 1999

BEFORE: **MICHAEL L. RAVIN**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on December 18, 1998, for hearing as a contested case, pursuant to *N.J.S.A.* 52;14B-1 to -15 and *N.J.S.A.* 52;14F-1 to -13. A hearing was scheduled for April 6, 1999, at the OAL in Newark, New Jersey. Prior to the hearing,

settlement discussions were held. A settlement was reached and the hearing was adjourned.

The parties agreed to settle this matter and prepared the attached Stipulation of Settlement indicating the terms of settlement.

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

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

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

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

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

April 28, 1994
DATE

Michael L. Ravin, ALJ
MICHAEL L. RAVIN, ALJ

Receipt Acknowledged:

4/30/99
DATE

Debbi Controneo
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 3 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER, LLP
Ten James Street
Florham Park, NJ 07932
(973) 301-0001
Attorneys for Respondent

RONALD LARRY CRAFT, GUARDIAN OF KRISTEN SOL, ON BEHALF OF KRISTEN SOL, AN INFANT, Petitioner,	BEFORE THE COMMISSIONER OF EDUCATION OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. EDUOS 11681-98N AGENCY REF. NO. 490-11/98
vs.	**STIPULATION OF SETTLEMENT**
BOARD OF EDUCATION OF THE TOWNSHIP OF MT. OLIVE, MORRIS COUNTY, Respondent.	

The parties hereby agree to resolve the above captioned matter in accordance with the following terms and conditions:

1. Petitioner shall pay to the Respondent a total sum of $300.00 which shall be designated for a school organization use by the Petitioner, subject to approval by the Respondent.

2. The parties enter into this settlement in order to reach a mutually agreeable compromise of a disputed claim. This Agreement is not a finding on the merits and is not an admission by either party of a violation of any statute or regulation.

3. Payment referred to in paragraph 1 shall be due no later than ten (10) days after the approval of this settlement by the Administrative Law Judge.

4. Petitioner and Respondent expressly waive and release any and all claims against each other with reference

to the issues presented to the Office of Administrative Law in the Petition of Appeal and Answer to Petition, Affirmative Defenses and Counterclaim filed by the parties. Each party agrees to a dismissal with prejudice of the claims raised in the aforesaid documents. Each party acknowledges familiarity with the facts and circumstances of this Settlement Agreement, and intends to be bound by this Agreement and enters into same voluntarily without coercion or duress.

5. All of the terms of this Settlement Agreement are deemed material. This document constitutes the entire understanding of the parties and incorporates and settles with finality all claims and disputes (ONLY PERTAINING TO THIS MATTER) which exist or may exist between the parties. R.L.C. BJB

IN WITNESS WHEREOF, the parties have set their hands and seals as of the date noted.

Ronald Larry Craft
RONALD LARRY CRAFT

DATED: 4/7/99

BOARD OF EDUCATION OF THE TOWNSHIP OF MT. OLIVE

BY: Bruce Bott
BRUCE BOTT, Board President

WITNESS: Lynn Jones
LYNN JONES, Board Secretary

DATED: 4/22/99

STATE OF NEW JERSEY)
) SS
COUNTY OF Morris)

On April 7, 1999, before me personally came Ronald Larry Craft known to me to be the individual described in and who executed the foregoing Stipulation of Settlement, and that he duly acknowledged to me that he voluntarily and knowingly executed said Stipulation of Settlement after having read and understood said document.

Notary Public

March 31, 1999
No. 48230

3c

OAL DKT. NO. EDU 11681-98
AGENCY DKT. NO. 490-11/98

R.L.C., on behalf of minor child, K.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, stipulation of settlement, and initial decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

The Commissioner notes, however, that the terms of the settlement appear to have been effectuated prior to the Commissioner's approval. He, therefore, reminds the parties that they acted at their peril in so doing and cautions them and other litigants whose controverted matters have been duly transmitted to OAL against effectuation of any settlement prior to its submission to, and approval by, the Commissioner pursuant to *N.J.A.C.* 1:1-19.1.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

June 14, 1999
Date of Mailing, June 14, 1999

PHILIP LEONG, PAUL JOHNSON, ERMELINDA IOSCA, IRIS MARTINEZ-ARROYO, YVONNE GOYINS, REGINALD TATE, VERA P. ALLEN AND RAMANAND DURGA,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners, employees of the Newark Board prior to takeover, argued that, upon abolishment of their central office administrative or supervisory positions, they were entitled to school-based supervisory or teaching positions.

ALJ granted Board's motion for summary decision, determining that when a central office supervisory position is abolished pursuant to *N.J.S.A.* 18A: 7A-44c, all tenure and seniority rights to and originating from that position are also abolished. Thus, petitioners were properly terminated. Petitioners retained only tenure and seniority rights which were not attained in connection with their former central office supervisory positions.

Commissioner adopted findings and determination in initial decision as his own. Matter was dismissed.

June 14, 1999
Date of Mailing, June 14, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. EDU 10921-96; 10922-96; 10923-96; 10924-96; 10925-96; 10926-96; 10927-96 and 10934-96
AGENCY DKT. NOS. 497-11/96; 498-11/96; 492-11/96; 486-11/96; 495-11/96; 493-11/96; 494-11/96 and 496-11/96

PHILIP LEONG, PAUL JOHNSON, ERMELINA IOSCA, IRIS MARTINEZ-ARROYO, YVONNE GOYINS, REGINALD TATE, VERA P. ALLEN AND RAMANAND DURGA,
Petitioners,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Anthony P. Sciarrillo, Esq., for petitioners

Cherie L. Maxwell, Esq., for respondent

Record Closed: March 29, 1999 Decided: April 27, 1999

BEFORE **ELINOR R. REINER**, ALJ:

PROCEDURAL HISTORY

On October 18, 1996, petitioners Philip Leong, Paul Johnson, Ermelina Iosca, Iris Martinez-Arroyo, Yvonne Goyins, Reginald Tate, Vera P. Allen and Ramanand Durga filed petitions of appeal with the Commissioner of Education. Petitioners Allen, Goyins, Tate, Iosca and Johnson alleged that they were entitled to a school-based supervisory position when their central office administrative positions were abolished. Petitioners Durga, Martinez-Arroyo and Leong alleged that they were entitled to a school-based supervisory position or a teaching position when their central office administrative positions were abolished. Respondent filed answers on December 3, 1996, alleging that its actions were consistent with statutory requirements and that petitioners failed to state a claim upon which relief could be granted.

On December 10, 1996, the Department of Education, Bureau of Controversies and Disputes, transmitted these matters to the Office of Administrative Law for hearings pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. These matters were assigned to the undersigned judge on May 2, 1997, and a prehearing conference was held on June 24, 1997. During the prehearing conference, the issues were isolated and a hearing was scheduled for May 12, 13, 14 and 15, 1998, at the Office of Administrative Law. The parties indicated that they would be filing cross-motions for summary decision. Prior to the first hearing date, the parties requested and were granted various extensions of time in which to file motions for summary decision. The record closed after the submission of a joint stipulation of facts and briefs in support of cross-motions for summary decision.

ISSUES

The parties have agreed that the issues in this case are as follows:

1. Were petitioners Allen, Goyins, Tate, Iosca and Johnson entitled to school-based supervisory positions when their central office administrative positions were abolished?

2. Were petitioners Durga, Martinez-Arroyo and Leong tenured administrators entitled to school-based supervisory positions or teaching positions when their central office administrative positions were abolished?

3. If petitioners are successful, to what relief are they entitled?

FACTS

The following facts have been stipulated to and are undisputed. J-1.

The eight petitioners were assigned to administrative or supervisory positions, or both, in the central office of the Newark School District ("central office"). On or about July 19, 1996, the State Board of Education assumed the operation of the Newark School District, pursuant to *N.J.S.A.* 18A:7A-34, forming the State-Operated School District ("District"). Pursuant to *N.J.S.A.* 18A:7A-44, the central office was reorganized and all of the administrative and supervisory positions were abolished.

Petitioner Philip Leong was hired by the Newark Board of Education as a supervisory monitor on October 11, 1983. In the 1985-86 school year, Leong was appointed to the central office as a director, assigned to the gifted and talented programs, and eventually attained tenure in that supervisory position. He held an administrative and supervisory certificate with a principal endorsement and a supervisor endorsement, and an instructional certificate with an English endorsement and an elementary education endorsement, and therefore fulfilled the requirements of his position. Following the reorganization of the central office, Leong was not

appointed to a school-based supervisory or instructional position in the District, but was terminated by the District, effective July 19, 1996.

Petitioner Paul Johnson was hired by the Newark Board of Education as a teacher on September 1, 1970, and eventually attained tenure. On April 11, 1988, Johnson was appointed to the central office as assistant director, art department, and eventually attained tenure in that supervisory position, as well. He held an administrative and supervisory certificate with a principal endorsement and a supervisor endorsement, and an instructional certificate with an art teacher endorsement, and therefore fulfilled the requirements of his supervisory position. Following the reorganization of the central office, Johnson was not appointed to a school-based supervisory or instructional position, but was transferred to his prior tenured position as art teacher. The transfer resulted in a reduction in Johnson's salary.

Petitioner Ermelina Iosca was hired by the Newark Board of Education as a substitute teacher on February 14, 1975. On October 13, 1977, Iosca was appointed as a teacher of English as a second language, and eventually attained tenure in that position. On September 9, 1987, she was appointed to the central office as an acting curriculum specialist, educational services department. On October 7, 1987, she was permanently appointed to that position, and eventually attained tenure in that supervisory position, as well. She held an administrative and supervisory certificate with a principal endorsement and a supervisor endorsement, and an instructional certificate with an elementary teacher endorsement and a teacher of English as a second language endorsement, and therefore fulfilled the requirements of her supervisory position. Following the reorganization of the central office, Iosca was not appointed to a school-based supervisory position, but was transferred to her prior tenured position as a teacher of English as a second language. The transfer resulted in a reduction in Iosca's salary.

Petitioner Iris Martinez-Arroyo was hired by the Newark Board of Education as the director of the Office of Bilingual Education in the central office on August 11, 1982, and eventually attained tenure, despite respondent's assertion that she did not have a bilingual/bicultural education endorsement, a requirement for that position. She held an administrative and supervisory certificate with a principal endorsement, a supervisor endorsement, an assistant executive superintendent endorsement, and a specialist in supervision and curriculum endorsement; she also held an instructional certificate with a teacher of English endorsement. Following the reorganization of the central office, Martinez-Arroyo was not appointed to a school-based supervisory position, but was terminated by the District, effective July 19, 1996.

Petitioner Yvonne Goyins was hired by the Newark Board of Education as a home economics teacher, and eventually attained tenure in that position. From 1986 to 1993 she served as supervisor, Office of Employment and Technology, and eventually attained tenure in that supervisory position, as well. On January 1, 1993, Goyins was appointed to the central office as office supervisor, Office of Employment and Technology, and also attained tenure in that supervisory position. She held an administrative certificate with a principal endorsement, a supervisor endorsement, an assistant executive superintendent endorsement, and a specialist in supervision and curriculum endorsement; she also held an instructional certificate with a teacher of home economics endorsement. On October 11, 1996, Goyins was appointed acting department chairperson of industrial arts. Following the reorganization of the central office, she was not appointed to a school-based supervisory position, but was transferred to her prior tenured position as a teacher of home economics.[1] The transfer resulted in a reduction in her salary.

Petitioner Vera Allen was hired by the Newark Board of Education as a substitute teacher on September 1, 1969, and served in that capacity until 1973. She

[1] It is unclear why the parties stipulate that Ms. Goyins was appointed acting department chairperson of industrial arts on October 11, 1996, three months after the reorganization, yet also stipulate that she was not appointed to a school-based supervisory position after the reorganization.

was rehired during the 1979-80 school year as a teacher, and eventually attained tenure. On March 12, 1990, Allen was appointed to the central office as acting curriculum specialist. She held an administrative and supervisory certificate with a principal endorsement, a supervisor endorsement, an assistant executive superintendent endorsement, a specialist in supervision endorsement, and a school administrator endorsement; she also held an instructional certificate with an elementary school endorsement and a nursery school endorsement. In September 1993, Allen again assumed the position of teacher. On March 5, 1996, she was appointed to the central office as acting supervisor of curriculum services. Following the reorganization of the central office, Allen was not appointed to a school-based supervisory position, but was transferred to her prior tenured position of teacher. The transfer resulted in a reduction in Allen's salary. The joint stipulation of facts does not indicate that Allen ever attained tenure as a supervisor.

Petitioner Reginald Tate was hired by the Newark Board of Education as a school psychologist on September 1, 1971, and eventually attained tenure in that position. On July 1, 1989, Tate was appointed to the central office as assistant director, Office of Child Guidance and Placement, and eventually attained tenure in that supervisory position, as well, despite respondent's assertion that he did not hold a director of student personnel services endorsement, a prerequisite for the position. He held an administrative certificate with a principal endorsement and a supervisor endorsement, an instructional certificate with a teacher of psychology endorsement and a secondary school teacher of Spanish endorsement, and an educational services certificate with a school psychologist endorsement. Following the reorganization of the central office, Tate was not appointed to a school-based supervisory position, but was transferred to his prior tenured position of school psychologist. The transfer resulted in a reduction in his salary.

Petitioner Ramanand Durga was hired by the Newark Board of Education as the director of the central office on November 11, 1980. He held an administrative certificate with a principal endorsement and a supervisor endorsement, and

instructional certificates from New York and Wisconsin. However, respondent asserts that Durga did not hold an instructional certificate from New Jersey, a requirement for his position. Following the reorganization of the central office, Durga was not appointed to a school-based supervisory or instructional position in the District, but was terminated by the District, effective July 16, 1996.

Both petitioners and respondent have moved for summary decision. Petitioners base their motion on the following arguments: (1) they are entitled to any other school-based supervisory position in the District for which they hold the appropriate certificates and endorsements, by virtue of their tenure as supervisors; (2) in the alternative, petitioners Leong, Martinez-Arroyo and Durga, all of whom were terminated, are entitled to teaching positions for which they hold the appropriate certificate, even though they were never tenured as teachers; and (3) the decision in *Van Dyke v. State-Operated School District of the City of Jersey City*, 91 *N.J.A.R.*2d (EDU) 43, on which respondent relies, is over broad.

Respondent's motion is based on the following arguments: (1) petitioners do not have tenure rights to supervisory positions outside of the central office, pursuant to *N.J.S.A.* 18A:28-5, *N.J.S.A.* 18A:7A-44(c) and the *Van Dyke* decision; and (2) petitioners Leong, Martinez-Arroyo and Durga are not entitled to teaching positions for which they hold the appropriate certificate, because they are not tenured as teachers.

DISCUSSION

SUMMARY DECISION STANDARD

Under the Uniform Administrative Procedure Rules, a party may be granted summary decision if

> the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine

> issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.
>
> [*N.J.A.C.* 1:1-12.5(b).]

The summary decision rule is essentially the same as the summary judgment rule under the New Jersey Rules of Court, permitting a party to move for summary judgment if

> the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.
>
> [*R.* 4:46-2(c).]

The Supreme Court in *Brill v. Guardian Life Insurance Co.*, 142 *N.J.* 520 (1995), provided further guidance for the summary decision analysis: "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one-sided that one party must prevail as a matter of law." 142 *N.J.* at 536 (citing *Anderson v. Liberty Lobby, Inc.*, 477 *U.S.* 242, 251-52, 106 *S. Ct.* 2505, 2512, 91 *L. Ed.* 2d 202, 214 [1986]).[2]

[2] *See also Frank v. Ivy Club*, 120 *N.J.* 73 (1990), holding that a hearing must be granted by an agency only if material disputed adjudicative facts exist.

A contested case can be "summarily disposed of before an [administrative law judge] without a plenary hearing in instances where the undisputed material facts, as developed on motion or otherwise, indicate that a particular disposition is required as a matter of law." *In re Robros Recycling Corp.*, 226 *N.J. Super.* 343, 350 (App. Div. 1988). A summary decision must be based on an examination of the totality of circumstances, mitigating and aggravating factors, adequate factual findings and conclusions of law. *Ibid.* [3]

TENURE OF SUPERVISORS AND ADMINISTRATORS

The tenure of teaching staff is authorized by the Tenure Act, *N.J.S.A.* 18A:28-1, *et seq.* A teaching staff member must hold a valid certificate to "teach, administer, direct or supervise the teaching, instruction, or educational guidance of . . . pupils in such public schools and of such other certificate, if any, as may be required by law." *N.J.S.A.* 18A:26-2. In order to attain tenure, a teaching staff member must hold the appropriate certificate for his or her position. *N.J.S.A.* 18A:28-4. In addition to certification, the teaching staff member must also be employed by the school district or board for: "(a) [t]hree consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or (b) [t]hree consecutive academic years, together with employment at the beginning of the next succeeding academic

[3] The tenure law is complex, and this complexity is compounded exponentially by the misuse of tenure terminology. As the administrative law judge (ALJ) noted in *Howley v. Ewing Township Board of Education*, 6 *N.J.A.R.* 509, 512 (1982), *aff'd*, State Bd. of Educ. (June 1, 1983), "Misuse and abuse of the education vocabulary associated with the tenure law is so common that it has become the rule rather than the exception." Unfortunately, the regulations also misuse the terms, even in the same paragraph, *e.g.*, *N.J.A.C.* 6:11-11.12(c)(1) reads in pertinent part: "The requirement for the school psychologist's *endorsement* includes an externship . . . . Students engaged in this externship are not yet eligible for a school psychologist's *certificate*" (emphasis added). As discussed below, an endorsement and a certificate are distinct credentials.

Similarly, the parties have used improper terminology in their submissions. For example, Exhibit #9 of the joint stipulation of facts is an announcement of a vacancy for an assistant director of child guidance, published by the Board. According to the announcement, the position requires a "Principal/Supervisor Certificate" (*i.e.*, a principal endorsement and a supervisor endorsement under an administrative and supervisory certificate), a "Director of Student Personnel Services Certificate" (*i.e.*, a director of student personnel services endorsement), and a "Teacher's Certificate" (*i.e.*, an instructional certificate). In this decision, the proper terminology without abbreviation will be used.

year; or (c) [t]he equivalent of more than three academic years within a period of any four consecutive academic years." *N.J.S.A.* 18A:28-5.

There are three types of educational certificates issued by the Board of Examiners: (1) instructional; (2) administrative and supervisory; and (3) educational services. *N.J.A.C.* 6:11-2.3. The Board of Examiners may also issue special "endorsements" under the appropriate certificates. *Ibid.* A teaching staff member must have the appropriate certificate and endorsement for his or her position. For example, an art teacher would be required to hold an instructional certificate with an art endorsement, which "authorizes the holder to teach art in all public schools." *N.J.A.C.* 6:11-6.2(a)(2). A teaching staff member may possess multiple endorsements under a certificate, qualifying him or her to fill any position covered by the corresponding endorsement. For example, an art teacher holding an instructional certificate with an art endorsement and an English as a second language endorsement is authorized to teach both art and English as a second language in all public schools. *N.J.A.C.* 6:11-6.2(a)(2), (a)(8).

There are at least four separate endorsements under an administrative and supervisory certificate: (1) school administrator; (2) principal; (3) supervisor; and (4) school business administrator. *N.J.A.C.* 6:11-9.3. According to the Supreme Court in *Dennery v. Board of Education of the Passaic County Regional High School District # 1*, 131 *N.J.* 626, 634 (1993), "[A]n educator with tenure in any endorsement that he or she possesses can, in effect, extend or transfer that tenure to other endorsements that are subsumed under the same certificate." Thus, the art teacher in the foregoing example with tenure under her instructional certificate with an art endorsement may apply that tenure to her English as a second language endorsement, *i.e.*, she is a tenured art teacher as well as a tenured English as a second language teacher. A literal reading of *Dennery* would appear to compel the conclusion that a supervisor with tenure under her administrative and supervisory certificate with a supervisor endorsement could also apply her tenure to her principal endorsement, which is held under the same administrative and supervisory certificate. However, both the Legislature and the

Supreme Court in a subsequent decision, *Nelson v. Board of Education of the Township of Old Bridge*, 148 *N.J.* 358 (1997), *rev'g* No. A-6441-94T5 (App. Div. April 29, 1996), *rev'g* 95 *N.J.A.R.*2d (EDU) 257, make it clear that tenure does not apply in the same way for administrative and supervisory personnel as it does for teachers.

In *Nelson* the petitioner held an administrative and supervisory certificate, with a principal endorsement and a supervisor endorsement, as well as an instructional certificate. He began his employment as a teacher of industrial arts, and was eventually appointed to department chairperson of industrial arts, achieving tenure in that supervisory position in 1985. His duties included assisting in the recruitment, hiring, training and supervising of department personnel, preparing the departmental budget, and evaluating teacher performance. Five years later, the board of education eliminated his position, reassigning him to his former position as a teacher of industrial arts. About three years later, three positions opened up, two as elementary school principals and one as a middle school vice principal. The petitioner filed a petition of appeal with the Commissioner of Education, asserting that he was entitled by tenure to be appointed to any one of the three positions, even though he had never actually served as a principal or vice principal. Citing to the Supreme Court in *Dennery*, which held that a tenured educator in any endorsement can transfer that tenure to other endorsements under the same certificate, the ALJ determined that the petitioner was entitled to an appointment to one of the elementary school principal positions.

However, the Commissioner of Education rejected the ALJ's decision, finding that tenure accrued only as a result of actual work experience in the separately tenurable positions specifically enumerated in *N.J.S.A.* 18A:28-5. Since the petitioner could not transfer his tenure as a supervisor to the position of principal, he was not entitled to the position of elementary school principal. The State Board of Education affirmed the Commissioner's decision. 95 *N.J.A.R.*2d (EDU) 257.

On appeal, the Appellate Division reversed the State Board of Education, reading the *Dennery* decision the same way as the ALJ – having earned tenure in the

supervisor endorsement under the supervisory and administrative certificate, the petitioner could transfer his tenure to his principal endorsement, even though he never worked as a principal. No. A-6441-94T5 (App. Div. April 29, 1996).

During pendency of the appeal to the Supreme Court, the Legislature amended *N.J.S.A.* 18A:28-5 in response to the Appellate Division's decision in *Nelson*, to clarify that "tenure is acquired in one of the specifically enumerated positions only if the individual has served for the requisite statutorily required period of time in that position." *L.* 1996, *c.* 58, §1, eff. June 28, 1996. The statute now reads, in pertinent part: "[T]enure in any of the administrative or supervisory positions enumerated herein shall accrue only by employment in that administrative or supervisory position. Tenure so accrued shall not extend to any other administrative or supervisory position." *N.J.S.A.* 18A:28-5.

The Supreme Court subsequently reversed the Appellate Division's decision in *Nelson*, and although it did not expressly overrule the *Dennery* decision, it noted that *Dennery* emphasized that the courts "should defer to the State Board in its interpretation of complex tenure laws." 148 *N.J.* 358, 366 (1997) (citing *Dennery, supra*, 131 *N.J.* at 637).

The decision in *Nelson* makes it clear that tenure is not transferable between certificates, or even between endorsements for separately tenurable positions within a single certificate. However, tenure may be transferable within the same endorsement, particularly a supervisor endorsement, which is "generic and authorizes the holder to supervise any subject matter and any grade level." *Galbraith v. Lenape Regional High School District*, 96 *N.J.A.R.*2d (EDU) 396, 406, *aff'd*, 97 *N.J.A.R.*2d (EDU) 558.

To summarize, tenure accrues only as a result of actual work experience in the separately tenurable positions specifically enumerated in *N.J.S.A.* 18A:28-5, including all positions that require appropriate certificates and endorsements. Tenure accrued in

a particular administrative or supervisory position does not extend to any other administrative or supervisory position enumerated in the statute.

VAN DYKE V. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY

The petitioners in the present matter argue that upon abolishment of their central office positions, they retained tenure rights in those supervisory positions outside of the central office, notwithstanding the ruling in *Van Dyke v. State-Operated School District of the City of Jersey City*, 91 *N.J.A.R.*2d (EDU) 43. In *Van Dyke*, the petitioners held supervisory positions with the Jersey City School District. The Jersey City Board of Education was abolished and replaced by the State-Operated School District, pursuant to *N.J.S.A.* 18A:7A-34 *et seq.* The petitioners' supervisory positions were subsequently abolished under a reorganization of the district's central administrative and supervisory staff, pursuant to *N.J.S.A.* 18A:7A-44(c):

> Notwithstanding any other provision of law or contract, the positions of the central administrative and supervisory staff, instructional and noninstructional, . . . shall be abolished upon the reorganization of the State-operated school district's staff. The State district superintendent may hire an individual whose position is so abolished, based upon the evaluation of the individual and the staffing needs of the reorganized district staff. These individuals shall be hired with tenure if they had tenure in their prior position. If they did not have tenure in their prior position, they may obtain tenure pursuant to the provisions of *N.J.S.*[*A.*] 18A:28-6. Individuals hired as State assistant superintendents shall not be hired with tenure and shall not acquire tenure. Employees or officers not hired for the reorganized staff shall be given 60 days' notice of termination or 60 days' pay. The notice or payment shall be in lieu of any other claim or recourse against the employing board or the school district based on law or contract. Notwithstanding this limitation, nothing herein shall preclude an individual from asserting upon separation from service any legal contractual right to health care coverage, annuities, accrued vacation days, accrued sick leave, insurance and approved tuition costs. **Any employee**

> **whose position is abolished by operation of this subsection shall be entitled to assert a claim to any position or to placement upon a preferred eligibility list for any position to which the employee may be entitled by virtue of tenure or seniority within the district. No employee whose position is abolished by operation of this subsection shall retain any right to tenure or seniority in the positions abolished herein**.
>
> [Emphasis added.]

The *Van Dyke* petitioners were not offered supervisory positions, but instead were transferred to their prior tenured positions as teachers or teaching consultants. They filed petitions of appeal, which were consolidated and referred to the Office of Administrative Law.

The ALJ read the last sentence of *N.J.S.A.* 18A:7A-44(c) – "No employee whose position is abolished by operation of this subsection shall retain any right to tenure or seniority in the positions abolished herein" – to mean that the petitioners were not entitled to claim "tenure or seniority rights (1) to their former abolished supervisory positions or (2) to preferment in supervisory positions not abolished or (3) in supervisory positions to which present incumbents have been rehired by the district superintendent under *N.J.S.A.* 18A:7A-44(c)." 91 *N.J.A.R.*2d (EDU) at 45. According to the ALJ, the petitioners only retained "rights of re-employment and preferred eligibility for *any other positions* to which they may be entitled by virtue of tenure or seniority." *Id.* at 45. The ALJ found support for his finding in statements by the Assembly Education Committee and the Senate Education Committee during enactment of *N.J.S.A.* 18A:7A-34 *et seq.*, which provided that affected employees retained bumping rights "for other positions" in the district. The Commissioner of Education adopted the ALJ's decision, reiterating the finding that the petitioners retained "*no* tenure or seniority rights to a supervisor position. Thus, the only 'bumping' rights they could exert would relate to *nonsupervisory positions* to which their tenure or seniority entitled them." *Id.* at 46. The Board of Education affirmed the decision for the reasons expressed by the Commissioner. On appeal, the Appellate Division found that

the petitioners failed to file a timely brief, and the case was dismissed with prejudice. No. A-3633-91T2 (App. Div. September 1, 1992).

The petitioners in the present matter argue that the generic interpretation of the term "position abolished" in *Van Dyke* is over broad. The last sentence of *N.J.S.A.* 18A:7A-44(c) reads that displaced central administrative and supervisory personnel retain no right to tenure or seniority in their abolished positions. The preceding sentence reads that displaced central administrative and supervisory personnel may assert a claim to any position or to placement on a preferred eligibility list for any position they are entitled to by virtue of tenure or seniority "within the district." The statements by the Assembly Education Committee and the Senate Education Committee reiterate that affected personnel retain bumping rights for other positions in the district for which they may have seniority, *i.e.*, positions in the district other than the abolished positions. Read together, the petitioners argue that displaced central administrative and supervisory personnel have no rights to their former supervisory positions in the central office, but do have rights to other supervisory positions in the District. According to the petitioners, this interpretation gives the proper legal effect to the penultimate sentence of *N.J.S.A.* 18A:7A-44(c): "Any employee *whose position is abolished* by operation of this subsection shall be entitled to assert a claim to any position or to placement upon a preferred eligibility list for any position to which the employee may be entitled by virtue of tenure or seniority *within the district*" (emphasis added).

The petitioners are attempting to sever tenure from the abolished supervisory positions. But the unarticulated reasoning behind *Van Dyke* is that when a central office position is abolished pursuant to the school takeover law, all tenure and seniority rights to and originating from that position are also abolished. Only the petitioners' tenure and seniority rights which did not originate from the abolished central office position are retained.

The petitioners' interpretation of *N.J.S.A.* 18A:7A-44(c) is not unreasonable. However, it is important to note that the Supreme Court in *Nelson*, citing to its earlier decision in *Dennery*, emphasized that administrative law judges and the Appellate Division "should defer to the State Board in its interpretation of complex tenure laws." *Nelson, supra*, 148 *N.J.* at 366 (citing *Dennery, supra*, 131 *N.J.* at 637). The State Board of Education affirmed the ALJ's and Commissioner's decision in *Van Dyke* that central office personnel displaced by *N.J.S.A.* 18A:7A-44(c) retain no supervisory tenure rights, only "*nonsupervisory* rights to which their tenure or seniority entitled them." *Van Dyke, supra*, 91 *N.J.A.R.*2d (EDU) at 46. Thus, I cannot accept petitioners' interpretation of *N.J.S.A.* 18A:7A-44(c) requiring deviation from the *Van Dyke* decision.

PETITIONERS NOT TENURED AS TEACHERS ARE NOT ENTITLED TO TEACHING POSITIONS

Next to be addressed is petitioners' alternative argument: Petitioners Leong, Martinez-Arroyo and Durga, all of whom were terminated, are entitled to teaching positions because their prior supervisory positions required instructional certificates as well as administrative and supervisory certificates, and therefore they earned tenure simultaneously as supervisors and teachers.

The Supreme Court in *Dennery* and in *Nelson* emphasized that tenure required "actual service in a position included under a certificate." *Nelson, supra*, 148 *N.J.* at 367; *Dennery, supra*, 131 *N.J.* at 638. Tenure accrues only as a result of actual work experience in the separately tenurable positions specifically enumerated in *N.J.S.A.* 18A:28-5, including the position of teacher. There is no evidence that petitioners Leong, Martinez-Arroyo and Durga had teaching duties or were required to teach in their supervisory positions in the central office. The local school district's imposition of a dual certification does not obviate the practical need for actual work experience as a teacher in order to attain tenure as a teacher. As respondent argues, the dual requirement of administrative and supervisory certificate and instructional certificate does not mean that "the holders of the positions would be required to perform any teaching skills; the requirement of the instructional certificate is a means of ensuring

that the holders of the supervisory positions do not function without the same basic knowledge and background as the instructors in the district."

Furthermore, it does not appear that petitioners Martinez-Arroyo and Durga ever attained tenure as supervisors in the central office, let alone as teachers. Tenure requires the teaching staff member to hold the appropriate credentials for the tenurable position throughout the probationary period. *N.J.S.A.* 18A:28-5. Petitioner Martinez-Arroyo was the director of the Office of Bilingual Education in the central office. She held an administrative and supervisory certificate with a principal endorsement, a supervisor endorsement, an assistant executive superintendent endorsement, and a specialist in supervision and curriculum endorsement, as well as an instructional certificate with a teacher of English endorsement. However, the position of the director of the Office of Bilingual Education in the central office also required a bilingual/bicultural education endorsement, which Ms. Martinez-Arroyo does not appear to hold. J-1, Exhibit #4. Petitioner Durga was the director of the central office. He held an administrative certificate with a principal endorsement and a supervisor endorsement, and instructional certificates from New York and Wisconsin. However, the position of director of the central office required a New Jersey instructional certificate, which Mr. Durga does not appear to hold. J-1, Exhibit #10.

CONCLUSION

Respondent is entitled to summary decision. When a central office supervisory position is abolished pursuant to *N.J.S.A.* 18A:7A-44, all tenure and seniority rights to and originating from that position are also abolished. Petitioners retain only tenure and seniority rights which were not attained in connection with their former central office supervisory positions. Thus, petitioners Johnson, Iosca, and Allen retain only their tenure rights as teachers.

The Joint Stipulation of Facts indicates that petitioner Goyins attained tenure as a supervisor of the Office of Employment and Technology prior to her appointment to a

position in the central office with the same title. However, *N.J.S.A.* 18A:7A-44(c) encompasses supervisors with "district-wide responsibilities," even if those supervisors did not reside in the central office building. *Cirasa v. State-Operated School District of the City of Paterson*, 95 *N.J.A.R.*2d (EDU) 141, 146. Thus, petitioner Goyins retains only her tenure rights as a teacher.

Petitioners Leong, Martinez-Arroyo, Tate and Durga are not tenured as teachers. Thus, petitioner Tate retains only his tenure rights as a school psychologist, and the remaining petitioners were properly terminated.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that respondent's motion for summary decision is granted. Petitioners' appeals are hereby dismissed.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 27, 1999
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

4/30/99
DATE

Debbie Antanaitis
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 3 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Exhibits

J-1 Joint stipulation of facts with exhibits (1-10)

OAL DKT. NOS. EDU 10921-96; 10922-96; 10923-96; 10924-96; 10925-96; 10926-96; 10927-96 AND 10934-96 (CONSOLIDATED)
AGENCY DKT. NOS. 497-11/96; 498-11/96; 492-11/96; 486-11/96; 495-11/96; 493-11/96; 494-11/96 AND 496-11/96

PHILIP LEONG, PAUL JOHNSON, ERMELINDA IOSCA, IRIS MARTINEZ-ARROYO, YVONNE GOYINS, REGINALD TATE, VERA P. ALLEN AND RAMANAND DURGA,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge. Accordingly, the initial decision is affirmed for the reasons expressed therein.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

June 14, 1999
Date of Mailing, June 14, 1999

187-99 E

P.A. AND N.A., on behalf of minor child, C.A.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST DEPTFORD, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

June 16, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4410-99
AGENCY DKT. NO. 88-4/99

P.A. and N.A., on behalf of
minor child, **C.A.,**
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST DEPTFORD, GLOUCESTER COUNTY,
Respondent.

Jamie Epstein, Esq., appeared for petitioners

Kim C. Belin, Esq., appeared for respondent (Capehart & Scatchard, P.A., attorneys)

Record Closed: June 15, 1999 Decided: June 16, 1999

BEFORE **ANTHONY T. BRUNO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, P.A. and N.A., as parents of C.A. appeal the respondent's denial of petitioners' request that son, C.A. graduating in 3 years (as a junior) be afforded all rights and privileges accrued to graduating fourth year students (Seniors). Petitioner also request the respondents'

policy to the contrary (Board Policy 8.10.5) be rescinded as arbitrary, capricious and unreasonable.

Complaint in this matter was filed with the Commissioner of Education on April 26, 1999 and respondent's answer was filed on June 7, 1999. On June 10, 1999 the matter was transmitted to the Office of Administrative Law for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The plenary hearing was scheduled for June 15, 1999 and commenced that date at Mercerville, New Jersey. Upon the completion of testimony the hearing record remained open to receive minutes of meetings of respondent when Board Policy 8.10.5 was discussed. The hearing record closed on June 15, 1999. Witnesses who testified and exhibits admitted into evidence are listed in the appendix.

FACTUAL CONSIDERATIONS

The material facts in this matter are not in dispute. Therefore the following factual statements taken from the testimony of the witnesses and the exhibits of the parties are the **FINDINGS** of **FACT:**

C.A is a 16 year old student at West Deptford Township High School. C.A. entered West Deptford High School in September 1996 and has continued as a student through June 1999. Through his second year of high school, C.A. had earned 75 high school credits (Exhibit P-2, Page P-4), and the testimony is clear that C.A. earned 40 credits for his work in the third year of high school. C.A. has enough high school credits to qualify for graduation.

On October 28, 1998, petitioner met with Howard Cohen, Principal of West Deptford Township High School to discuss plans for C.A.'s next school year (1999-2000). Petitioners though that C.A. might attend a private school for his fourth year and return to West Deptford High School for graduation with his class. Cohen told petitioners that if C.A. left high school, he could not return for graduation with the other students in his class. Cohen further advised petitioners that C.A. was eligible for early graduation and for some of the scholarship and other awards C.A. would not receive if he left for private school.

After considering Cohen's information petitioner wrote to Cohen on November 4 requesting approval for C.A. to graduate with the class of 1999 (Exhibit R-1). C.A. wrote on November 9 that he wished to graduate in 3 years "because I feel that I have exhausted all the possibilities in high school." (Exhibit R-2).

Respondent, Board of Education, considered petitioners request and on December 14, 1998 adopted a resolution approving C.A.'s graduation in June 1999 Exhibit P-1). Cohen advised petitioners that C.A. was granted "Senior" status and would be moved to a "Senior" homeroom. C.A. asked to stay with his "Junior" homeroom.

P.A. testified that C.A. was then first in his Senior Class of 226 students with a GPA of 5.692.

Petitioners learned during a conversation with Cohen that C.A. would receive no awards for which a GPA was a criteria, nor would C.A. participate in any class rank awards - such as the County dinner honoring the top 5 students from each high school. C.A. could not be valedictorian nor salutatorian.

Petitioners met with Cohen and Dr. Lawrence Hobdell, Superintendent of Schools of the West Deptford Township Schools on March 4. The matter discussed at the meeting are enumerated in Hobdell's letter to petitioners (Exhibit P-6). P.A. testified that he was made aware of the specifics of Board Policy 8.10.5 (Exhibit P-3) in the December meeting with Cohen and Board Policy 8.10.4 (Exhibit R-3) in the March meeting with Hobdell and Cohen. P.A. received a copy of the policies from Hobdell..

Petitioners asked the Board of Education to reconsider its decision to apply Board Policy 8.10.5 to C.A.'s graduation request. Hobdell testified that he wrote to petitioners on April 13 (Exhibit P-7) to confirm the application of Board Policy 8.10.5 and to specify the extent of recognition to be afforded C.A.

ANALYSIS AND DISCUSSION

It is because petitioners question the reasonableness of Board Policy 8.10.5 and 8.10.0.4 that respondent was asked to provide its minutes and supporting memoranda relative to the adoption of the policies. The minutes of the closed session of the West Deptford Township Board of Education (Exhibit R-4) reviews the situation which precipitated Board review and expresses the sentiment "that senior students who have worked extremely hard during their four years will receive the appropriate recognition for their efforts during commencement exercises. . .".

I **FIND** that the Board had 3 options from which to choose policies for recognizing 3 year graduates. I **FIND** that the Board weighed the relative fairness of each option, and exercising its prerogative with adequate and proper discretion chose the option which became Board Policy 8.10.0.4 and 8.10.5. I **CONCLUDE** that both policies are not arbitrary, capricious or unreasonable.

The uncontradicted testimony of Dr. Hobdell is that the policies have been enforced uniformly since they were adopted on October 9, 1995. I therefore **FIND** the statement to be **FACT,** and **CONCLUDE** that the Policies are not applied unevenly for any reason whatsoever.

Realizing that the only matter which may be timely considered 2 days before graduation is whether C.A. should be recognized and honored as a valedictorian, petitioners have been forced to abandon their challenge to the decision that C.A. cannot be considered for some of the approximately 91 awards to be made Thursday evening. A review of the 7 awards listed in Exhibit P-4 reveals the sponsoring organizations established the criteria for award consideration. Had any organization wished to have a 3-year graduate considered, the organization could have done so.

The titles "valedictorian" and "salutatorian" derive from classical Latin for the person who bids farewell and the person who greets. Today those titles are earned by the 2 academic representatives of a graduating class who speak for and to their classmates at the commencement

exercises. Because they are representatives of the graduating class I **FIND** the action of the Board of Education to restrict the valedictorian and salutatorian to those graduating seniors who have actively, and sometimes aggressively but hopefully not viciously, competed for 4 years for those honors to be fair and reasonable. To the contrary I cannot **FIND** it fair for someone to join the academic fray 6 months before graduation to be an academic representative of his or her classmates.

P.A. opined that should C.A. be denied valedictorian status C.A.'s scholarship and future business opportunities would be "hindered." Not only can such opinion be given no weight because of lack of documentary support, but also because experience does not lead to that conclusion.

Counsel for respondent points out correctly that judicial judgment cannot be substituted for board of education policy. I **CONCLUDE** that respondent exercised its discretion in a proper and reasonable manner in adopting Board Policy 8.10.0.4 and 8.10.5. In addition to the propriety to the action of the Board of Education, I **FIND** the petitioners and C.A. to have been fully informed of all of the consequences of each alternative before them. C.A. could have taken his fourth year of high school at a private school, graduate from West Deptford High School after 3 years, or return to west Deptford High School to graduate with the Class of 2000. C.A. could compete for valedictorian or salutatorian honors and all of the academic awards only if C.A. remained at West Deptford High School for the fourth year. Petitioners and C.A. were not offered "cafeteria" choices. Each option had drawbacks as well as benefits. I **CONCLUDE** that petitioners and C.A., by choosing for C.A. to graduate after 3 years of high school, they chose to accept all of the consequences of Board Policy 8.10.5 and 8.10.0.4.

ORDER

Accordingly, it is **ORDERED** that petitioners complaint be **DISMISSED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who by law is authorized to make a final decision in this matter. Pursuant to *N.J.A.C.* 1:1-9.4(e)8 and the agreement of the parties and the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** shall issue a final decision within fifteen (15) days.

Within six (6) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 16, 1999
DATE

Anthony T. Bruno
ANTHONY T. BRUNO, ALJ

Receipt Acknowledged:

6/16/99
DATE

D. N. Antanaitis/jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 16 1999
DATE

Barbara A. Harnak
OFFICE OF ADMINISTRATIVE LAW

tmp

APPENDIX

WITNESSES

For petitioners:

P.A.

For respondent:

Lawrence A. Hobdell, Ed.D.

Howard Cohen

EXHIBITS

For petitioners:

P-1 Board of Education resolution (12/14/98)

P-2 C.A.'s high school records

P-3 Board of Education Policy 8.10.5

P-4 List of awards C.A. not eligible to receive

P-5 Letter from Purdue University (2/16/99)

P-6 Letter from Dr. Hobdell (3/23/99)

P-7 Letter from Dr. Hobdell (4/13/99)

For respondent:

R-1 Letter from P.A. and N.A. (11/4/98)

R-2 Letter from C.A. (11/9/98)

R-3 Board of Education Policy 8.10.0.4

R-4 Board of Education minutes and proposals for treating early graduation status (5/3/95)

OAL DKT NO. EDU 4410-99
AGENCY DKT. NO. 88-4/99

P.A. AND N.A., on behalf of minor child, C.A.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST DEPTFORD, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter heard on an accelerated basis pursuant to *N.J.A.C.* 1:1-9.4 and the initial decision of the Office of Administrative Law have been reviewed.

Upon such review, the Commissioner determines to affirm the initial decision of the Administrative Law Judge (ALJ). In so doing, the Commissioner concurs that the Board presents a rational basis for adhering to its policy to restrict students who graduate in three years from being eligible for honors and recognition based on their grade point averages. The Board maintains that the purpose for this policy is "(1) to protect the senior graduates from displacement by students who graduate in only three years; and (2) to evaluate and award students who have excelled over a similar period of time." (Board's Brief, June 15, 1999, at p. 4)

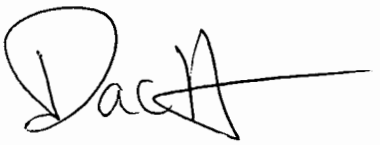
Moreover, it is clear from petitioners' submissions that the Board carefully considered petitioners' request, and determined that the following recognition would be appropriate, within the confines of its policy:

> [C.] will be recognized among the top ten percent of the Class of 1999 and will wear the appropriate graduation garb denoting his special academic accomplishments.
>
> [C.] will be listed in the graduation program with all other seniors with the symbol beside his name designating him as among the top ten percent of his class.
>
> Of the approximate 91 senior awards, [C.] will be able to compete with other seniors in the class for approximately 80 of those awards; excepted are those approximately eleven awards where a grade point average or class rank is a qualifying criteria (sic) for an award. (Petition of Appeal at Exhibit P-14)

Therefore, like the ALJ, the Commissioner cannot find the Board's decision to deny C.A. the opportunity to compete for honors and awards based on his grade point average to be patently arbitrary, capricious, unreasonable, or otherwise made in bad faith.

Accordingly, the initial decision is adopted for the reasons expressed therein and the within Petition of Appeal is dismissed.*

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

June 16, 1999
Faxed to Parties, June 16, 1999
Mailed to Parties, June 17, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

E.W., on behalf of minor, S.W., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE BOROUGH OF HALEDON, PASSAIC COUNTY, :

RESPONDENT. :

E.W., on behalf of minor, S.W., : COMMISSIONER OF EDUCATION

PETITIONER, : DECISION

V. :

BOARD OF EDUCATION OF THE PASSAIC COUNTY MANCHESTER REGIONAL SCHOOL DISTRICT, PASSAIC COUNTY, :

RESPONDENT. :

June 17, 1999

OAL DKT. NO. EDU 9803-98 and 5918-98
AGENCY DKT. NO. 426-9/98 and 224-7/98

E.W., on behalf of minor, S.W.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF HALEDON, PASSAIC COUNTY,

RESPONDENT.

E.W., on behalf of minor, S.W.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE PASSAIC COUNTY MANCHESTER REGIONAL SCHOOL DISTRICT, PASSAIC COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record and notice of withdrawal of this consolidated matter transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

June 17, 1999
Date of Mailing June 17, 1999

189-99

MARY WALTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SPRING LAKE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

June 17, 1999

OAL DKT. NO. EDU 2851-97
AGENCY DKT. NO. 98-3/97

MARY WALTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SPRING LAKE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

June 17, 1999
Date of Mailing, June 17, 1999

191-99

B.T.H., on behalf of minor child, S.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

June 18, 1999

OAL DKT. NO. EDU 8346-98
AGENCY DKT. NO. 366-8/98

B.T.H., on behalf of minor child, S.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

June 18,1999
Date of Mailing, June 18, 1999

192-99

PATRICIA INTVELD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FLORHAM PARK, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

June 21, 1999

OAL DKT. NO. EDU 7080-98
AGENCY DKT. NO. 191-6/98

PATRICIA INTVELD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FLORHAM PARK, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

June 21, 1999
Date of Mailing, June 21, 1999

193-99

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

June 21, 1999

OAL DKT. NO. EDU 6949-98
AGENCY DKT. NO. 349-7/98

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

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

June 21, 1999
Date of Mailing, June 21, 1999

194-99

JOHN LESKIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

June 21, 1999

OAL DKT. NO. EDU 9829-98
AGENCY DKT. NO. 457-10/98

JOHN LESKIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

June 21, 1999
Date of Mailing, June 21, 1999

195-99

E.M. and J.M., on behalf of P.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

June 21, 1999

OAL DKT. NO. EDU 7175-98
AGENCY DKT. NO. 217-6/98

E.M. and J.M., on behalf of P.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

June 21, 1999
Date of Mailing, June 21, 1999

BOARD OF EDUCATION OF THE BOROUGH OF WOODLYNNE, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LINDENWOLD, CAMDEN COUNTY AND A.S. AND S.S., as parents of A.S.,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

The Woodlynne Board appealed a determination by the County Superintendent of Schools that A.S. was homeless and Woodlynne School District was his district of residence.

The ALJ found that, for the period April 2, 1996 through June 1997, A.S. was not the child of a homeless family, in accordance with *N.J.A.C.* 6:3-8.3, and that respondent Lindenwold Board was responsible for his educational costs during this period.

The Commissioner concurred with the ALJ, clarifying, however, that A.S.'s entitlement to a free education in Lindenwold for this time period flows from his status as a child whose parents were domiciled in the district, as per *N.J.S.A.* 18A:38-1a, rather than from any status as an affidavit student, pursuant to *N.J.S.A.* 18A:38-1b(1). The petition was granted.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8609-97

AGENCY DKT. NO. 121-3/97

BOARD OF EDUCATION OF THE BOROUGH OF WOODLYNNE, CAMDEN COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF LINDENWOLD, CAMDEN COUNTY AND A.S. AND S.S. AS PARENTS OF A.S.,

Respondents.

Susan S. Hodges, Esq., for petitioner (Capehart and Scatchard, attorneys)

Kenneth E. Smith, Esq., for respondent Board of Education of the Borough of Lindenwold (John D. Wade, attorney)

A.S. and **S.S.**, parents of **A.S.**, *pro se*

Record Closed: March 10. 1999 Decided: May 4, 1999

BEFORE **KATHRYN A. CLARK**, ALJ:

Woodlynne Board of Education appeals the determination that the pupil, A.S., is homeless and further appeals the assignment of Woodlynne School District as the pupil's district of residence.

PROCEDURAL HISTORY

Woodlynne appealed from a February 4, 1997 determination by the County Superintendent of Schools that Woodlynne is the district of residence and is therefore, responsible for A.S.'s educational costs. Woodlynne seeks an order that A.S. is not a homeless child, and that his district of residence, and therefore the financial responsibility for his education, rests with Lindenwold.

Cross motions for summary decision were filed. Both petitioner's and respondent's motions were denied.

Summary decision is to be granted if, after considering the evidence presented in the light most favorable to the non-moving party, there exists no genuine issue of material fact. *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520, 523 (1995). The essential question is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one-sided that one party must prevail as a matter of law" *Id.* at 533. "When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." *N.J.A.C.* 1:1-12.5(b).

DISCUSSION OF THE TESTIMONY AND EVIDENCE

The only witness to testify was S.S., the mother of A.S., who said that she and her husband and her son were now living at 523 B. Drive, Magnolia.

Previously, they had lived in a townhouse at 216 C. Avenue, Woodlynne. Their landlord stopped paying his mortgage and the bank moved to foreclose.

S.S. and her husband were not working when they lost their residence, and they went to Welfare for assistance.

The family moved to Lindenwold in April, 1996, to live with S.S.'s mother. After their move to Lindenwold, S.S. said that the family had no intention of moving back to Woodlynne.

While at her mother's house, S.S. said that she and her husband paid rent and paid the gas bill, and paid part of the electric bill, the cable TV bill, and the food bills. S.S. said that S.S.'s mother signed an affidavit (that was still unavailable) that S.S.'s mother supported A.S. during the time he lived in her house (April 2, 1996 through June, 1997). S.S. said that her mother provided support to the whole family during this period, and did support A.S. as if he were her own child. S.S. did not give up custody of A.S.

The Lindenwold house could have remained their permanent residence, but sometime after the S's moved in, S.S.'s mother decided to move to Florida. S.S.'s mother sold her house and S.S. and her husband and her family moved in July, 1997 to Magnolia.

S.S. and her husband are now both working and the family is now living at 523 B. Drive, Magnolia. A.S. is now in school in Gloucester Township.

FINDINGS OF FACT

Having had the opportunity to observe and to judge the demeanor and credibility of all witnesses in their testimony, and upon review of all the evidence and exhibits submitted, and drawing reasonable inferences therefrom, I **FIND** the following as **FACT** by a preponderance of the credible evidence:

A.S. is the child of A.S. (the father) and S.S. (the mother). The family currently resides in Magnolia, New Jersey, in Chews Landing School District. Prior to April 2, 1996, the family resided in Woodlynne, New Jersey, and A.S. attended public school in the Woodlynne School District. The landlord, of the building where the family lived, was evicted, subsequent to which the family also had to move. There is no contention that the family was evicted due to any fault of their own.

After leaving their Woodlynne home, the family moved to A.S.'s grandmother's home, in Lindenwold, New Jersey on or about April 2, 1996. The family lived with the grandmother, in Lindenwold, until they moved to their present residence in July of 1997.

From April 2, 1996 through June, 1997, A.S. attended school in the Lindenwold School District. The grandmother signed an affidavit, the truth of which no party disputes, that she had been supporting A.S. since March, 1996.

LEGAL DISCUSSION

The relevant statute, *N.J.S.A.* 18A:38-1, states that public schools shall be free to all domiciliaries of the school district, and also to any child who is "kept in the home of another person domiciled within the school district and (who) is supported by such other person gratis as if (he) were such other person's own child." Further, a showing is required that the domiciliary intends to keep and support the child without cost to the parent for a longer time than merely throughout the school term.

The grandmother filed an affidavit (not submitted with the motion papers) with Lindenwold, which apparently stated that she supported A.S. during the period in question (April 2, 1996 through June, 1997). The balance of his support was provided by his parents, who at the time also lived in Lindenwold.

N.J.A.C. 6:3-8.2 defines a homeless child as "one who lacks a fixed, regular, and adequate residence." No party asserted that A.S.'s grandmother's home was not an adequate residence. A.S. lived there for over a year and there is no evidence that A.S. lived anywhere else during that time. There is no evidence that his grandmother (and/or his parents) did not want or intend him to remain at the grandmother's home indefinitely, until the grandmother, after a year, decided to move to Florida.

N.J.A.C. 6:3-8.3(b)(6) provides that a child shall also be considered homeless if he is "[t]he child of a homeless family which is out of necessity living with relatives or friends". A.S.'s

mother submitted an affidavit (included in the submissions) stating that she and A.S. were living with the grandmother out of necessity. No party disputed this. Therefore, one may conclude that A.S. was living with his grandmother out of necessity. This leaves the question of whether A.S. was the "child of a homeless family".

To determine whether A.S. is a "child of homeless family" all the facts surrounding his residing with his grandmother have to be examined. *N.J.A.C.* 6:3-8. He was supported by his grandmother, a domiciliary of Lindenwold, and by his parents, who at the time, were also domiciliaries of Lindenwold. He was not the child of a homeless family from April 2, 1996 through June, 1997.

CONCLUSION

This case may be said to stand for many things, but surely it should stand for the value of live testimony. Counsel for petitioner exerted much effort in arranging for the presence of her witness, S.S., and it was worth it. S.S.'s testimony was clear, straightforward, compelling, and completely dispositive of the issue in this case.

S.S. and her husband A.S., and therefore their child A.S. were not then, and surely, are not now, homeless. A.S. was not the child of a homeless family for the period April, 1996 through June, 1997. Lindenwold is the district of residence for the period April 2, 1996 through June, 1997, and Lindenwold is responsible for A.S.'s educational costs during this period.

ORDER

It is therefore **ORDERED** that the appeal be **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 4, 1999
DATE

Kathryn A Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

May 6, 1999
DATE

Kathleen J. Carmosino
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 7 1999
DATE

Barbara A Hennel
OFFICE OF ADMINISTRATIVE LAW

es

OAL DKT. NO. EDU 8609-97
AGENCY DKT. NO. 121-3/97

BOARD OF EDUCATION OF THE BOROUGH OF WOODLYNNE, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LINDENWOLD, CAMDEN COUNTY AND A.S. AND S.S., as parents of A.S.,	:	DECISION
RESPONDENTS.	:	
	:	

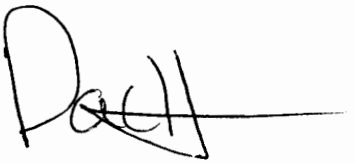
The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

The Commissioner concurs with the Administrative Law Judge (ALJ) that, for the period April 2, 1996 through June 1997, A.S. was not the child of a homeless family, in accordance with *N.J.A.C.* 6:3-8.3, and that the respondent Board of Education of the Borough of Lindenwold was responsible for his educational costs during this period. In so determining, however, the Commissioner clarifies that A.S.'s entitlement to a free education in Lindenwold for this time period flows from his status as a child whose parents were domiciled in the district, as per *N.J.S.A.* 18A:38-1a,[1] rather than from any status as an affidavit student, pursuant to *N.J.S.A.* 18A:38-1b(1).

[1] Here, the Commissioner notes the testimony offered by S.S. that the house in Lindenwold could have remained the permanent residence of their family, had S.S.'s mother not decided to sell her house and move to Florida. (Initial Decision at p. 3)

Accordingly, as determined by the ALJ, Lindenwold was responsible for the educational costs for A.S. for the time period April 2, 1996 through June 1997.[2]

IT IS SO ORDERED.[3]



COMMISSIONER OF EDUCATION

[2] Although the initial decision indicates that the within petition is dismissed (Initial Decision at p. 5), as this decision indicates, petitioner's prayer for relief is granted.

[3] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

June 21, 1999
Date of Mailing, June 21, 1999

197-99

R. McP., on behalf of minor child, H.McP.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

June 21,1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11467-98

AGENCY DKT. NO. 470-10/98

R. McP. ON BEHALF OF MINOR CHILD, H. McP.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,

Respondent

Anthony Carbone, Esq., for petitioner

Robert J. Merryman, Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: April 28, 1999 Decided: April 30, 1999

BEFORE **EDITH KLINGER**, ALJ:

On December 8, 1998, this matter was transmitted to the Office of Administrative Law for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13. A hearing was scheduled for May 19, 1999.

Prior to the date of hearing, the parties advised the undersigned that they had resolved this matter. On April 28, 1999, the parties submitted the attached Stipulation of Settlement indicating the terms of agreement which are incorporated herein by reference.

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

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

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

I **CONCLUDE** that the agreement meets the safeguard requirements of *N.J.A.C.* 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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

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

April 30, 1999
DATE

Edith Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged:

5/5/99
DATE

Debbie Antanaitis/bp
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 6 1999
DATE

Barbara A Harnak
OFFICE OF ADMINISTRATIVE LAW

md

APRUZZESE, McDERMOTT, MASTRO & MURPHY
A Professional Corporation
25 Independence Boulevard
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Attorney(s) for Respondent
Bayonne Board of Education

R. McP. ON BEHALF OF H. McP.,	:	BEFORE THE COMMISSIONER OF EDUCATION
Petitioners,	:	
v.	:	STATE OF NEW JERSEY OAL Dkt. No. EDU-11467-98 AGENCY DOCKET NO. 470-10/98
BOARD OF EDUCATION OF THE CITY OF BAYONNE,	:	**STIPULATION OF SETTLEMENT**
Respondent.	:	

The parties in this Appeal, having voluntarily resolved all disputed matters, hereby enter into the following settlement., which fully disposes of all issues and controversies between the Appellant and Respondent.

1. Appellant Rosa McPeek ("McPeek") hereby dismisses her petition of Appeal against the Bayonne Board of Education ("Board") with prejudice, and withdraws her request for a hearing.

2. McPeek and the Board agree that at this time the student, H. Mc.P., is entitled to the public schools in the Bayonne School District on a tuition free basis based on his residing with Rosa McPeek and will be permitted to remain in the Bayonne School District for the remainder of the 1998-99 school year.

Law Offices
Apruzzese, McDermott,
Mastro & Murphy
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3. It is further agreed that if H. McP.'s residence and domicile remain the same he will continue to be entitled to attend Bayonne Public Schools on a tuition free basis.

4. It is agreed that the Board has the right to verify the residence and domicile of H. McP. and, if circumstances concerning his domicile and/or residence change, to challenge his right to continue his attendance in the Bayonne School district on a tuition free basis.

5. It is understood between the parties that the Board's acknowledgement that H. McP. is entitled to a free education in the Bayonne School district is not an agreement to allow him to continue to attend the Bayonne School District beyond the current school year. His right to continue to attend the Bayonne School District on a tuition free basis will depend solely on his meeting the legal requirements for domicile and/or admission pursuant to N.J.S.A. 18A:38-1.

6. It is understood and agreed by the parties that by the execution of this agreement the Board does not acknowledge any wrongdoing, liability or violation of any applicable law or regulation.

Dated: 4.16.99

Rosa McPeek

Dated: 4/23/99

Richard J. Malanowski
Superintendent
Bayonne School District

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OAL DKT. NO. EDU 11467-98
AGENCY DKT. NO. 470-10/98

R. McP., on behalf of minor child, H.McP.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record, stipulation of settlement and initial decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.
June 21,1999
Date of Mailing, June 21,1999

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT A. DOMBLOSKI,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWN OF	:	DECISION
BELVIDERE, WARREN COUNTY.	:	
	:	

SYNOPSIS

Board certified tenure charges of unbecoming conduct and other just cause against respondent high school business education teacher. ALJ denied request to consolidate matter with separate tenure charges previously filed against respondent.

ALJ concluded that respondent was guilty of conduct unbecoming a teacher. Respondent had pleaded guilty to one count of Criminal Contempt, 4th degree, for having violated a restraining order. Moreover, ALJ noted respondent previously had been found guilty of unbecoming conduct when he deliberately misled the District with respect to his claimed possession of a supervisor's certificate. (*In the Matter of the Tenure Hearing of Robert A. Dombloski*, decided by the Commissioner August 6, 1998) Thus, the ALJ found respondent clearly acted directly contrary to the expectations placed upon teaching staff members who are expected to serve as role models for their students. (*In the Matter of the Tenure Hearing of Ernest Tordo*) ALJ found that the only appropriate sanction for his misconduct was termination of his employment as a tenured teaching staff member. ALJ ordered respondent removed from his employment.

Commissioner concurred with the ALJ that respondent's conduct in connection with the tenure charges brought was sufficient to warrant his dismissal, even where his behavior was viewed independently of the prior finding of unbecoming conduct, and even where his psychological condition might have contributed to his behavior. Commissioner did not share the ALJ's view that the disturbances, which occurred in the District as a result of respondent's misbehavior, were "not substantially disruptive." Commissioner noted that respondent's conduct negatively impacted the student, C.S. Commissioner directed respondent be dismissed from his tenured position as of the date of this decision and referred the matter to the State Board of Examiners for action against his certificate as it deems appropriate.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5354-97

AGENCY DKT. NO. 117-4/97

BOARD OF EDUCATION OF THE TOWN OF BELVIDERE,

Petitioner,

v.

ROBERT A. DOMBLOSKI,

Respondent.

Allan Dzwilewski, Esq., for petitioner (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Gail Oxfeld Kanef, Esq., for respondent (Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: April 26, 1999 Decided: May 7, 1999

BEFORE **STEPHEN G. WEISS,** ALJ

PROCEDURAL HISTORY

This matter, which was transmitted to the Office of Administrative Law by the Department of Education on May 19, 1997, concerns tenure charges filed by the Board of Education of the Town of Belvidere in March 1997 against the respondent, Robert A. Dombloski, a tenured teaching staff member. A request that the matter be consolidated with separate tenure charges previously filed against Dombloski and assigned to Judge Ken Springer for hearing (OAL Dkt. No. EDU 7683-96) was denied by him.

The charges filed by the Board in the instant case alleged that Dombloski had been guilty of conduct unbecoming a tenured teaching staff member, specifically as follows:

> 1. On or about October 2, 1996, Dombloski entered a plea of guilty to one count of Criminal Contempt, 4th degree. As stated in the Accusation, 96-100384, Count #1, the Warren County Prosecutor alleged the following:
>
> > . . . between May 2, 1996 and September 29, 1996, in the Townships of White, Pohatcong and Lopatcong, in the County of Warren, aforesaid, and within the jurisdiction of this Court, did purposely or knowingly disobeyed a judicial order of Honorable John Stritehoff, Jr. made on May 2, 1996 in the matter of *LoAnn Snyder v Robert Dombloski*, Warren County, Docket No. FV21-00041-96 (specifically as set forth on the attached addendum); contrary to the provisions of *N.J.S.* 2C:29-9a, and against the peace of this State, the Government and dignity of the same.

As stated in the above referred to Addendum to the Accusation, the Prosecutor further alleged:

> On Complaint W609781 between May 2 and May 18, 1996 in violation of the Restraining Order did send several note cards with cash enclosed. Did make telephone calls to the victim's residence. On May 18, 1996 did follow her in his vehicle while traveling on Route #519, County of Warren.
>
> On Complaint W609782 between May 23 and July 2, 1996 did continue to make harassing phone calls, specifically did on May 26, at 8:30 a.m. by stating, 'I'm losing my job because of you.' On June 1, 1996, 2:00 p.m. did call and state 'how much money do you need to not work this summer?' On July 1, 1996 at 11:00 p.m. did again drive his vehicle in the vicinity of the victim's residence located at 22 Colby Court, White Township.
>
> On Complaint W606269 did continue to make phone calls in violation of the Restraining Order

> specifically on August 16, 1996, 1:59 a.m., August 17, 1996 at 2:30 a.m. and 12:10 p.m.
>
> Between August 18 and September 29, 1996 did continue to make contact by sending flowers on September 3, 1996 to the Pohatcong Elementary School and to the victim's residence on September 19, 1996. Did continue to telephone the victim's residence on September 27, 1996. On September 28, 1996 did continue to call the victim's residence and specifically state 'I will turn myself in if you are present.' Telephone contact continued on September 29,1996.

2. In accordance with the relevant Order and the Plea Form, agreed to and signed by Dombloski, the listed accusations were merged into the guilty plea.

3. Through wide spread news coverage and otherwise, accusations by the alleged victim against Dombloski became known to Belvidere School District officials commencing in at least April, 1996. Such accusations were particularly serious because of two daughters of the alleged victim of Dombloski's actions attended Belvidere High School. In fact, one of the daughters actually had Dombloski as a teacher. At the request of the mother and pursuant to an April 26, 1996 Temporary Restraining Order, protection of this daughter was afforded by removing her from Dombloski's class for the remainder of the 1995-96 school year and otherwise instructing Dombloski to have no contact with the daughter. No alternate class or course assignment was possible at that time and therefore and therefore [sic] alternative arrangements were made to enable her to receive credit for the school year. This change lessened her educational program and opportunities, depriving her of classroom instruction, interaction with fellow students, etc. The High School also instituted other procedures designed to insure a safe and healthy environment for both daughters while at school or school related activities. These and other such procedures have been continued to date as the Court proceedings are again on-going because of additional allegations.

See, Tenure Charge and Statement of Evidence, March 3,1997.

In his Answer to the above charges, Dombloski took the position that even if proved true, they did not involve "conduct unbecoming." Further, with respect to the specific factual allegations he denied several of them.

A plenary hearing was conducted by the undersigned on December 8, 1998. Much of the delay between the transmittal to OAL in May 1997 and commencement of the hearing in December 1998 stemmed from ongoing efforts to attempt to settle the case pending before Judge Springer. When that effort proved unsuccessful, the charge assigned to me proceeded to trial.

TESTIMONY FOR THE BOARD

The Board's sole witness, Frank A. Jiorle, Jr., for the past six years has been the principal of Belvidere High School. Sometime in 1996, Jiorle was advised by the local police of the filing of the criminal charges against Dombloski and he obtained a copy of the temporary restraining order which prohibited respondent from having any contact with a student at the high school, C.S., who is a daughter of the victim of his stalking. Indeed, since C.S. then was a student in Dombloski's accounting class, she immediately was removed from the class and had to be given daily work by a guidance counselor since there was no other accounting class to which she could have been reassigned. This activity took place between April 26, 1996 and the end of the school year in June. According to Jiorle, moving C.S. out of Dombloski's class because of the temporary restraining order had a decidedly negative impact upon the student insofar as socialization opportunities through peer interaction was concerned. Also, depriving her from receiving direct instruction from a business teacher had a negative educational impact upon her.

On cross-examination, Jiorle agreed that C.S. passed her accounting course at the end of the 1995-96 school year. He also agreed that he was not aware of Dombloski ever coming to the school grounds when he was not supposed to do so.

TESTIMONY FOR RESPONDENT

Dombloski testified on his own behalf and admitted he had violated the court order. However, he ascribed his conduct to "acute depression" and "obsessive-compulsive disorder." In other words, he claimed that he was unable because of those conditions to avoid what he was doing. As a result, of his actions, respondent has seen both a psychologist and a psychiatrist and was placed on medications.

With respect to Dombloski's claim of psychiatric difficulties, I admitted in evidence over Board objection a series of records from the Carrier Foundation, Belle Mead, New Jersey, relating to his having been a patient there (Exhibit R-1). The psychiatric admission evaluation report, dated January 19, 1997, concluded that Dombloski was suffering from a major depressive disorder with a diagnosis by history of obsessive-compulsive disorder. Presently, he is on anti-depressive and other medications to deal with his problems and has continued his care at St. Clare's Hospital in Denville, New Jersey, on an out-patient basis as part of his probation. Although he believes his condition essentially now is under control, and his treatment is expected to end shortly, he will remain on medications under the supervision of his psychiatrist.

DISCUSSION

In essence, this is a "penalty" case since Dombloski's stipulated behavior unquestionably amounts, in my judgment, to conduct "unbecoming a teaching staff member" for which appropriate disciplinary measures must be taken. *See, N.J.S.A.* 18A:28-5. By violating the duly entered restraining order and engaging in the sort of conduct described in the charges, Dombloski clearly acted in a manner directly contrary and inimical to the expectations placed upon teaching staff members who are expected to serve as role models for their students. As the Commissioner observed in *In the Matter of the Tenure Hearing of Ernest Torto*, 1974 *SLD* 97, 99, "when a teacher deliberately and willfully vilolates the law. . . and consequently violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner." There is no

need for me to here review the crude misbehavior in which Dombloski engaged - he has admitted it. The issue is whether or not dismissal should be the consequence of his misconduct.

Board counsel points to a number of previous decisions whereby teaching staff members who engaged in various sorts of criminal or other serious misconduct were dismissed with the Commissioner pertinently commenting upon the special relationship that teachers have to set an example and the penalties they must suffer when they fail to do so. Some of the conduct involved in those other cases was more serious than that committed by Dombloski; others arguably were less troubling. Although each case is fact sensitive and comparisons are thereby difficult to make, what Dombloski admits doing in this case constitutes ample basis for his dismissal unless there are overriding factors mitigating against the severity of that penalty.

Thus, according to Dombloski, there are two major reasons why termination would not be appropriate: (1) although admittedly he violated the restraining order, there was no disruption, as such, to the business of the school district; and (2) at the time he engaged in the criminal behavior, he was suffering from a mental disease (obsessive-compulsive disorder) over which he had little or no control.

With respect to the first argument, I tend to agree that although the steps which the School District had to take to deal with Dombloski were somewhat inconvenient, certainly to the student involved who had to be removed from her class, in the overall they were not substantially disruptive of the District's activities. The student was able successfully to complete her course and there was no substantial interference with her opportunity to receive a thorough and efficient free public education.

With respect to possible mitigation of the severity of any punishment because of his diminished mental status, it is true that Dombloski prior to 1996 was an in-patient at the Carrier Clinic for nearly three weeks and subsequently has attended psychiatric therapy sessions as an out-patient at St. Clare's Hospital. During this period, Dombloski was

treated with medication to help him control his condition and testified that he continues in therapy and would not terminate it unless cleared to do so by his psychiatrist.

Nevertheless, in my view, even though I sympathize with respondent that he suffered from an impairment of his mental status, I still believe that the only appropriate sanction for the misconduct he admittedly committed is termination of employment as a tenured staff member. As noted, Dombloski had a special obligation as a public school teaching staff member to set a proper example for his students and he clearly violated that obligation. As noted previously, nearly three months after pleading guilty to 4th degree criminal contempt, and less than one month after receiving a three-year probationary sentence, he was arrested for violating the restraining order. Neither Belvidere nor any other school district need tolerate the continued employment of a teaching staff member who has behaved as Dombloski did.

Furthermore, as the Board also argues, and with which I agree, possible mitigation of removal as a sanction is rendered less likely in light of the fact that Dombloski previously has been found guilty of conduct unbecoming a teaching staff member; to wit, the decision by the Commissioner of Education in August 1998 modifying Judge Springer's initial decision and finding that Dombloski deliberately misled the School District with respect to his claimed possession of a supervisor's certificate. *See, In the Matter of the Tenure Hearing of Robert A. Dombloski*, OAL Dkt. No. EDU 7683-96, decided by the Commissioner, August 6, 1998..

Accordingly, in light of the undisputed facts and Dombloski's clear violation of his obligations to conduct himself in a manner befitting a tenured teaching staff member, I see no reason further to prolong this decision. Based upon those undisputed facts and the circumstances of his misconduct, I **CONCLUDE** that the respondent, Robert A. Dombloski, has behaved in a manner unbecoming a tenured teaching staff member in violation of *N.J.S.A.* 18A:28-5 and I **ORDER** that he be removed from his employment as a result of that proven misconduct.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 7, 1999
DATE

Stephen Weiss
STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

5/11/99
DATE

Debbie Antanaitis /pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 13 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

pb

APPENDIX

Witnesses:

For Petitioner:

Frank A. Jiorle, Jr.

For Respondent:

Robert A. Dombloski

Exhibits:

For Petitioner:

P-1 For Identification - packet of newspaper articles

For Respondent:

R-1 In Evidence -packet of medical documents from Carrier Foundation, Etc.

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT A. DOMBLOSKI,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWN OF	:	DECISION
BELVIDERE, WARREN COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and the Board's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4.

Respondent asserts that the initial decision consists of factual findings which are generally consistent with his position, including the Administrative Law Judge's (ALJ) finding on page six that respondent's conduct was "not substantially disruptive of the District's activities." (Initial Decision at p. 6) Further, respondent points out that the ALJ recognized the role his "diminished mental status" played in his conduct. (Respondent's Exceptions at p. 2) However, respondent challenges the ALJ's consideration of his prior finding of unbecoming conduct on another tenure matter, contending that there is no nexus between these matters: "[T]he previous matter had absolutely nothing to do with the subsequent matter." (*Id.*)

Additionally, respondent avers that although the ALJ concluded that the Board need not tolerate the continued employment of a teacher who behaved as he did, the ALJ nonetheless conducted no analysis in this regard. Respondent warrants that while he does not deny that he committed the offenses alleged in the tenure charges against him,

> they are not school related and there is no dispute in light of the Administrative Law Judge's findings that his psychological

> condition contributed to his actions. It is also tremendously significant herein that at no time has Mr. Dombloski been found to forfeit his position. Accordingly, the crimes to which he plead guilty are not of such a serious nature nor do they touch upon his employment in any way[,] shape or form so that a forfeiture was either sought or determined to have occurred. (*Id.* at p. 3)

Respondent reasons that his behavior did not rise "to the level of conduct unbecoming a tenure[d] employee ***." (*Id.* at p. 4) Although he admits he violated the restraining order, the calls were nonthreatening in nature and were not related to his work. (*Id.*) Thus, respondent argues that when the relevant case law, as well as the substantial mitigating evidence in this matter, is considered, along with his history in the District since 1969, termination is too harsh a penalty.

In reply, the Board argues that the ALJ appropriately determined that the factors in this matter which might mitigate against respondent's dismissal do not outweigh the seriousness of his conduct. Although respondent claims that termination is not an appropriate penalty since his (admitted) actions did not, according to him, cause disruptions in the District's activities and because, at the time of his actions, he suffered from Obsessive-Compulsive Disorder (Board's Reply at p. 4), the Board points out that respondent, in his Answer to the within tenure charges, never claimed that he was suffering from a psychological disorder. (*Id.* at p. 5) Moreover, the Board indicates that

> it is not a foregone conclusion that Respondent did, in fact, suffer from Obsessive-Compulsive Disorder at the time he committed these acts, or that if he did suffer from the disorder, that he is completely cured at the present time. (*Id.*)

Notwithstanding the reports which respondent submitted into evidence, the Board contends that respondent produced no witnesses with information on this issue and there was no way, therefore, to determine the veracity of the psychological reports. (*Id.*) The Board notes that the Superior Court Judge in the criminal matter did not determine that respondent's alleged mental

condition should exonerate his guilt or mitigate his punishment, and, if respondent suffered from any diminished capacity, the Judge would not have accepted his guilty plea. (*Id.* at p. 6)

The Board next asserts that notwithstanding respondent's repeated claims in his exception arguments and other submissions before the ALJ

> [s]ubsequent to the 1996 incident, Respondent has, in fact, again violated the same restraining order. On January 8, 1997, barely three months after pleading guilty to fourth degree criminal contempt for violating the restraining order against him, and just twenty-six days after receiving a three-year probationary sentence, Respondent was again arrested for violating the restraining order and the terms of his probation. On June 30, 1997, Respondent pleaded guilty to two counts of criminal contempt of court for his continued harassment of Ms. [S.], one count of civil contempt for failing to appear in court, and one count of violation of his probation. *** Therefore, as the ALJ recognized, it appears that the likelihood the behavior in question will recur has already been reached. (*Id.* at p. 8)

Further, the Board finds that the ALJ correctly considered respondent's prior finding of unbecoming conduct, in spite of respondent's contention that the incident had nothing to do with the latter incidents. (*Id.* at p. 10) Moreover, the Board argues that respondent's conduct could not be characterized as either a "momentary lapse in his personal life" or "one fleeting instance of bad judgment," as were the circumstances in cases cited by respondent to convince the Commissioner that a teaching staff member's psychological condition at the time he/she committed an act of unbecoming conduct should mitigate against termination of employment. (*See In the Matter of the Tenure Hearing of Pappa, School District of the Township of Old Bridge*, 1988 *S.L.D.* 542, 548; *In the Matter of the Tenure Hearing of Lieb, School District of the Town of West Orange*, 1985 *S.L.D.* 933, 943.) (Board's Reply at pp. 10, 11)

Upon careful and independent review of the record in this matter, which did not include a transcript of the hearing conducted at the OAL, the Commissioner concurs with the ALJ that respondent's behavior with respect to the incidents enumerated in the Board's tenure

charges constitutes conduct unbecoming a teaching staff member. (Initial Decision at p. 5) In so doing, the Commissioner clarifies that the issue herein is *not* whether respondent's conduct rises to the level of warranting forfeiture of public employment, pursuant to *N.J.S.A.* 2C:51-2, as amended by P.L. 1995, c. 250, but, rather, whether respondent's conduct warrants his dismissal, or reduction in salary, pursuant to the tenure laws, *N.J.S.A.* 18A:6-10 *et seq.*[1] As the ALJ aptly notes:

> By violating the duly entered restraining order and engaging in the sort of conduct described in the charges, Dombloski clearly acted in a manner directly contrary and inimical to the expectations placed upon teaching staff members who are expected to serve as role models to their students. (*Id.*)

"In determining the discipline which should be imposed in cases involving unbecoming conduct, *** the Commissioner considers the nature and circumstances of the incident in question, the individual's prior record and current attitude, and the likelihood that the behavior in question will recur." (*Board of Education of the Township of Parsippany-Troy Hills v. Molinaro*, 96 *N.J.A.R.* 2d (EDU) 268, 276, *citing In the Matter of the Tenure Hearing of Frederick L. Ostergren, School District of Franklin Township, Somerset County*, 1966 *S.L.D.* 185) Initially, as the Board notes, although respondent pleaded guilty to one count of criminal contempt, he committed more than one act of bad judgment:

> In the present matter, Respondent *initially* harassed Ms. [S.], which led to the granting of a restraining order against him. After Respondent's harassing conduct was "discovered," however, Respondent continued to harass Ms. [S.] and continued to violate the restraining order, which led to his conviction for criminal contempt in the fourth degree. (Board's Reply at p. 11) (emphasis in original)

Further, the Commissioner does not share the ALJ's view that the disturbances which occurred in the District as a result of respondent's misbehavior were "not substantially

[1] Thus, the Commissioner finds respondent's argument that it is "tremendously significant" that he was not found to have forfeited his position to be misplaced. (Respondent's Exceptions at p. 3)

disruptive." Rather, the Commissioner concurs with the Board's position that respondent's conduct negatively impacted C.S., (Initial Decision at p. 4) or, at the very least, provided an unwarranted interruption in her educational program, notwithstanding that C.S. was ultimately able to pass her accounting course. Indeed, respondent fails to meaningfully rebut the Board's contention that

> [t]he High School also instituted other procedures designed to insure a safe and healthy environment for both of Ms. [S.'s] daughters while they were at school or at school related activities.*** Furthermore, Frank Jiorle, the school principal, testified that on one day, the police sent patrol cars to the school to see if Respondent showed up there and/or to arrest him. Therefore, it seems quite clear that Respondent's conduct had a negative educational impact on Ms. [S.'s] daughter and affected the entire school. (Board's Post-Hearing Reply Brief at p. 2)[2] (emphasis in original)

Moreover, even assuming, *arguendo*, that respondent's conduct did *not* negatively affect school operations, the Commissioner notes that dismissal may be imposed upon a tenured employee for unbecoming conduct "even if such conduct did not occur in the course of a teacher's employment." (*Molinaro, supra,* at 276, *citing In the Matter of the Tenure Hearing of Robert H. Beam, School District of the Borough of Sayreville*, 1973 *S.L.D.* 157) The Commissioner has determined:

> The teaching profession is chosen by individuals who must comport themselves as models for young minds to emulate. This heavy responsibility does not begin at 8:00 a.m. and conclude at 4:00 p.m., Monday through Friday, only when school is in session. Being a teacher requires, *inter alia*, a consistently intense dedication to civility and respect for people as human beings. The Commissioner has, on past occasions, determined tenure charges arising from incidents which happened in the evening both on and off school property. *** (citations omitted) *In re Beam, supra*, at 163.[3]

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[2] Respondent merely argues that such contention is "substantially vague" (Respondent's Answer at p. 2) and asserts that "[t]he patrol cars appeared on only one day." (Respondent's Post-Hearing Brief at p. 3)

[3] *See also In the Matter of the Tenure Hearing of McIntyre*, 96 *N.J.A.R.* 2d (EDU) 718, *aff'd* State Board 726, *aff'd* New Jersey Superior Court, Appellate Division 726, where the respondent teacher was pulled over by the police at 1:00 a.m. and, after the officer detected an odor of burnt marijuana and observed empty beer containers in the car,

Additionally, the Commissioner concurs with the Board that respondent fails to demonstrate any remorse for his conduct, arguing, instead, in an attempt to mitigate against a finding of guilt, that "the phone calls he made were non-threatening in nature." (Respondent's Exceptions at p. 4) Clearly, respondent does not, even now, appreciate the significance of his misbehavior. Irrespective of whether respondent's calls may be characterized as threatening, these calls "were serious in their consequences to the [recipient and her family]." *See In the Matter of the Tenure Hearing of Stephen Levitt, School District of the City of Newark, Essex County*, 1977 *S.L.D.* 976, *aff'd* State Board 1978 *S.L.D.* 1027, *aff'd* New Jersey Superior Court, Appellate Division 1979 *S.L.D.* 849, 850.

Thus, the Commissioner concurs with the ALJ that respondent's conduct in connection with the tenure charges brought herein is sufficient to warrant his dismissal, even where his behavior is viewed independently of the prior finding of unbecoming conduct, and even where his psychological condition may, as respondent alleges, have contributed to his behavior. *See In re Dombloski, supra; In the Matter of the Tenure Hearing of Henderek*, 94 *N.J.A.R.* 2d (EDU) 268, *aff'd* State Board 276. Like the ALJ, the Commissioner finds that respondent's actions in this matter evidence a lack of self-restraint and controlled behavior which are compelled by his position as a professional employee in a public school system holding great influence over the lives of children. *See also In the Matter of the Tenure Hearing of*

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was given a field sobriety test. Respondent's person and his vehicle were searched and trace amounts of marijuana were found in the car, along with rolling papers and a bag of marijuana on respondent's person. Therein, the Commissioner was not persuaded by respondent's assertion that "no student, teacher or school administrator was involved in this matter," but, instead, underscored that teachers hold positions of public trust, and dismissed respondent from his tenured position. (*Id.* at pp. 725, 726)

Jacque L. Sammons,) School District of Black Horse Pike Regional, Camden County, 1972 S.L.D. 302, 321; *Molinaro, supra*, at 276.[4]

Accordingly, the initial decision of the OAL, directing that respondent be dismissed from his tenured position as a teaching staff member, as of the date of this decision, is adopted for the reasons expressed therein and amplified above. In view of the nature of the charges proven, this matter is hereby referred to the State Board of Examiners for action against respondent's certificate as it deems appropriate. *N.J.A.C.* 6:11-3.6.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

[4] With respect to respondent's prior record in the District, the Commissioner notes that respondent has presented neither documentary nor testimonial evidence in support of his reinstatement, save the simple statement that he "has been in the district since 1969." (Respondent's Exceptions at p. 4)

[5] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

June 23, 1999
Date of Mailing, June 23, 1999

199-99 R

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT R. THOMAS,	:	
PASSAIC COUNTY TECHNICAL	:	COMMISSIONER OF EDUCATION
VOCATIONAL HIGH SCHOOL DISTRICT,	:	DECISION ON REMAND
PASSAIC COUNTY.	:	
_____	:	

June 23,1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1527-99
Agency Dkt. No. 125-5/98

IN THE MATTER OF THE TENURE HEARING OF ROBERT R. THOMAS PASSAIC COUNTY TECHNICAL VOCATIONAL HIGH SCHOOL DISTRICT

Gerald S. Keegan, Esq., for Board of Education of the Passaic County Technical Vocational High School District

Raymond R. Wiss, Esq., for Robert R. Thomas, respondent (Wiss, Cooke & Santomauro, attorneys)

Record Closed: May 3, 1999 Decided: May 6, 1999

BEFORE **SEBASTIAN GAETA, JR.**, ALJ:

STATEMENT OF CASE

This matter is the remand of OAL Docket No. EDU 5328-98, which forwarded to the Commissioner of Education a proposed settlement agreement. The Commissioner of Education remanded the matter to determine whether respondent, Robert R. Thomas, a teaching staff member, was advised of the Commissioner's duty, pursuant to *N.J.A.C.* 6:11-3.6, to refer tenure determinations for possible revocation of certificate.

The Board of Education of the Passaic County Technical Vocational High School District (Board) brought charges against respondent, a tenured teacher, for unbecoming conduct and conduct threatening the well-being of students.

It was alleged that, on December 5, 1995, respondent made racially and ethnically based insulting remarks to a fellow teacher in a lunchroom filled with students. Following an investigation, the Board found probable cause that the incident occurred as alleged. The superintendent immediately suspended respondent. That suspension continued until February 8, 1996 when the Board received the reports of two psychiatrists who had evaluated respondent. An agreement was reached which permitted respondent to return to his teaching duties on February 12, 1996, upon certain conditions, including that he would provide a written apology to the teacher, Rosa Astacio-Borja. The letter was addressed by respondent to "Rosa Anatasio-Borgia."

On April 16, 1996, the Board concluded that the December 5, 1995 incident had been verified but were not serious enough to certify tenure charges. On May 9, 1996, Ms. Astacio-Borja filed a Verified Petition before the Commissioner of Education to direct that the Board certify tenure charges against respondent.

The Commissioner of Education transmitted the matter to the Office of Administrative Law, as a contested matter, to determine whether the Board abused its discretion by failing to certify the tenure charges to the Commissioner in accordance with *N.J.S.A.* 18A:6-11.

The matter was heard before the Honorable Jeffrey A. Gerson, ALJ, who issued an Initial Decision ordering that the December 5, 1995 incidents be certified and forwarded to the Commissioner of Education. The Commissioner of Education concurred with Judge Gerson's Initial Decision and ordered that the board certify the December 5, 1995 incident in accordance with *N.J.S.A.* 18A:6-11. *Rosa Astacio Borja v. Board of Education of the Passaic County Technical-Vocational High School District,*

Passaic County, OAL Dkt. No. EDU 5963-98 (February 13, 1998), adopted Commissioner of Education (March 30, 1998).

Pursuant to the Order of the Commissioner of Education, on April 28, 1998, the Board, on April 28, 1998, considered the several tenure charges filed against respondent. The Board determined that the December 5, 1995 incidents warranted dismissal or reduction in salary and voted to suspend respondent without salary. The other charges, contained in the statement of Tenure Charges, were found to be unsupported by sufficient evidence. Respondent took a timely appeal to the Commissioner of Education, who transmitted the matter to the Office of Administrative Law for a contested hearing pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14B-1 to 13. No person sought leave to intervene, as permitted by *N.J.A.C.* 1:1-16.1. The matter was scheduled for plenary hearings on December 1, 2, 9 and 10, 1998. On October 21, 1998, counsel for the parties and the undersigned Administrative Law Judge met in an in person prehearing conference.

On December 1, 1998, the parties, stated that the matter had been amicably resolved. The settlement terms were then placed upon the record.

On December 2, 1998, the Administrative Law Judge, issued an Initial Decision Approving the Settlement.

On January 19, 1999, the Commissioner of Education issued his Decision remanding the matter to the Office of Administrative Law.

Pursuant to the Commissioner's Order, the Administrative Law Judge and counsel for the parties conducted a conference. It was concluded that respondent was aware of the Commissioner's duty to refer tenure determinations for possible revocation of certificate and that the parties wished to enter into a settlement agreement which would satisfy the requirements of the Commissioner's Order.

On May 3, 1999, a Settlement Agreement signed by respondent, Robert R. Thomas and by representatives of the Passaic County Technical Vocational High School, was received.

DISCUSSION

In accordance with *In re Cardonick*, 1990 S.L.D. 842, 846, the record of any proposed settlement must include:

> . . . the nature of the charges, circumstances justifying the settlement, consent or authorization by the Board of Education and the teacher to the proposed agreement, the Administrative Law Judge's finding that the teacher entered into the agreement with a full understanding of his rights, and [a finding] that the agreement is consistent with the public interest. 1990 S.L.D. 850

At the public hearing on December 1, 1998, the issue of whether or not the earlier settlement should be accepted was discussed at length. The matters discussed are incorporated in the attached Settlement Agreement.

Based upon my review of the record and the terms of the Settlement Agreement, I **FIND**:

(1) That the parties have voluntarily agreed to the settlement.

(2) That the terms of the settlement serve the best interests of the School District, its teachers, staff and students.

(3) That respondent, Robert R. Thomas, is aware of and understands that, pursuant to *N.J.A.C.* 6:11-3.6, the Commissioner of Education has the duty to refer this matter to the State Board of Examiners for any action which it may deem appropriate.

(4) Before entering into this agreement respondent, Robert R. Thomas fully understood his rights and had an adequate opportunity to consult with legal counsel.

(5) The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that the terms of the settlement are in the public interest.

It is **ORDERED** that the parties comply with the settlement terms and that the proceedings are hereby concluded.

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

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

May 6, 1999
DATE

Sebastian Gaeta Jr.
SEBASTIAN GAETA, JR., ALJ

Receipt Acknowledged:

5/11/99
DATE

Debbie Antanaitis by
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 13 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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SETTLEMENT AGREEMENT

THIS AGREEMENT, made and entered into this day of April, 1999, by and between **ROBERT THOMAS**, hereinafter referred to as "Thomas" and **PASSAIC COUNTY TECHNICAL INSTITUTE**, hereinafter referred to as "PCTI"

WITNESSETH:

WHEREAS, the parties hereto are the principals in a certain tenure action entitled In the Matter of the Tenure Hearing of Robert R. Thomas, Passaic County Technical Vocational High School District, OAL Docket No. EDU 5328-98, Agency Docket No. 125-5/98; and

WHEREAS, the above action arose from alleged verbal assault by Thomas upon another tenured teaching staff member, Rosa Astacio-Borja in a lunchroom filled with students on December 5, 1995. It is alleged that the verbal assault was without provocation and was racially and ethnically based. Mr. Thomas allegedly called Ms. Astacio-Borja an illegal alien who swam across the Rio Grande, and that Hispanics "should not be in this country" and "you and all your people should be sent home." Mr. Thomas allegedly pointed to Ms. Astacio-Borja's school identification card and yelled that she should instead be wearing a "green card." Immediately after the incident on 12/5/95, the Respondent was suspended by the Superintendent with pay. On January 22, 1996, PCTI met to review the suspension. At that time, it was agreed that a) Mr. Thomas' suspension would continue until the next scheduled board meeting, and b) Mr. Thomas would be examined by a psychologist or psychiatrist of the Board's choosing and a psychologist or psychiatrist of Mr. Thomas's choosing; and

WHEREAS, On February 8,1996, the Board reviewed the reports of the two psychiatrists

and entered into a stipulation of agreement with Mr. Thomas that stated, in part, that: a) Mr. Thomas would be reinstated to full active teaching duties as of February 12, 1996, b) Board reserves the right to withhold Mr. Thomas' increment, c) Mr. Thomas agree to follow up counseling with the psychologist, d) Mr. Thomas would be observed by a supervisor at least once per week for the balance of the school year and e) Mr. Thomas would provide a written apology to Ms. Astacio-Borja, which apology would be distributed to all staff at the discretion of the superintendent; and

WHEREAS, Mr. Thomas complied with all the requirements of the stipulation of agreement; and

WHEREAS, On April 18, 1996, PCTI voted not to certify tenured charges against Mr. Thomas; and

WHEREAS, On May 9, 1996, Ms. Astacio-Borja filed a Verified Petition before the Commissioner of Education seeking to direct the Board to certify tenured charges against Mr. Thomas. On May 28, 1996, the Board met and resolved to withhold Mr. Thomas' increment for the upcoming year; and

WHEREAS, On February 13, 1998, Administrative Law Judge Jeffrey A. Gerson filed his initial opinion wherein Judge Gerson ordered that Count One of Ms. Astacio-Borja's statement of tenured charges and verified petition be certified and forwarded to the Commissioner of the Department of Education; and

WHEREAS, On March 30, 1998, the Commissioner of Education confirmed the initial decision of Judge Gerson; and

WHEREAS, the parties are now desirous of settling this matter and the said settlement is justified in that the public interest is protected by the proposed settlement as follows:

1. Thomas will receive no additional monetary inducement for his retirement.

2. Thomas will not seek reimbursement for the 120 days he was suspended without pay.

3. Thomas will apply for service retirement.

4. Thomas will never return to PCTI to his teaching capacity.

5. A tenured dismissal hearing would have a disruptive effect upon the school environment and this settlement would avoid the divisive aspect of the hearing.

6. Because of the racial aspects of the incident, it caused an extremely emotional, disruptive and possibly volatile situation at the school. To continue with a tenured hearing at this date almost three years later would have an effect of reopening healed wounds.

7. The New Jersey courts have looked with great favor upon the voluntary resolution of litigation through settlement. As a general principle, and without considering the toll of human resources, the settlement of lawsuits in good faith can be set to save time, money and proof problems. School boards, in their efforts to conserve public funds, no less than private parties, have been encouraged by the state and federal courts to carefully consider equitable settlement possibilities.

NOW, THEREFORE, for and in consideration of the mutual covenants, promises and undertakings hereinafter set forth, the parties agree as follows:

I. Thomas shall submit his resignation to the PCTI and request retirement;

II. Thomas shall not request further employment with PCTI;

III. Thomas hereby waives all claims related to the 120 day suspension without pay imposed by PCTI on April 28, 1998, including any claim for the withholding of any increment of salary;

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IV. Neither party will make a claim for legal fees against the other;

V. Upon fulfillment of all the terms outlined herein, PCTI shall dismiss all tenure charges;

VI. Thomas hereby acknowledges that he has been advised of the Commissioner's duty, pursuant to N.J.A.C. 6:11-3.6 to refer tenure determinations to the State Board of Examiners for possible revocation of certificate.

7. By execution of this agreement all parties release and give up any and all claims against each other and agree that they will seek anything further from each other. Both parties understand and agree to the terms of this settlement agreement.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year written below their names.

Robert Thomas
ROBERT THOMAS

Dated: 4-20-99

PASSAIC COUNTY TECHNICAL INSTITUTE

George D. Walker
By: PRESIDENT

Dated: 4-27-99

Mae Reiner
SECRETARY TO THE BOARD

OAL DKT. NOS. EDU 1527-99 and EDU 5328-98 (ON REMAND)
AGENCY DKT. NO. 125-5/98

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT R. THOMAS,	:	
PASSAIC COUNTY TECHNICAL	:	COMMISSIONER OF EDUCATION
VOCATIONAL HIGH SCHOOL DISTRICT,	:	DECISION ON REMAND
PASSAIC COUNTY.	:	
	:	

The record, settlement agreement and initial decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

In view of the nature of the charges, however, this matter is hereby referred to the State Board of Examiners for action against respondent's certificate as it deems appropriate.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

June 23, 1999
Date of mailing, June 23, 1999

200-99

E.A. AND D.G., on behalf of minor child, N.G.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parents of N.G., a 16 year-old student who was expelled for possession of a knife on school property, previously sought emergent relief requiring the respondent Board, *inter alia*, to conduct a Child Study Team evaluation and provide home instruction pending the outcome of the evaluation. The ALJ granted emergent relief; the Commissioner affirmed.

Upon receipt of the Child Study Team evaluation from respondent Board revealing that N.G. did not have an educational or learning disability and that her behavior leading to her expulsion was not a manifestation of an educational or learning disability, the ALJ dismissed the matter since there were no remaining issues to be resolved and petitioners advised the OAL by telephone that they sought no further relief.

The Commissioner agreed with and adopted as his own the recommendation of the ALJ.

June 24, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION DISMISSING CONTESTED CASE

OAL DKT. NO. EDU 06682-98S

AGENCY DKT. NO. 374-8/98

E.A. AND D.G. ON BEHALF OF MINOR CHILD, N.G.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,

Respondent.

E.A. and D.G. on behalf of minor child, **N.G.**, petitioner, *pro se*
Dennis M. DeSantis, Esq., for respondent (Destribats, Campbell, DeSantis, Magee and O'Donnell, attorneys)

Record Closed: April 20, 1999 Decided: May 12, 1999

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from an application for emergent relief filed before the Commissioner of Education, which was transmitted to the Office of Administrative Law on August 7, 1998. Emergency relief was granted by Order on Request for Emergent Relief dated August 28, 1998, affirmed by the Commissioner of Education Decision on Motion, dated September 9, 1998.

In the attached letter dated April 13, 1999, attorney for the respondent advised that a Child Study Team Evaluation of N.G. had been conducted revealing that N.G. did not have an

educational or learning disability and that her behavior was not a manifestation of an educational disability. N.G. was expelled and all educational services to her were terminated.

On April 20, 1999, a telephone call to petitioners revealed that they seek no further relief, however, no written confirmation of the parents' disinterest in any further proceedings could be obtained. I **CONCLUDE** that there are no remaining issues to be resolved and because the petitioners have sought no further relief, it is hereby **ORDERED** that this matter be **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 12, 1999
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

5/13/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 14 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

Attachment

DESTRIBATS, CAMPBELL, DeSANTIS, MAGEE & O'DONNELL
COUNSELLORS AT LAW
247 WHITE HORSE AVENUE
TRENTON, NEW JERSEY 08610-2699
(609) 585-2443

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JAY G. DESTRIBATS
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DENNIS M. DeSANTIS
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MICHAEL S. POWERS*

OF COUNSEL
HENRY F. GILL
EDWARD J. PHELAN

† CERTIFIED CIVIL TRIAL ATTORNEY
* MEMBER OF N.J. & PA. BAR
△ MEMBER OF N.J. & N.Y. BAR

April 13, 1999

The Hon. Jeff S. Masin
State of New Jersey
Office of Administrative Law
9 Quakerbridge Plaza
PO Box 049
Trenton, NJ 08625-0049

Re: E.A. and D.G. on behalf of minor child, N.G. v. Bd. of Ed. of the Twp. of Hamilton, Mercer County
OAL DKT. NO. EDU 6682-98
AGENCY DKT. NO. 374-8/98

Dear Judge Masin:

Please be advised I am in receipt of your letter dated March 30, 1999. Pursuant to the Court's Order the Child Study Team conducted an evaluation of N.G. and found that she did not have any educational or learning disability and moreover that her behavior was not a manifestation of an educational disability. Accordingly N.G. was expelled and all educational services to her were terminated.

Should the Court require any additional information, please contact me.

Very truly yours,

Dennis M. DeSantis

cc: Eladio Andujar and Daisy Gonzalez
Michael V. Luciano

M:\WPTBENN G v HTBEN041399 Letter to the Hon. Judge Jeff S. Masin.doc

OAL DKT. NO. EDU 6682-98
AGENCY DKT. NO. 374-8/98

E.A. AND D.G., on behalf of minor child, N.G.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review of the record and initial decision, the Commissioner agrees with and adopts as his own the recommendation of the Administrative Law Judge (ALJ) to dismiss the matter for the reasons set forth in the initial decision which indicate, *inter alia,* that N.G. was evaluated by the Child Study Team, which determined that N.G. was not educationally disabled and that the behavior leading to N.G.'s expulsion was not a manifestation of an educational disability. In so determining, the Commissioner notes that petitioners informed the ALJ via telephone on April 20, 1999 that they did not seek further relief in the matter, although no written confirmation to that effect was filed as part of the record; moreover, as noted above, petitioners did not file any exceptions to the initial decision. Accordingly, the matter is dismissed. [1]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

June 24, 1999
Date of Mailing, June 24, 1999

201-99

JACK JACOBS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the Board's refusal to pay the tuition and transportation costs for his son, D.J., a home-schooled student, to attend Bergen County Vocational Technical School (BCVTS).

The ALJ determined that the Board was obligated to pay the tuition and transportation costs for D.J.'s attendance at BCVTS for the 1997-98 school year.

The Commissioner affirmed the initial decision of the ALJ, noting that all New Jersey pupils, not just those enrolled in the public schools, are entitled to a vocational education and underscoring that a student attending a public vocational school by statutory right is entitled to transportation services from the responsible local district if the student resides in the district and lives remote from the public school of attendance. The Commissioner directed the Board to reimburse petitioner $2,125 for transportation costs from September 1997 through January 1998 and tuition costs for D.J.'s attendance at BCVTS for the 1997-98 school year.

June 24,1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3517-98
AGENCY DKT. NO. 356-9/97

JACK JACOBS,

Petitioner,

v.

BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,

Respondent.

Jack Jacobs, *pro se*

Cherie I. Maxwell, Esq., for respondent Board of Education of the Northern Valley Regional School District, Bergen County (Sill Cummis Radin *et al.*, attorneys)

Record Closed: February 3, 1999 Decided: May 4, 1999

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF CASE

Jack Jacobs, petitioner, challenges the decision of respondent, Board of Education of the Northern Valley Regional School District (Board), to deny

tuition costs and transportation to his son D.J. D.J. was home-schooled student and attended Bergen County Vocational-Technical School.

The matter was transmitted to the Office of Administrative Law (OAL) on April 9, 1998 as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A hearing was scheduled for January 13, 1999. The parties did not dispute the relevant facts. The record closed on February 3, 1999 upon reciept of the parties legal arguments. The forty-five-day statutory period within which to file the initial decision expired on March 30, 1999. Based on the administrative law judge's voluminous caseload, an extension of time to complete the initial decision was granted until May 4, 1999. *N.J.S.A.* 52:14B-10(c); *N.J.A.C.* 1:1-18.8.

FACTS

The parties have stipulated the relevant facts. (J-1). Therefore, I **FIND** as follows:

Petitioner, J.J., is the father of a minor child, D.J. J.J. and D.J. are residents of Closter, Bergen County, New Jersey. On January 20, 1998, D.J. was 18 years old.

The Board, a regional school district located in Bergen County, New Jersey, consists of the following municipalities: Closter, Demarest, Northvale, Hoaworth, Norwood, Old Tappan, and Harrington Park.

In the fall of 1994, D.J. was a ninth grade student attending Northern Valley Regional High School (NVRHS). In January 1995, J.J. voluntarily removed D.J. from the high school and taught him at home. On April 25, 1997,

J.J. attempted to enroll D.J. in a graphic arts program at the Bergen County Vocational-Technical School (BCVTS). The Board denied J.J.'s request to pay tuition for D.J. for that program.

In June 1997, J.J. re-enrolled D.J. at NVRHS for the fall term commencing in September 1997. On June 5, 1997, the Board approved tuition for D.J. to attend BCVTS and proposed a curriculum of ninth grade courses. The Board declined J.J.'s request to determine D.J.'s academic proficiency level using standardized placement tests.

On August 1, 1997, D.J. disagreed with the Board's decision to place D.J. in the ninth grade and re-established a home curriculum for D.J. Also, in August 1997, the Board determined not to pay tuition or transportation costs for D.J.'s attendance at BCVTS.

After December, 1997, D.J. did not attend BCVTS. From September 1997 through June 1998, D.J. attended BCVTS in the afternoons. Between September 2, 1997 to October 23, 1997, J.J. transported D.J. twelve miles each way from their residence to BCVTS.

On September 22, 1997, J.J. filed a petition for emergent relief before the Commissioner of Education seeking tuition and transportation from the Board for D.J.'s attendance at the BCVTS. On October 8, 1997, the ALJ issued an order that denied petitioner's request for emergent relief of transportation to BCVTS. In the proceedings before the OAL, J.J. did not request emergent relief for tuition because BCVTS permitted D.J. to attend its school pending resolution of the matter.

On November 5, 1997, the Commisioner reversed the ALJ's decision and granted J.J.'s emergent relief application for transportation. On November 24, 1997, the Board appealed the Commissioner's decision to the State Board of Education (State Board).

On December 4, 1997, the Board applied to the Commissioner for a stay of its November 5th decision pending the appeal to the State Board. On January 7, 1998, the Commissioner denied the request to stay its November 5, 1997 decision. On January 15, 1998, the Board moved before the State Board for a stay of the Commissioner's January 7, 1998 decision, pending appeal.

On February 2, 1998, the Board assumed the cost of transporting D.J. to BCVTS. On March 4, 1998, the State Board affirmed the Commissioner's decision to award J.J. emergent relief of transportation costs for D.J. The State Board, however, set aside the portion of the Commissioner's decision which included payment of tuition by the Board, because tuition was not a part of the emergent relief petition. Further, the State Board directed the Commissioner to transmit the matter to the OAL for a determination on the merits of petitioner's claims for transportation and tuition.

For the 1998-99 school year, D.J. is enrolled in college and has not attended BCVTS.

ISSUE

The issue is whether petitioner is entitled to reimbursement for tuition and transportation for his son who attended Bergen County Vocational-Technical School and was home-schooled?

DISCUSSION

Petitioner challenges the decision of the Board to deny payment for tuition and transportation for D.J. while he attended BCVTS from September 1997 through June 1998.[1] D.J. had a home curriculum the first half of the day and attended BCVTS in the afternoon.

The Board contends that it was not legally obligated to fund his education at BCVTS because D.J. was home-schooled and not enrolled in the school district.

The language of the pertinent statue, *N.J.S.A.* 18A:54-20.1.a., and the Commissioner's interpretation of the law in two recent decisions, do not support the Board's position. "The interpretation of any statute necessarily begins with consideration of its plain language." *Lammers v. Bd. of Educ.,* 134 *N.J.* 264, 267 (1993). Accordingly, *N.J.S.A.* 18A:54-20.1.a., provides

> The board of education of each school district or regional school district in any county in which there is a county vocational school district shall send to any of the schools of the county vocational school district each pupil who resides in the school district or

[1] The denial of payment for transportation was through February 1, 1998, since the Board assumed the costs for transporting D.J. as of February 2, 1998.

> regional school district and who has applied for admission to and has been accepted for attendance at any of the schools of the county vocational school district. The board of education shall pay tuition for each of these pupils to the county vocational school district pursuant to subsection c. of this section.
>
> [*N.J.S.A.* 18A:54-20.1.a.]

The language of the statute is broad and contemplates an independent entitlement to vocational education. Contrary to the Board's position, the statute does not limit a pupil's attendance at a county vocational school to pupils "enrolled" in the district in which they reside. Instead, the statute covers pupils who need only "reside" in the school district.

The scope of a student's entitlement to attend county vocational schools was recently addressed in *M.R. v. Bd. of Ed. of Pompton Lakes,* #386-97, Final Decision, Commissioner of Edu. (July 29, 1997) <http://www.state.nj.us/njded/legal/index.html>. In that matter, two students, who were residents of Passaic County, had applied and been accepted for admission into schools operated by the Bergan County Vocational School District. The Passaic County School district contended that the students were entitled to attend only the Passaic county vocational Schools and refused to pay tuution and transportation costs. The Commissioner concluded that, as a matter of law, students who are accepted into county vocational schols outside their county of residence are entitled to tutuion and transportation costs when a comparable program is not offered in their home school district. Further, the Commissioner determined that entitlement to vocational education established by *N.J.S.A.* 18A:54-20.1, and further elaborated through *N.J.A.C.* 6:43-3.11,

> establish a statewide delivery system for vocational education that ensures pupil access to such education through a tiered structure that first directs pupils to the local or regional district, then to the county district if the local district does not offer a

> comparable type of program, and then to schools statewide, to the extent that facilities permit and students qualify, if a comparable type of program is unavailable within the county district. The terms of both the statute and rule are plain in their directive that county districts *shall* admit nonresident students to the extent space is available and students qualify, and that they *shall* be entitled to collect tuition from the sending districts in which their pupils reside, together with a nonresident fee to the extent permitted by law. Indeed, the mechanism established for setting and collection of county district tuition is, by its own terms, applicable to sending districts both within and without the county. There can, therefore, be no question, that students are entitled to attend, without cost to the student or parent, vocational schools outside their district and county of residence when comparable types of programs are not available within the county.
>
> Such right of access of necessity entails a concomitant right to transportation.
>
> [*M.R., supra,* p.4-5.]

While the language of *N.J.S.A.* 18A:54-20.1.a. and *N.J.A.C.* 6:43-3.11 does not mention home-schooled pupils, it also does not exclude any category of pupils. The emphasis of the statute is on the local school district's obligation to "each pupil who resides" in the school district. The Board's position creates an exception to the statute where none exists. In light of *M.R.,* it is reasonable to conclude that *N.J.S.A.* 18A:54-20.1.a. and *N.J.A.C.* 6:43-3.11 requires a school district to pay the tuition and transportation of a resident home-schooled pupil who has been accepted by the district's own county vocational school.

I have considered the Board's assertion that, "[i]t is noteworthy that the Bergen County Vocational School would not accept D.J. without his enrollment in the District, and only accepted him after said enrollment." *Respondent's Letter Brief,* p.3, dated Jan. 19, 1999. Neither tuition authorization or its letter of acceptance by the BCVTS to D.J. contains a requirement that he be enrolled in the Board's district. The stated purpose of the authorization form is to secure the sending district's agreement that it will pay the tuition. The form states just

above the signature lines "[m]y signature acknowledges receipt of the Bergen County Technical Schools Tuition Schedule and serves as an agreement between my district and the Bergen County Technical Schools to pay tuition on behalf of this applicant, if admitted." *Petitioner's Brief,* Exhibit, dated Jan. 19, 1999. It is reasonable that BCVTS would want to ensure that an applicant's tuition will be paid by the school district in which the applicant resides. Thus, the attendance of D.J. at BCVTS became at risk once the school learned that the Board had denied payment of tuition for D.J. If acceptance was withdrawn by BCVTS, the triggering event was respondent's denial of tuition, not D.J.'s failure to enroll in the school district.

I have also considered the Board's reliance upon a memorandum issued by the New Jersey Department of Education in April 1997 entitled *Home Schooling in New Jersey. Respondent's Letter Brief, supra,* p.2. The sections of the memorandum cited by the Board provide that:

> When parents/guardians are educating a child at home, the child is not enrolled in a school and is, therefore, not accorded any of the entitlements or privileges of the public school district unless specifically provided, as in the federal law described above under the special education section. Any services offered, other than special education evaluations, are at the sole discretion of the board of education once the child is identified as being educated at home:
>
> .....
>
> ...
>
> - **County Shared-Time Vocational Schools** - A vocational board of education should adopt a policy regarding homeschoolers. A child educated at home may apply on an annual basis to the vocational schools. The vocational school may permit the child being educated at home to attend a shared-time vocational school provided that homeschooler does not displace public school students attending the vocational school.
>
> [*Respondent's Letter Brief, supra,* p.2-3.]

The memorandum has neither the effect of a statute or a duly promulgated regulation. *Metromedia, Inc. v. Dir., Div. of Taxation,* 97 *N.J.* 313 (1984),

However, even if the cited sections were applicable, they are contrary to *N.J.S.A.* 18A:54-20.1.a.

Pursuant to *N.J.S.A.* 18A:54-20.1.a. and *N.J.A.C.* 6:43-3.11 all New Jersey pupils have an independent entitlement to a vocational education which is not limited to pupils enrolled in the public schools. Therefore, the attendance of homeschoolers who have been accepted by their local district's own county vocational school should not be restricted by those public school students attending the same vocational school. Such a limitation is only appropriate where the student is accepted to a vocational school outside their county of residence. *See M.R., supra.*

Further, the Board's position is contrary to *N.J.S.A.* 18A:38-25, which provides:

> Every parent, guardian or other person having custody and control of a child between the ages of six and 16 years shall cause such child regularly to attend the public schools of the district or a day school in which there is given instruction equivalent to that provided in the public schools for children of similar grades and attainments or to receive equivalent instruction elsewhere than at school.

Home instruction meets the requirements of the statute if the instruction provided the child is equivalent to that provided in the public schools. *See State v. Massa,* 95 *N.J.Super.* 382 (Co. 1967). The equivalency of D.J.'s education has never been challenged by the Board. The restrictive interpretation of *N.J.S.A.* 18A:54-20.1.a., urged by the Board would have the effect of penalizing families who choose to home school their children as permitted under *N.J.S.A.* 18A:38-25. It would be unreasonable to conclude that the Legislature had such an intent.

The Commissioner has determinated that the right of access to vocational education also entails a concomitant right to transportation. *M.R., supra,* at p.5-6. Hence, the Board was obligated to provide D.J.'s transportation where D.J. was a resident student living remote from BCVTS, the public school he attended from September, 1997, through June, 1998. Indeed, *N.J.S.A.* 18A:39-1 requires that where a school district provides transportation for public school students, students who reside in that district but attend remote non-public schools are also entitled to transportation.

CONCLUSION

Based on the whole of the record, I **CONCLUDE** that the Board"s interpretation of *N.J.S.A.* 18A:54-20.1.a. is untenable in the face of the statute's language and recent decisions by the Commissioner. Petitioner is, therefore, entitled to his requested relief of costs for tuition and transportation.

It is so **ORDERED**.

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

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

recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

May 4, 1999
DATE

Mumtaz Bari Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

5/11/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 13 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Exhibits:

J-1 Stipulation of Facts.

JACK JACOBS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions[1] and the Board's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in making his determination.[2]

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge (ALJ) that respondent was obligated to pay the tuition and transportation costs for D.J.'s attendance at the Bergen County Vocational Technical School (BCVTS) for the 1997-98 school year. In so concluding, the Commissioner

[1] Petitioner "excepts" solely to the ALJ's recitation of facts on page three of the initial decision, noting that her statement, "[A]fter December, 1997, D.J. did not attend BCVTS" is incorrect. However, petitioner indicates that the next sentence, although it contradicts the former, is an accurate account of the facts. That is, "[F]rom September 1997 through June 1998, D.J. attended BCVTS in the afternoons." (Initial Decision at p. 3)

[2] The Board submitted a reply which included cross-exceptions, as per *N.J.A.C.* 1:1-18.4(d). The arguments advanced in the cross-exceptions, however, are a reiteration of those raised before the ALJ. Since the Commissioner finds that the ALJ fully and fairly considered the Board's arguments, they are not summarized herein.

finds the express language of *N.J.S.A.* 18A:54-20.1 and *N.J.S.A.* 18A:39-1 to be determinative.[3]

As the ALJ observes:

> Pursuant to *N.J.S.A.* 18A:54-20.1a and *N.J.A.C.* 6:43-3.11 all New Jersey pupils have an independent entitlement to a vocational education which is not limited to the pupils enrolled in the public schools. Therefore, the attendance of homeschoolers who have been accepted by their local district's own county vocational school should not be restricted by those public school students attending the same vocational school.*** (Initial Decision at p. 9)

To the extent the Board points to contradictory evidence which has "neither the effect of a statute [nor] a duly promulgated regulation," (Initial Decision at p. 8) the Commissioner, like the ALJ, finds that such evidence cannot, given the language in the pertinent statutes and regulations, be dispositive of the issues herein.[4]

Finally, with respect to transportation costs, the Commissioner underscores:

> [W]here a student is attending a public vocational school by statutory right, with tuition paid by the local district of residence, the pupil transportation statute does *not* require that the student be "enrolled" in the responsible local district in order to be entitled to transportation services from that district. Instead, the statute merely requires that the student reside in the district and live remote from the "public school of attendance." *Jack Jacobs v. Board of Education of the Northern Valley Regional School District, Bergen County*, Commissioner Decision on Motion, November 5, 1997, slip. op. at p. 6 (emphasis in original).

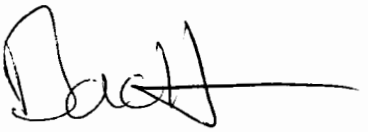
---

[3] The Commissioner herein notes that, after issuing his final decision in *M.R., supra,* on July 29, 1997, the decision was appealed to the State Board of Education. There, the respondent Board contended for the first time that the Commissioner's determination violated the Carl D. Perkins Vocational and Applied Technology Act, 20 *U.S.C.* Section 2301 *et seq.* (*M.R., supra*, State Board of Education, December 3, 1997, slip op. at p. 3) Upon request of the Commissioner, the State Board remanded this matter on December 3, 1997 to the Commissioner with direction that it be transmitted to the OAL "for hearing and determination of all the issues raised [in the] appeal, including the factual question of whether the Board can offer a comparable program to petitioners in Passaic County." (*Id.* at pp. 3-4) While at the OAL, the parties settled the matter.

[4] To the extent that the informational booklet "Home Schooling in New Jersey" is not grounded in applicable law, it cannot be considered authoritative and the Commissioner will forthwith direct its revision or withdrawal as necessary.

Accordingly, the initial decision of the ALJ is affirmed, as clarified herein.[5] The Board is directed to reimburse petitioner $2,125 for transportation costs from September 1997 through January 1998[6] and tuition costs for D.J.'s attendance at the Bergen County Vocational Technical School for the 1997-98 school year.[7]

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

[5] The Commissioner concurs with petitioner's "exception" that the stipulated facts on record show that D.J. attended the BCVTS in the afternoons from September 1997 through June 1998. (Stipulation of Facts at p. 2, paragraph 15)

[6] Although the Board objects to the amount of petitioner's transportation costs, as presented, the basis for its objection is that the amount sought by petitioner is not in accordance with *N.J.S.A.* 18A:39-1, which provides, in part, that where a local board transports students to and from any remote school other than a public school, it does so at an annual per pupil rate not to exceed $675. (Board's Reply/Cross-Exceptions at p. 6) However, the Commissioner finds that this provision of *N.J.S.A.* 18A:39-1 is not applicable to the instant matter, since the BCVTS *is* a public school. Petitioner has submitted an invoice indicating that Valley Kids, Inc. transported D.J. to the BCVTS from late October 1997 through January 1998 at a total cost of $1,419. The Board did not specifically object to the amount of this invoice. (Board's Brief of January 11, 1999 at p. 1, affirming that "[W]hile Northern Valley contends that it should not be responsible for any costs of transportation, it does not contest the amount of the invoice from Valley Kids, Inc. for those months.") Additionally, petitioner asserts that his costs for transporting his son to and from the BCVTS on a daily basis for the months of September 1997 through October 23, 1997 total $706. Although the Board contends this amount is "excessive," (Board's Reply/Cross-Exceptions at p. 6) where it provides no basis for such a contention, other than that already dismissed as inapplicable, and where the amount, on its face, appears reasonable, in light of the mileage traversed, the Commissioner has no reason to reject petitioner's claim.

[7] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

June 24, 1999
Date of Mailing, June 24, 1999

201-99

EDU #9421-97
C # 580-97E
SB # 94-97
EDU #3517-98
C # 201-99
SB # 33-99

JACK JACOBS,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decision on motion by the Commissioner of Education, November 5, 1997

Decision by the State Board of Education, March 4, 1998

Decided by the Commissioner of Education, January 24, 1999

For the Petitioner-Respondent, Jack Jacobs, pro se

For the Respondent-Appellant, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Cheri L. Maxwell, Esq., of Counsel)

On March 4, 1998, the State Board of Education affirmed that part of the determination of the Commissioner of Education which, acting on an application for emergent relief, directed the Northern Valley Regional School District (hereinafter "District") to pay the cost for transportation for D.J., a student residing in the District

DECEMBER 1, 1999

who was attending the Bergen County Technical School in the afternoons while being home-schooled.[1]

On June 24, 1999, the Commissioner issued his decision on the merits of the underlying case. Adopting the Administrative Law Judge's determination and based on a joint stipulation of facts submitted by the parties, the Commissioner concluded that the District was required by N.J.S.A. 18A:54-20.1 and N.J.S.A. 18A:39-1 to pay the student's tuition for attending Bergen County Technical School during the 1997-98 school year and for transportation from his home in the District to the Technical School during that period.

The District has appealed to the State Board, seeking reversal of the Commissioner's decision in both respects. The District contends that it should not be required to pay D.J.'s tuition because he was being home-schooled and was not enrolled in the District's schools during the relevant period. Relying on a memorandum entitled "Home Schooling in New Jersey" that was issued by the Department of Education in 1997, the District argues that services provided by a public school district, including a county vocational school, are rendered at the option of the provider, in this case Bergen County Technical School, and that, therefore, the District should not be held responsible for tuition for D.J.'s vocational program. It further argues that a tuition agreement executed between the District and the Bergen County Technical School was "moot" because although D.J. was enrolled in the District when the agreement was executed, he was "disenrolled" by the time he began attending the vocational program.

[1] In that decision, we set aside that portion of the Commissioner's decision that directed the District to pay the cost of tuition during the pendency of the case because petitioner had not requested such relief in applying for emergent relief.

The District also challenges the Commissioner's conclusion that D.J.'s father (hereinafter "petitioner") should be reimbursed $2,125 by the District for the cost of D.J.'s transportation to and from the Technical School from September 1997 through January 1998. Pointing to N.J.S.A. 18A:39-1, the District contends that a home school program is not a "non-public school" within the meaning of the statute so that the entitlement to transportation conferred by that statute under specified circumstances on students attending non-public schools remote from their homes does not apply. However, it argues that if the statute were applicable, reimbursement should be limited to $675, which is the maximum amount for transportation costs under the statute for students attending non-public schools.

Under the circumstances presented, we affirm the Commissioner's determination that the express terms of N.J.S.A. 18A:54-20.1 placed an obligation on the District to pay tuition to the Technical School for D.J. during the 1997-98 school year. As the Commissioner stressed, N.J.S.A. 18A:54-20.1 provides that:

> The board of education of each school district or regional school district in any county in which there is a county vocational school district shall send to any of the schools of the county vocational school district each pupil who resides in the school district or regional school district and who has applied for admission to and has been accepted for attendance at any of the schools of the county vocational school. The board of education shall pay tuition for each of these pupils to the county vocational school ....

The language of this statute is clear and unambiguous. A district board is required to send each student who resides in the district to the county vocational school in that county and to pay the tuition for each regardless of whether the student is

enrolled in the district's schools. No publication by the Department of Education could alter the statutory requirement, and, like the Commissioner, we have paid it no heed.[2]

We also affirm the Commissioner's determination that petitioner is entitled to $2,125 reimbursement for the costs of his son's transportation from September 1997 to January 1998. In so doing, we stress that petitioner incurred these costs because the District refused to recognize its statutory obligation to D.J. Hence, while we recognize that petitioner calculated the amount due him for September to October, the period during which he drove his son to the Technical School, to include the same hourly rate charged by the private bus company that he ultimately engaged, we do not find this result to be inequitable. Moreover, as the Commissioner pointed out, although the District argues that the amount is excessive, the only alternative it offers is the statutory maximum specified in N.J.S.A. 18A:39-1. Commissioner's Decision, slip op. at 15, n.6. We concur with the Commissioner that this provision is not applicable here because the express terms of the pertinent provision apply only to "....school pupils residing in [any district providing any transportation for public school pupils to and from school pursuant to this section] in going to any remote school other than a public school ...." (Emphasis added.)

We recognize that the language of N.J.S.A. 18A:39-1 and N.J.S.A. 18A:54-20.1 does not expressly provide for the situation that was presented by this appeal. After reviewing these statutes, as well as those related statutes which establish the framework under which transportation is provided to New Jersey's school children, we conclude that the Commissioner properly found that an obligation on the part of the

[2] In his decision, the Commissioner noted that the publication at issue, "Home Schooling in New Jersey," could not be viewed as authoritative, and he directed that it be revised or withdrawn as necessary. Commissioner's Decision, slip op. at 14, n.4.

District could be inferred under those statutes given the circumstances. However, we direct that, under the Commissioner's direction, the Department of Education undertake a comprehensive review of the regulations providing for the distribution of State aid for transportation to insure that they are consistent with the options currently afforded by New Jersey's educational delivery system including, as was the case here, home schooling combined with a shared-time vocational program.

December 1, 1999

Date of mailing DEC 03 1999

202-99

S.C., on behalf of minor child, B.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner sought an order declaring that B.W. was permitted to attend the public schools in respondent's district free of charge pursuant to *N.J.S.A.* 18A: 38-1.

The ALJ dismissed the petition without prejudice, finding that the matter was moot since it was uncontroverted that B.W. was domiciled outside the district and receiving schooling in that district.

The Commissioner concurred with the ALJ, stressing, however, that the notice and due process rights of *N.J.S.A.* 18A: 38-1 must be construed in light of the recent Appellate Division decision, *J.A., for herself and on behalf of her minor niece, T.C. v. Board of Education for the District of South Orange and Maplewood*, A-1615-97T2 decided March 2, 1999.

June 25, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10336-98

AGENCY DKT. NO. 456-10/98

S.C. ON BEHALF OF MINOR CHILD,

B.W.,

Petitioner,

v.

BOARD OF EDUCATION OF THE

TOWNSHIP OF DEPTFORD,

GLOUCESTER COUNTY,

Respondent.

S.C., parent of B.W., petitioner, *pro se*

Raymond J. Zane, Esq., for respondent (Zane & Lozuke, attorneys)

Record Closed: March 31, 1999 Decided: May 12, 1999

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter commenced on October 6, 1998, when S.C., parent of B.W., filed a petition of appeal with the Commissioner of Education seeking an order that B.W. was permitted to attend the public schools in respondent's district free of charge pursuant to *N.J.S.A.* 18A:38-1. An answer was filed on behalf of respondent on November 6, 1998, and on November 20, 1998 the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 to -13.

By letter dated January 6, 1999, the undersigned wrote to petitioner with a copy to respondent's attorney as follows:

> The above-captioned matter has been assigned to me for hearing and disposition. There is a note in the file from the Department of Education which indicates that this matter may be moot because you have enrolled your child in another school district (Philadelphia). If this information is incorrect and you still require a determination from the Commissioner concerning whether the child is entitled to attend the public schools in Deptford free of charge pursuant to *N.J.S.A.* 18A:38-1, please call my chambers and advise my secretary who will then schedule a hearing date. If we do not hear from you by 5 p.m. on January 19, 1999, we will conclude that you have withdrawn your request for a hearing, and the file will be returned to the Department of Education.

Petitioner called and advised that he wished to proceed with the matter, and accordingly a telephone conference call was scheduled and was conducted on January 19, 1999. Although petitioner acknowledged during the telephone conference call that his daughter had been re-enrolled in another school district, he indicated that there were other issues concerning which he still required a determination from the Commissioner. Respondent's counsel indicated that he would be filing a motion for summary decision dismissing the matter as moot.

By letter dated February 18, 1999, and received on March 1, 1999, respondent's counsel filed a notice of motion to dismiss the petition for mootness together with a supporting certification. Petitioner filed a certification in response to the motion to dismiss on March 31, 1999, whereupon the record closed.

The certification of counsel in support of the motion to dismiss provides in pertinent part:

> 5. Mr. [C.] indicated to the Court that he had no objections to this matter being withdrawn, however, he wanted to preserve his right to be able to enroll the child in the Deptford Board of Education school system should he have custody of the child and the child reside with him in Deptford Township.

In his responding certification, petitioner states with respect to the above-quoted paragraph "I do request to preserve this right, if possible." The remainder of petitioner's certification repeats the assertions which petitioner made during the January 19, 1999 telephone conference call that respondent had precluded his daughter from attending respondent's public schools without notifying him of his right to appeal the district's determination concerning residency. Attached to the petition of appeal, however, is a letter from the school principal to petitioner dated September 22, 1998 providing:

> Enclosed is a transfer card for your child. She has told us that she goes to her mother's home at night, which is not what the her original registration information stated. A child must attend school in the district in which they are domiciled. Therefore, your child cannot attend Deptford Schools.
>
> Enclosed you will find a copy of N.J.S.A. 18A:38-1. New Jersey State law is very clear about residency rules. This transfer will take effect on Monday, September 28.

Obviously petitioner received the September 22, 1998 letter since he attached it to his petition of appeal. Since all of the information concerning the right to continue to attend school in the district pending appeal to the Commissioner of Education is contained in *N.J.S.A.* 18A:38-1, the statutory provisions which were either provided with the September 22, 1998 letter as indicated or about which petitioner should have questioned the school principal if a copy of the statute had not been enclosed as stated, petitioner's complaints that respondent failed to notify him of his rights appear to be without merit. Furthermore, as respondent argues in its motion, because the child is currently domiciled outside the district, the within matter is moot.

For all the foregoing reasons, it is hereby **ORDERED** that the petition of appeal is **DISMISSED WITHOUT PREJUDICE** to petitioner's rights to refile such a petition in the future should he have custody of the child and the child resides with him in Deptford Township and the issue arises again.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 12, 1999
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

5/14/99
DATE

Debbie Antanaitis/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 17 1999
DATE

Barbara A Harnes
OFFICE OF ADMINISTRATIVE LAW

ml

OAL DKT. NO. EDU 10336-98
AGENCY DKT. NO. 456-10/98

S.C., on behalf of minor child, B.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

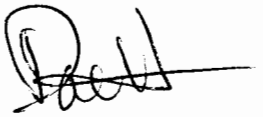
The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon his independent review of the record, the Commissioner concurs with the finding of the Administrative Law Judge that, since it is uncontroverted that minor child B.W. is currently domiciled outside of the district and receiving schooling in that district, the within matter is appropriately dismissed as moot. The Commissioner, however, stresses that the notice and due process rights of *N.J.S.A.* 18A:38-1 must be construed in light of the recent court decision in *J.A., for herself and on behalf of her minor niece, T.C. v. Board of Education for the District of South Orange and Maplewood,* Superior Court of New Jersey, Appellate Division, A-1615-97T2, decided March 2, 1999.[1]

[1]Additionally, while the record is somewhat equivocal on this point, if, indeed, the September 22, 1998 letter to petitioner (Initial Decision at p. 3) constituted the District's notice that petitioner's child was ineligible to attend the schools of the District effective September 28, 1998, such notice, on its face, was not in compliance with the provisions of *N.J.S.A.* 18A:38-1b(2). That provision specifies, "No child shall be removed from school *during the 21-day period in which the parent may contest the board's decision* or during the pendency of the proceedings before the commissioner." (emphasis added)

Accordingly, the initial decision of the OAL is affirmed for the reasons stated therein and the instant Petition of Appeal is dismissed as moot.[2]

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

June 25, 1999
Date of Mailing, June 25, 1999

203-99

CLINTON BARLOW,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF LAMBERTVILLE SCHOOL DISTRICT AND BOARD OF EDUCATION OF THE HUNTERDON REGIONAL SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner demanded that respondents amend their records for his daughter, J.K.C., to reflect his surname in addition to her mother's surname.

The ALJ determined to dismiss the matter without prejudice because the issues of visitation, alleged harassment and emotional distress set forth in petitioner's writings are proper matters for the Superior Court, Family Division, and petitioner's dispute with respondents is limited since respondent South Hunterdon has indicated it will amend its records if presented with appropriate documentation.

The Commissioner adopted as his own the recommendation of the ALJ to dismiss the matter without prejudice to petitioner pursuing the issue of his daughter's legal surname in a court of appropriate jurisdiction.

June 25, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10883-98
AGENCY DKT. NO. 538-11/98

CLINTON BARLOW,
Petitioner,
v.
BOARDS OF EDUCATION OF LAMBERTVILLE AND SOUTH HUNTERDON REGIONAL SCHOOL DISTRICT, HUNTERDON COUNTY,
Respondents.

Clinton Barlow, petitioner, *pro se*

Denise P. Coleman, Esq., on behalf of respondents (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: April 29, 1999 Decided: May 13, 1999

BEFORE **SOLOMON A. METZGER,** ALJ:

This matter arises out of petitioner's demand that respondents amend their records for J.K.C., his daughter, to reflect his surname in addition to her mother's surname, pursuant to *N.J.S.A.* 18A:6-9. The Department of Education transmitted the matter to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A.* 52:14F-1 to -13. Respondents have filed a motion for summary decision and petitioner has answered. The record closed on April 29, 1999, with receipt of the respondents' reply.

Certain facts are undisputed. J.K.C. was born on July 20, 1983, to S.B.C. Petitioner's paternity was established by order of the Hunterdon County Juvenile and Domestic Relations Court, on September 23, 1983. J.K.C. was enrolled in the South Hunterdon Regional High School District (South Hunterdon) on September 4, 1996, under the name J.K.C., and based on school records has continuously resided with her mother. South Hunterdon serves grades 7 to 12. Petitioner contacted South Hunterdon in the latter part of 1998 to request a name change in J.K.C.'s school files and was told that a court order was required (Respondents' Br., Davidson Cert.). Petitioner asserts in his filing with the Commissioner that he is also suing S.B.C. and B.K.T., J.K.C.'s grandmother, for "violating my child's visiting rights as well as for over ten years of mental anguish and physical harassment, unlawful depriving me of seeing my daughter." In its order of September 23, 1983, establishing paternity, the Juvenile and Domestic Relations Court referred to the child as J.K.C.-Barlow (Attachment to Petitioner's Br.). This is the substance of the record.

Respondents argue first that the Commissioner lacks jurisdiction in this matter, because it is part of a family dispute that belongs in the Superior Court, Family Division. Moreover, even if the Commissioner has jurisdiction for purposes of insuring that districts maintain correct records under *N.J.A.C.* 6:3-6.7, he should refrain here. Primary jurisdiction rests with the Superior Court, Family Division, and the entire controversy doctrine demands that litigation not proceed piecemeal, *Hackensack v. Winner*, 82 *N.J.* 1 (1980). Finally respondents maintain that petitioner failed to file this matter timely under the 90-day rule, *N.J.A.C.* 6:24-1.2(c). Petitioner's somewhat disjointed response does not take up these questions, but appears to see the 1983 paternity order as dispositive.

From his writings it seems that petitioner is striving to redress long-standing grievances with S.B.C. concerning their child. These involve visitation, alleged harassment and emotional distress, which are all proper matters for the Superior Court, Family Division. Petitioner's dispute with respondents is limited and South Hunterdon has already indicated that it will amend its records if presented with appropriate documentation. Thus, while the Commissioner has jurisdiction to correct inaccurate records, that role need not always drive a decision to hear a

matter, *McQueston v. Board of Education of the Eastern Camden County Regional School District*, 1988 *S.L.D.* 1688.

To properly address the issues at bar, S.B.C. would have to be given an opportunity to intervene. The proofs at hearing would then likely raise questions concerning the relationship of the parents with each other and J.K.C. over the years. That is very much the business of the Family Division and will be pursued there in any event by virtue of petitioner's wider suit. The issue of J.K.C.'s proper name can be taken up in that context. Finally, the 1983 paternity order is far from dispositive on the question of J.K.C.'s legal name. That was not a proceeding to establish a legal name; the court merely utilized the name J.K.C.-Barlow.

Based on the foregoing, it is **ORDERED** that this petition be **DISMISSED**, without prejudice to its being brought elsewhere.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

5/13/99
DATE

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

5/14/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 17 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

/caa

OAL DKT. NO. EDU 10883-98
AGENCY DKT. NO. 538-11/98

CLINTON BARLOW,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF LAMBERTVILLE SCHOOL DISTRICT AND BOARD OF EDUCATION OF THE HUNTERDON REGIONAL SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION
RESPONDENTS.	:	

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

Upon review, the Commissioner agrees with and adopts as his own the recommendation of the Administrative Law Judge to dismiss the petition for the reasons expressed in the initial decision.

Accordingly, the matter is hereby dismissed, without prejudice to petitioner pursuing the issue of his daughter's legal surname in a court of appropriate jurisdiction.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.
June 25, 1999
Date of Mailing, June 25, 1999

204-99

IN THE MATTER OF THE TENURE	:	
HEARING OF EMILIA EUBANKS,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
CAMDEN, CAMDEN COUNTY.	:	DECISION
	:	

June 25,1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8151-98
AGENCY DKT. NO. 402-9/98

SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY,
Petitioner,
v.
EMILIA EUBANKS,
Respondent.

Karen A. Murray, Esq., for petitioner (Murray, Murray & Corrigan, attorneys)

Arnold M. Mellk, Esq., for respondent (Wills, O'Neill & Mellk, attorneys)

Record Closed: April 23, 1999 Decided: May 11, 1999

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

The within matter commenced on September 4, 1998, when the Board of Education of the City of Camden (hereinafter petitioner) filed tenure charges in accordance with the requirements of N.J.S.A. 18A:6-11 against Emilia Eubanks, a tenured clerk, for unbecoming conduct, excessive absenteeism and incapacity. An answer on behalf of respondent was filed on September 9, 1998 and on September 10, 1998, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 to -13.

A prehearing conference was conducted on October 1, 1998 and a hearing was scheduled for February 8, 9 and 10, 1999. Prior to the scheduled hearing dates, the parties advised that they

had reached a settlement agreement and would be submitting a stipulation for the approval of the undersigned and the Commissioner of Education. The executed agreement which was received on April 9, 1999, is attached hereto and made a part hereof as if set forth herein at length. Also attached hereto and made a part hereof is respondent's signed waiver of the in-person appearance referred to in paragraph four of the stipulation of settlement. Respondent's signed waiver was received on April 23, 1999, whereupon the record closed.

I have reviewed the record and the terms of settlement and I **CONCLUDE** in view of all of the circumstances, it would not be improper for the Commissioner of Education to approve the settlement as an appropriate voluntary resolution of this matter entirely consistent with the law and the philosophy of Cardonick v. Board of Education of the Borough of Brooklawn, EDU 7093-81, 7094-81 and 100-82, decided April 6, 1983 by the State Board of Education. The parties have set forth in their written agreement all of the circumstances which have caused petitioner to conclude that a hearing on the merits in this matter would probably not serve the public interest. The agreement provides for no payment of public monies to respondent and since respondent's position is clerk/typist and she possesses no certificate issued by the State Board of Examiners, consideration by the Board of Examiners pursuant to N.J.A.C. 6:11-3.5 is unnecessary.

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

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

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

May 11, 1999
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

5/13/99
DATE

Deborah Gattuso
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 14 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cc

MURRAY, MURRAY & CORRIGAN
25 Sycamore Avenue
Little Silver, New Jersey 07739
Attorneys for the Petitioner
Camden Board of Education
(732) 747-2300

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ASSEMBLY

1998 APR -9 P 3:17

IN THE MATTER OF THE TENURE HEARING OF EMILIA EUBANKS, BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY.	**BEFORE THE HON. KATHLEEN M. DUNCAN, ADMINISTRATIVE LAW JUDGE, OFFICE OF ADMINISTRATIVE LAW OF THE STATE OF NEW JERSEY** **DOCKET NO. 08151-98S** **STIPULATION OF SETTLEMENT**

THIS STIPULATION OF SETTLEMENT is entered into by and between the Petitioner, Board of Education of the City of Camden (hereinafter "BOARD") and Respondent, Emilia Eubanks (hereinafter referred as "EUBANKS") (the BOARD and EUBANKS are hereinafter referred to jointly as the "Parties" and each may be referred to severally as a "Party");

WHEREAS, EUBANKS has been continuously employed by the Board since January 1, 1980;

WHEREAS, on or about September 1, 1998, the BOARD certified to the Commissioner of Education charges against EUBANKS which, if true, were sufficient to warrant her dismissal;

WHEREAS, EUBANKS has been continuously suspended without pay since September 1, 1998;

WHEREAS, on or about September 1, 1998, EUBANKS filed an Answer to the charges denying the allegations as stated;

WHEREAS, this matter was listed for hearing before the Honorable M. Kathleen Duncan, ALJ, on February 8 and 9 and 10, 1999 and the Parties having agreed to a means of resolving this dispute in a manner consonant with the public interest; and

WHEREAS, EUBANKS and the BOARD have entered into this stipulation with a full understanding of their rights, recognizing that this stipulation and their agreement is subject to the review and approval of the Commissioner of Education;

WHEREAS, EUBANKS was a clerk/typist for the Board and had not acquired a teaching certificate, the question of possible revocation of such certificate by the State Board of Examiners being moot;

NOW, THEREFORE, the matter in difference having been amicably adjusted by and between the parties,

IT IS HEREBY STIPULATED AND AGREED AS FOLLOWS:

1. EUBANKS has tendered her resignation, effective February 1, 1999, pursuant to a plea agreement in Superior Court of New Jersey, Camden County which required EUBANKS' forfeiture of public office. A copy of the plea agreement is attached as Exhibit A to this stipulation. A copy of the letter of resignation is attached as Exhibit B to this stipulation. At the February 22, 1999 meeting, the BOARD accepted EUBANKS resignation, effective on the resignation date. As a result of Eubanks' plea agreement and resignation, and upon approval of this Agreement by the

Commissioner of Education, the BOARD will withdraw, without prejudice, the tenure charges that it has filed against EUBANKS.

4. The Parties enter into this agreement with the mutual understanding that a formal record will be made of EUBANKS' acceptance of the terms of this settlement at the Office of Administrative Law and that, as part of that record, she will have an opportunity to present proofs as to: (a) the knowing and voluntary waiver of her tenure rights; and (b) her capacity to make such a waiver.

5. The Parties further agree that this agreement is contingent upon approval by the Office of Administrative Law and the Commissioner of Education. Neither party will take any legal action whatsoever that is inconsistent with this Agreement before the Office of Administrative Law or any other forum. Provided, however, that nothing in this agreement is intended to restrict the State Board of Examiners from taking any action it deems appropriate.

6. The Parties agree that they and their officers, agents, and administrators will be bound by a covenant of good faith and fair dealing with respect to performance under this Stipulation.

7. This Stipulation constitutes a full release of any and all claims EUBANKS may have against the BOARD. Specifically, EUBANKS forever releases the BOARD from any and all complaints, charges, liabilities, demands, debts, accounts, obligations, promises, suits, actions, causes of action, demands in law or equity, including claims for damages (including but not limited to back pay and front pay), equitable relief, and attorney fees or costs, which EUBANKS now has, or claims to have, or which

EUBANKS at any time hereafter may have, or claim to have, whether presently known or unknown, arising at any time, up to and including the date on which she signs the document. EUBANKS specifically releases the BOARD from any claims she has or may have had under the New Jersey Law Against Discrimination or the federal Americans with Disabilities Act;

8. The Parties agree that nothing in this agreement is intended to waive any obligations EUBANKS may have for restitution to the BOARD pursuant to the plea agreement that was executed in Superior Court of New Jersey, Camden County on or about February 1, 1999.

9. The Parties agree that this document constitutes their full understanding. It is agreed that there are no other understandings or agreements (either written or oral) which would have any impact upon the present action.

10. By signing this agreement, the Parties certify that they have had the opportunity to discuss this Stipulation with counsel. They are fully satisfied with the services of their counsel with respect to both this Stipulation and all other aspects of this case and they enter into this Stipulation knowingly, willingly and without any coercion or improper inducements.

11. The Parties further agree that this agreement is contingent upon approval by the Office of Administrative Law and the Commissioner. Neither Party will take any legal action whatsoever that is inconsistent with this agreement before the Office of Administrative Law or any other forum.

12. By signing this agreement, each signatory represents that she or he is a Party or has been duly authorized by a Party to sign on that Party's behalf.

13. The Parties agree that this Stipulation may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

FOR THE CITY OF CAMDEN BOARD OF EDUCATION

DATED: 4/7/99 By: _____
KAREN A. MURRAY, ESQ.

COUNSEL FOR EMILIA EUBANKS

DATED: 3/23/99 By: _____
ARNOLD MELLK, ESQ.

DATED: By: _____
EMILIA EUBANKS

PLEA FORM

County CAMDEN

DEFENDANT'S NAME EMILIA EVANS before Judge ROSENZWEIG

1. List the charges to which you are pleading guilty:

Ind./Acc./Compl.#	Count	Nature of Offense	Degree	STATUTORY MAXIMUM Time	Fine	VCCB Assmt*
S96132	1	THEFT	DP	MAX 6 MOS.	1000	50
				MAX		
				MAX		
				MAX		
				MAX		

RECEIVED AND FILED
02-01 1999
IN THE COUNTY CLERK'S OFFICE
SPECIAL DEPUTY CLERK

Your total exposure as the result of this plea is: TOTAL 6 MOS 1000 50 C.J.

PLEASE CIRCLE APPROPRIATE ANSWER

2. a. Did you commit the offense(s) to which you are pleading guilty? (YES) [NO]
   b. Do you understand that before the judge can find you guilty, you will have to tell the judge what you did that makes you guilty of the particular offense(s)? (YES) [NO]
3. Do you understand what the charges mean? (YES) [NO]
4. Do you understand that by pleading guilty you are giving up certain rights? Among them are:
   a. The right to a jury trial in which the State must prove your guilt beyond a reasonable doubt? (YES) [NO]
   b. The right to remain silent? (YES) [NO]
   c. The right to confront the witnesses against you? (YES) [NO]
5. Do you understand that if you plead guilty:
   a. You will have a criminal record? (YES) [NO]
   b. Unless the plea agreement provides otherwise, you could be sentenced to serve the maximum time in confinement, to pay the maximum fine and to pay the maximum Violent Crimes Compensation Board Assessment? (YES) [NO]
   c. You must pay a minimum Violent Crimes Compensation Board assessment of $50 ($100 minimum if you are convicted of a crime of violence) for each count to which you plead guilty? (Penalty is $30 if offense occurred between January 9, 1986 and December 22, 1991 inclusive. $25 if offense occurred before January 1, 1986.) (YES) [NO]
   d. If the offense occurred on or after February 1, 1993 and you are being sentenced to probation or a State correctional facility, you must pay a transaction fee of up to $1.00 for each occasion when a payment or installment payment is made? (YES) [NO]
   e. If the offense occurred on or after August 2, 1993 you must pay a $75 Safe Neighborhood Services Fund assessment for each conviction? (YES) [NO]
   f. If the offense occurred on or after January 5, 1994 and you are being sentenced to probation, you must pay a fee of up to $25 per month for the term of probation? (YES) [NO]

*VIOLENT CRIMES COMPENSATION BOARD ASSESSMENT

Defendant's Initials EE

FEB-05 99 15:15 FROM:

6. Do you understand that the court could in its discretion impose a minimum time in confinement to be served before you become eligible for parole, which period could be as long as one half of the period of the custodial sentenced imposed? N/A [YES] [NO]

7. Did you enter a plea of guilty to any charges that require a mandatory period of parole ineligibility or a mandatory extended term? [YES] (NO)
a. If you are pleading guilty to such a charge, the minimum mandatory period of parole ineligibility is ____years and ____months (fill in the number of years/months) and the maximum period of parole ineligibility can be ____years and ____months (fill in the number of years/months) and this period cannot be reduced by good time, work, or minimum custody credits.

8. Are you pleading guilty to a crime that contains a presumption of imprisonment which means that it is almost certain that you will go to state prison? [YES] (NO)

9. Are you presently on probation or parole? [YES] (NO)
a. Do you realize that a guilty plea may result in a violation of your probation or parole? [YES] [NO] (N/A)

10. Are you presently serving a custodial sentence on another charge? [YES] (NO)
a. Do you understand that a guilty plea may affect your parole eligibility? [YES] [NO] (N/A)

11. Do you understand that if you have plead guilty to, or have been found guilty on other charges, or are presently serving a custodial term and the plea agreement is silent on the issue, the court may require that all sentences be made to run consecutively? [YES] [NO] (N/A)

12. List any charges the prosecutor has agreed to recommend for dismissal: N/A

Ind./Acc./Compl.#	Count	Nature of Offense and Degree

13. Specify any sentence the prosecutor has agreed to recommend:

Probation & Restitution To B.O.E. &
Camden; Forfeit of Public Office

14. Has the prosecutor promised that he or she will NOT:
a. Speak at sentencing? [YES] (NO)
b. Seek an extended term of confinement? (YES) [NO]
c. Seek a stipulation of parole ineligibility? (YES) [NO]

15. Are you aware that you must pay restitution if the court finds there is a victim who has suffered a loss and if the court finds that you are able or will be able in the future to pay restitution? (YES) [NO] [N/A]

Defendant's Initials

16. Do you understand that if you are a public office holder or employee, you can be required to forfeit your office or job by virtue of your plea of guilty? [YES] [NO] [N/A]

17. Do you understand that if you are not a United States citizen or national, you may be deported by virtue of your plea of guilty? [YES] [NO] [N/A]

18. Have you discussed with your attorney the legal doctrine of merger? [YES] [NO] [N/A]

19. Are you giving up your right at sentence to argue that there are charges you pleaded guilty to for which you cannot be given a separate sentence? [YES] [NO] [N/A]

20. List any other promises or representations that have been made by you, the prosecutor, your defense attorney, or anyone else as a part of this plea of guilty:

Waive Right to Appeal.

21. Have any promises other than those mentioned on this form, or any threats, been made in order to cause you to plead guilty? [YES] [NO]

22. a. Do you understand that the judge is not bound by any promises or recommendations of the prosecutor and that the judge has the right to reject the plea before sentencing you and the right to impose a more severe sentence? [YES] [NO]
b. Do you understand that if the judge decides to impose a more severe sentence than recommended by the prosecutor, that you may take back your plea? [YES] [NO]
c. Do you understand that if you are permitted to take back your plea of guilty because of the judge's sentence, that anything you say in furtherance of the guilty plea cannot be used against you at trial? [YES] [NO]

23. Are you satisfied with the advice you have received from your lawyer? [YES] [NO]

24. Do you have any questions concerning this plea? [YES] [NO]

DATE: 2/1/99 DEFENDANT Emilia Eubanks

DEFENSE ATTORNEY R. T. Lewis

PROSECUTOR [signature]

[ ] This plea is the result of the judge's conditional indications of the maximum sentence he or she would impose independent of the prosecutor's recommendation. Accordingly, the "Supplemental Plea Form for Non-Negotiated Pleas" has been completed.

NAME: Emilia Eubanks
ADDRESS: 550 N. 30th St. Apt. Ha-42 Camden, AR 08105
TELE#: 338-1202
D.O.B.: 2/15/56
SS#: 208-46-8133
SENT DT.: Feb. 1, 1999

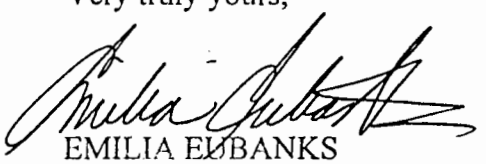
Emilia Eubanks
550 North 30th Street, Apt. H-12
Camden, NJ 08105

January 29, 1999

TO WHOM IT MAY CONCERN:

Please be advised that I wish to resign my position as of February 1, 1999.

Very truly yours,



EMILIA EUBANKS

APR 2 2 1999

TO WHOM IT MAY CONCERN:

I have signed the settlement agreement between the Camden Board of Education and myself, and, with reference to paragraph 4 of the agreement, I decline and waive the opportunity to appear before the Office of Administrative Law to present any proofs as to the waiver of my tenure rights and my capacity to make such a waiver. My signing of the agreement is such waiver.

Emilia Eubanks

Date:

OAL DKT. NO. EDU 8151-98
AGENCY DKT. NO. 402-9/98

IN THE MATTER OF THE TENURE	:	
HEARING OF EMILIA EUBANKS,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
CAMDEN, CAMDEN COUNTY.	:	DECISION
	:	

The record of this matter, the proposed stipulation of settlement, and the initial decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

June 25, 1999
Date of Mailing, June 25, 1999

205-99

SANDRA GOODMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EVESHAM, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

June 25, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8849-97

AGENCY DKT. NO. 369-9/97

SANDRA GOODMAN,

Petitioner,

v.

BOARD OF EDUCATION OF EVESHAM, BURLINGTON COUNTY,

Respondent.

Keith Waldman, Esq., for the petitioner (Selikoff & Cohen, attorneys)

John Dyer III, Esq., for the respondent

Record Closed: May 5, 1999 Decided: May 11, 1999

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

This matter was transmitted to the Office of Administrative Law on November 6, 1997, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

MAY 11 1999
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

5/13/99
DATE

Deborah Antonetti
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 14 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

None

For the Respondent:

None

WITNESSES:

For the Petitioner:

None

For the Respondent:

None

SELIKOFF & COHEN, P.A.
307 Fellowship Road, Suite 314
Mt. Laurel, New Jersey 08054-1233
(609) 778-6055
Counsel for Petitioner/Complainant
Sandra Goodman

SANDRA GOODMAN, an individual, Petitioner, v. BOARD OF EDUCATION OF THE EVESHAM TOWNSHIP PUBLIC SCHOOL DISTRICT, COUNTY OF BURLINGTON, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW DOCKET NO. EDUOR 08849-97S
SANDRA GOODMAN, an individual, Petitioner, v. BOARD OF EDUCATION OF THE EVESHAM TOWNSHIP PUBLIC SCHOOL DISTRICT, COUNTY OF BURLINGTON, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY DOCKET NO. 369-9/97
SANDRA GOODMAN, Complainant, v. BOARD OF EDUCATION FOR THE EVESHAM TOWNSHIP PUBLIC SCHOOL DISTRICT Respondent.	STATE OF NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY DIVISION ON CIVIL RIGHTS DOCKET NO. ED13AE-43184
SANDRA GOODMAN, Complainant, v. BOARD OF EDUCATION FOR THE EVESHAM TOWNSHIP PUBLIC SCHOOL DISTRICT Respondent.	EQUAL EMPLOYMENT OPPORTUNITY COMMISSION DOCKET NO. 17E98-0299 <u>STIPULATION OF DISMISSAL</u>

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STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

THIS STIPULATION OF SETTLEMENT is entered into by and between the Petitioner BOARD OF EDUCATION OF Evesham Township, BURLINGTON COUNTY (hereinafter "BOARD") and Respondent SANDRA GOODMAN (hereinafter referred as "GOODMAN") (the BOARD and GOODMAN are hereinafter referred to jointly as the "Parties" and each may be referred to severally as a "Party");

WHEREAS, GOODMAN has been continuously employed by the BOARD as a teaching staff member from September 1, 1965 to present;

WHEREAS, the Parties have engaged in protracted negotiations concerning GOODMAN's employment rights since June of 1997;

WHEREAS, by letter dated June 25, 1997 and received by her on or after June 26, 1997, in the absence of a negotiated settlement of GOODMAN's employment rights, the BOARD notified her withheld her salary and adjustment increments for the 1997-98 school year;

WHEREAS, on or about September 25, 1997, GOODMAN filed a Petition of Appeal to the Commissioner of Education ("Commissioner") in the matter entitled Sandra Goodman v. Board of Education for the Evesham Township Public School District, Burlington County, Agency Ref. No. 369-9/97 (Education Case");

WHEREAS on or about October 14, 1997, the BOARD filed an Answer denying the allegations of the Petition of Appeal in the Education Case;

WHEREAS on or about October 30, 1997, the Commissioner transferred the Education Case to the Office of Administrative La.. where the matter was docketed as OAL Docket No. EDUOR 08849-97S for hearing;

WHEREAS, on or about November 26, 1997, GOODMAN filed a Verified Complaint with the State of New Jersey Department of Law and Public Safety Division on Civil Rights ("DCR") in the matter entitled Sandra Goodman v. Board of Education for the Evesham Township Public School District, Docket No. ED13AE-43184 alleging that the BOARD withheld her increments as a form of retaliation and age discrimination;

WHEREAS, on or about November 26, 1997, GOODMAN also filed a charge of discrimination with the United States Equal Employment Opportunity Commission ("EEOC") in the matter entitle` Sandra Goodman v. Board of Education for the Evesham Township Public School District, Charge No. 17E980299 alleging that the BOARD withheld her increments as a form of retaliation and age discrimination (the DCR and EEOC cases are referred to as the "Discrimination Cases");

WHEREAS the BOARD denied the allegations of the Complaint and Charge;

WHEREAS a fact-finding conference held by the DCR on or about September 18, 1998 at the DCR's Camden office

WHEREAS, on or about June 4, 1998, GOODMAN sought placement in the 1998-99 school year under the BA+30 column in the salary guide in recognition of her having attained an additional fifteen (15) credit hours of job-related education;

WHEREAS, on or about June 9, 1998, the BOARD withheld GOODMAN's salary and adjustment increments for the 1998-99 school year and also refused to place her under the BA+30 column of the salary guide;

WHEREAS on or about August 13, 1998, GOODMAN amended her petition of appeal claiming that the BOARD improperly withheld her 1998-99 salary and adjustment increments;

WHEREAS in or around October of 1999, GOODMAN filed a grievance contesting the BOARD'S refusal to place her under the BA+30 column of the guide;

WHEREAS GOODMAN contemplated amending her complaint before the DCR;

WHEREAS on January 6, 1999, at GOODMAN's request, the DCR transmitted the Discrimination Case to the OAL for hearing on a consolidated basis with the Education Case, as amended;

WHEREAS the BOARD has offered to pay certain leave benefits to qualified retirees, including GOODMAN ("Leave Benefits");

WHEREAS GOODMAN desires to retire and the pendency of the above-referenced cases was the only reason she elected not to avail herself of the Leave Benefits;

WHEREAS, the Parties identified a number of substantial factual and legal issues which would have to be litigated for the full and final adjudication of this case, including (a) whether the increment withholdings were justified; (b) whether the BOARD violated GOODMAN's rights under the New Jersey Law Against Discrimination and (c) whether the BOARD's violated GOODMAN's rights under the collectively negotiated agreement;

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WHEREAS, the Education Case and the Discrimination Case were listed for hearing before the Honorable Bruce Campbell, ALJ, on January 19 and 22, 1999;

WHEREAS, as a result of the Parties' continuing negotiations, they have agreed to terminate amicably GOODMAN'S employment and/or affiliation with BOARD as of June 30, 1999 through GOODMAN'S resignation to retire, and to settle and terminate any and all disputes between them in a manner consonant with the public interest; and

WHEREAS GOODMAN and the BOARD have entered into this Stipulation with a full understanding of their rights, recognizing that this Stipulation and any obligations or duties created thereby are subject to the review and final approval of the Commissioner, the Director of the DCR ("DCR Director") and the Regional Directc of the EEOC ("EEOC Regional Director");

NOW THEREFORE, the matter in difference having been amicably adjusted by and between the Parties,

IT IS HEREBY STIPULATED AND AGREED AS FOLLOWS:

1. The Parties incorporate the above recitals by reference.

2. GOODMAN, for and in consideration of the undertakings of BOARD set forth in Paragraph 5 herein, and intending to be legally bound, does hereby remise, release and forever discharge BOARD and its officers, members, employees and agents, its and their respective successors and assigns, heirs, executors and administrators, of and from any and all manner of actions and causes of actions, suits, debts, claims and demands whatsoever in law or in equity, which she ever had, now has, or

hereafter may have, or which her heirs, executors or administrators hereafter may have by reason of any matter, cause or thing whatsoever, from the beginning of her employment with BOARD to the date of these presents, and particularly, but without limitation, of the foregoing general terms, any claims arising from or relating in any way to her employment relationship and/or the termination of her employment relationship and/or affiliation with BOARD, including but not limited to, any claims which have been asserted or could have been asserted or could be asserted now or in the future under any and all federal, state or local laws and any common law claims now or hereafter recognized, and any and all claims arising out of her employment with BOARD. Nothing in this paragraph is intended to operate as a release, waiver, or forfeiture of GOODMAN's rights, and the BOARD's obligations under: (a) any state worker's compensation act or statute, or (b) any State of New Jersey administered retirement, pension, savings, or 401(k) plan in which GOODMAN is a participant.

3. BOARD, for and in consideration of the undertakings of GOODMAN set forth herein, and intending to be legally bound, does hereby remise, release and forever discharge GOODMAN and her heirs, executors and administrators, of and from any and all manner of actions and causes of actions, suits, debts, claims and demands whatsoever in law or in equity, which it ever had, now has, or hereafter may have, or which its officers, members, employees and/or agents, its and their respective successors and assigns, heirs, executors or administrators hereafter may have by reason of any matter, cause or thing whatsoever, from the beginning of her employment with BOARD to the date of these presents, and

particularly, but without limitation, of the foregoing general terms, any claims arising from or relating in any way to her employment relationship and/or the termination of her employment relationship and/or affiliation with BOARD, including but not limited to, any claims which have been asserted or could have been asserted or could be asserted now or in the future under any and all federal, state or local laws and any common law claims now or hereafter recognized, and any and all claims arising out of her employment with BOARD.

4. **Subject to the final approval of this Stipulation by the Commissioner, the DCR Director and the EEOC Regional Director**, GOODMAN agrees that: (a) she shall tender to BOARD a letter of resignation to be effective at the close of business on June 30, 1999; (b) that she shall no longer be employed by BOARD thereafter (c) that her signature on this Stipulation constitutes an acknowledgement that she is relinquishing all present and future rights to tenure, employment and reemployment with BOARD as of the close of business on June 30, 1999, and (d) that her signature on this Stipulation serves as her written authorization to withdraw and does withdraw (1) the Education Case, as amended; (2) the Discrimination Cases; (3) the grievance and (4) any claims which could have been raised in the Discrimination Cases.

5. In full consideration of the mutual execution of this Stipulation, and the mutual agreement to be legally bound by its terms, in a timely fashion, BOARD agrees to take formal action at a duly-noticed meeting to:

(a) restore GOODMAN's salary and adjustment increments for the 1998-99 school year retroactively and prospectively based upon the Board's finding that GOODMAN has recovered from the previously recognized shortcoming and has recaptured lost ground by steadily improving performance;

(b) place GOODMAN at Step 17 of the BA+30 column of the guide retroactively and prospectively for the 1998-99 school year in recognition of her having obtained this level of education;

(c) provide GOODMAN with salary and all benefits and emoluments to which she would otherwise be entitled for the time period from September 1, 1998 through June 30, 1999;

(d) accept GOODMAN's application for the Leave Benefits and pay her all sums to which she otherwise would have been entitled had she applied for the Leave Benefits on or before November 1, 1998. At present, the amount of such Leave Benefits is $36,000. This amount is calculated as follows: $65,141 (final salary) divided by 200 (pursuant to the contract) multiplied by 111 (current days available) equals $36,153.25. Given that this sum exceeds the $36,000 maximum Leave Benefits payment allowed under the contract, her Leave Benefits are capped at $36,000. The Leave Benefits are subject to revision in the event that GOODMAN exhausts days available between the date of this agreement and June 30, 1999. In the event that this should occur, the same formula will be used, the only difference being that the number of days will be revised downward accordingly;

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(e) The BOARD and its administrators will promptly take such other and further actions, will promptly respond to all inquiries by the Teachers' Pension and Annuity Fund ("TPAF") The Parties understand that, in this context "promptly" means within 72 hours of receipt of such request or form. In the event that the schools are closed for any reason when the request or form is received, the BOARD will respond within 72 hours of the time the schools reopen.

(f) The BOARD agrees that GOODMAN has been "terminated (other than by reason of gross misconduct)" within the meaning of 29 U.S.C. § 1163(2) as of June 30, 1999, so as to qualify GOODMAN for continued health care coverage under the Consolidated Omnibus Budget Reconciliation Act, ("COBRA"), 29 U.S.C. §§1161-1168, should she elect such coverage. BOARD agree to cooperate with GOODMAN to the extent necessary for her to be eligible for and receive COBRA benefits;

(g) as a result of the BOARD's actions in subparagraphs (a) and (b) above, GOODMAN's 1998-99 salary is a total of $65,141, representing $62,241 (Step 17 in the BA+30 column) and a $2,900 longevity payment. The Parties acknowledge that the BOARD's withholding of GOODMAN's salary increment for the 1997-98 school year remains intact.

6. It is expressly agreed and understood that BOARD does not have and will not have any obligation to provide GOODMAN at any time in the future with any payments, benefits or considerations other than those recited in Paragraph 5 above.

7. GOODMAN further agrees and covenants that neither she, nor any person, organization or other entity on her behalf, will file, charge, claim, sue or cause or permit to be filed, charged or claimed any action for legal or equitable relief (including damages, injunctive, declaratory, monetary or other relief) involving any matter occurring at any time in the past up to the date of this Stipulation.

8. BOARD agrees and covenants that neither it nor anyone on its behalf will file, charge, claim, sue or cause or permit to be filed, charged, or claimed any action for legal or equitable relief (including damages, injunctive, declaratory, monetary or other relief) involving any matter occurring at any time in the past up to the date of this Stipulation or involving any continuing effects or any acts or practices which may have arisen or occurred prior to the date of this Stipulation.

9. GOODMAN agrees and acknowledges that the agreement by BOARD described herein and the settlement and termination of any claims against BOARD as set forth herein, are not and shall not be construed to be an admission of any violation of any federal, state or local statute or regulation, or of any duty owed by BOARD to her.

10. In the event that the Commissioner, the DCR Director or the EEOC Regional Director sets aside any aspect of this Stipulation, the Parties agree to reform it to effectuate its purposes. Should reformation prove impossible, the pre-settlement status quo will be restored and the matters will be relisted for consolidated hearing before the OAL

11. Should BOARD fail to pay all monies owed to GOODMAN directly or to be paid on her behalf under this Stipulation as said monies become due, GOODMAN may avail herself of all remedies under law and equity to enforce this agreement in any tribunal having jurisdiction.

12. The Parties acknowledge that TPAF is not a party to this Stipulation and nothing in this Stipulation binds TPAF to grant GOODMAN a pension. In the event that TPAF takes any action to deny GOODMAN her full pension benefits as contemplated by this agreement, the BOARD covenants to cooperate fully to take such other and further acts as are necessary to assist GOODMAN in any supplemental application and/or appeal from TPAF's initial action.

13. This Stipulation is a bilateral agreement and is the product of joint negotiation and drafting. In the event of dispute as to a term of this Stipulation, the Stipulation will not be construed against either Party as the party who drafted it.

14. The Parties agree that they and their officers, agents, and administrators will be bound by a covenant of good faith and fair dealing with respect to performance under this Stipulation and that neither will do anything to deprive the other of the benefit of the bargain.

15. The Parties hereby certify that they have read the terms of this Stipulation, that they have had an opportunity to discuss it with their attorneys and pension consultants and that they understand its terms and effects. GOODMAN acknowledges further that she is executing this Stipulation of her own volition, with full understanding of its terms and effects, and with the intention of releasing all claims recited herein, for consideration

which she acknowledges is adequate and satisfactory to her. Neither BOARD nor its agents, representatives, or attorneys have made any representations to her concerning the terms or effects of this Stipulation other than those contained herein.

16. By signing this Stipulation, each signatory represents that she or he is a Party or has been duly authorized by a Party to sign on that Party's behalf.

17. The Parties agree that this Stipulation may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

Intending to be legally bound hereby, GOODMAN and BOARD execute the foregoing Stipulation this 4 day of May, 1999.

WITNESS:

Kathleen A Zeger

Sandra Goodman
SANDRA GOODMAN

WITNESS:

, BOARD SECRETARY

, ~~BOARD PRESIDENT~~ Superintendent

OAL DKT. NO. EDU 8849-97
AGENCY DKT. NO. 369-9/97

SANDRA GOODMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EVESHAM, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, stipulation of settlement/dismissal, and initial decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

June 25, 1999
Date of Mailing, June 25,1999

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G.J.C. AND L.C., ON BEHALF OF MINOR CHILD, N.C.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	
RESPONDENT.	:	

June 25, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
ON MOTION FOR EMERGENT RELIEF
OAL DKT. NO. EDU 4627-99
AGENCY DKT. NO. 164-6/99

G.J.C. AND L.C. ON BEHALF OF MINOR CHILD, N.C.,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,
Respondent.

G.J.C. and L.C., petitioners, *pro se*

Michael J. Rogers, Esq., for respondent (McDonald, Rogers & Rizzolo, attorneys)

BEFORE **JOSEPH LAVERY**, ALJ:

THE EMERGENT MOTION

Petitioners, G.J.C., the father, and **L.C.** the mother, **on behalf of their son, N.C.**, appeal from denial of credit for his senior-year first-period course in Physics, which as a consequence will bar him from graduation with his class today, June 25, 1999. The Board's denial will also prevent

graduation until N.C. passes a five-credit course of his choosing, bringing the number of prerequisite credits to the total required.

The **Somerville Board of Education, respondent,** contests the appeal, defending its actions and policy as reasonable and lawful.

Today's order grants the parents request, (a) awarding credit for the course in Physics, and (b) directing that N.C. be permitted to participate in graduation ceremonies tonight.

ANALYSIS OF THE RECORD

Background:

But for the present dispute, N.C., a senior at Somerville High School, would graduate in the ceremony this evening with his class. The Board has decided to bar N.C. from graduation because he was absent for sixteen days during his first period class. The limit for absences is 15 days. In disposing of the school-level appeal to the Board Attendance Committe by N.C. through his father, G.J.C., the Board maintained that there were no "extenuating circumstances or hardships" which would impel it to decide in his favor, and according to policy, credit for the course therefore will not be granted. The attendant consequences noted above followed, and petitioners brought the instant appeal.

Arguments of the Parties

Petitioner's argument:

G.J.C., father of N.C., testified that graduation with the students with whom he had gone through four years of high school was of primary importance as a lifetime milestone, with attendant memories. Were graduation to be forbidden, it would result in trauma and leave him an object of ridicule among his peers, in particular at reunions. Moreover, retaking a course which he had passed academically, with an A-minus in the final exam, jeopardized the prospects of his

college applications, and would prevent his summer training for Olympic trials in Tae Kwon Do, in which he has been a life-long competitor.

Petitioners argue that N.C. was absent seven days for medical reasons, three for athletic requirements. Addressing the four latenesses, petitioners note that N.C. one was five minutes beyond the allowable time of ten minutes, and the other was nine minutes beyond that time. Listing the history of N.C.'s absences and latenesses in their petition to the Commissioner, petitioners note the reasons therefore:

Absences

October 10	Absent for driving test
October 16	Absent for driving re-test
December 23	Absent for head injury obtained in Tae Kwon Do training, requiring physician treatment and CAT scan
January 7 and 8	Absent in California for national Tae Kwon Do championship
January 11	Absent because of return home from California championship at 2:30 a.m.
January 19	Major dental surgery, removal of four molars and treated by dentist, with confirming medical note.
January 20	Recovering from the above
February 11, March 3, April 19, 26	Mononucleosis, treated by physician, with confirming medical note.

Late Arrivals

November 9	nineteen minutes late - slept in
December 17	two hours, five minutes late - slept in
February 9	thirty minutes late - pulled over by police
February 10	fifteen minutes late

Petitioner asks that mitigating circumstances be considered. These include (a) residing at the end of a relatively rural bus route, (b) inordinate traffic on the route to school when N.C. is transported by his parents on occasion, (c) later times allowed for arrival in surrounding schools, (d) differences in the number of absences allowed by surrounding schools, (e) seven verifiable medical absences, (f) competition in Tae Kwon Do tournament culminating life-long preparatory training, in a sport where N.C. has garnered three gold and one silver medal (g) absence of drinking, smoking, drugs, tattoos or history of disruption or discipline, tempered only by N.C.'s,tendency to be "cheeky" and finally (h) academics and test scores fully qualifying N.C. for graduation.

Petitioner argues further that if the class credit which he is being denied could have been resolved through taking an extra class this year, the school should have advised N.C.'s parents and they would have complied. Additionally, it has not been shown that N.C. has failed to "fully gain the educational and social benefits of group situations" through sufficient attendance which is the Somerville High School's reason for need to attend class. Additionally, in-school or out-of-school suspension applies to other kinds of infractions, and should have been applied here, rather than deny academic credit.

L.C., mother of **N.C.**, testified that during the illnesses considered here, she was certain that she had called in to cover the two days, January 19 and January 20, 1999, when her son had undergone major dental surgery, and spoke with a woman with whom she had spoken on other times when she reported illness. On the other hand, she acknowledged that for the mononucleosis days and the absence for head injury, she had neglected to call in though she knew of the requirement. Her son, **N.C.**, acknowledged that he had not read the school policy, and was not aware of how important it would prove to be. He added that since he had studied extremely hard for the final examination in physics, he believed it would be a shame to require him to retake the course.

In summary, petitioners point out that surgery for four molars is a serious illness even by the school handbook, and that the Board has reacted too severely to the series of latenesses and

absences that brought N.C. only one day beyond the maximum limit for course credit. Petitioners add that the Board seems intent on punishing N.C. for a concededly "cheeky" attitude. They argue that the history of recent extreme strengthening of the Board disciplinary policies since two other siblings had gone through the same school system, has become outsized. The punishment allotted here has gone far beyond that which is appropriate.

Respondent's argument:

The Board maintains that the attendance policy was followed with N.C. as it is in all cases. and that N.C. did not comply with that policy

Mr. William Roesch, the assistant principal testifying for the school board, noted that the policy had been delivered to N.C. as with all students. He had unexcused absences amounting to sixteen days, which would include four tardinesses in the Physics class in which he is now recorded as having an "incomplete." In order to complete the required number of credits for high school, N.C. would have to take any course of his choosing which could include the Physics course to earn the next five credits. However, the earlier course with the "incomplete" would be figured into his grade point average as a 0 for purposes of grade-point average.

Mr. Roesch stressed that there was an appeal process and was preceded by two warning letters, one on January 18, 1999, and another on April 28, 1999, when N.C.'s absences reached fourteen. On May 14, 1999, the parents were advised that the absences had exceeded the limitation and a petition for appeal was supplied. Mr. Roesch recalled that he spent twenty minutes explaining the procedure to N.C., and eventually stopped further discussion at that point. Only three pink slips indicating the reasons for absence were provided: January 7, January 8 and January 11, 1999, all indicating that he had overslept.

As to the absences on October 2 and October 16 (Mr. Roesch agreed that the October 19 date was error), the driver's test was not excused, because it is necessary to come to school and sign out first, then return. This did not happen. The attendance record card filled in with information comes from the Branchburg School District Attendance Officer.

Additionally, Mr. Roesch said, medical certification must be provided within seventy-two hours, while in this case they were presented in the course of the administrative appeal at the Board level. The Attendance Committee was composed of five staff members, and accepted the appeal on May 24, holding hearings on June 16, June 21 and June 22, 1999 Mr. Roesch acknowledged that the dates of absences were not provided to the parents before the hearing, despite their request, because the school wanted to prevent "falsified notes, unverified notes" by whoever was making the appeal. Additionally, the emergency room cat-scan evidence does not match the absence date of December 23.

CONCLUSIONS OF LAW

The applicable law:

The rule governing emergent relief is *N.J.A.C.* 6:24-1.5, and this rule, in turn, relies on the four-part test of *Crowe v. Di Goia*, 90 *N.J.* 126 (1982) as its standard. Interim relief should not be granted thereunder, except (1) when necessary to prevent irreparable harm, (2) when the legal right underlying the claim in settled, (3) when the material facts are uncontroverted, and (4) when the relative hardship caused by grant or denial of relief is considered.

In addition to the test of *Crowe v. DeGioia*, *supra*, the Uniform Administrative Procedure Rules at *N.J.A.C.* 1:1-12.5 set forth the elements of emergent relief:

> ***N.J.A.C.* 1:1-12.6 Emergency relief**
>
> . . .
>
> (f) When temporary relief is granted by an agency head under circumstances which do not permit an opposing party to be fully heard, temporary relief shall:
>
> 1. Be based upon specific facts shown by affidavit or oral testimony, that the moving party has made an

adequate, good faith effort to provide notice to the opposing party, or that notice would defeat the purpose of the application for relief;

2. Include a finding that immediate and irreparable harm will probably result before adequate notice can be given;

3. Be based on the likelihood that the moving party will prevail when the application is fully argued by all parties;

4. Be as limited in scope and temporary as is possible to allow the opposing party to be given notice and to be fully heard on the application; and

5. Contain a provision for serving and notifying all parties and for scheduling a hearing before the agency head or for transmitting the application to Office of Administrative Law.

It is also relevant the Board's action, though presumed lawful, must also survive application of the standard that it be reasonable, and not arbitrary. *Kopera V. Bd. of Educ., Tp.* of *W. Orange*, 60 *N.J. Super.* 288 (App. Div. 1960).

This is the law which must be applied in the present circumstances.

Applying the Law to the Facts:

Based on the above judicial decisions and regulatory citation, the emergent relief should be granted.

There is no question that policy determinations by the Board may not be overturned unless that policy is arbitrary and unreasonable, *Kopera, supra.* Neither this tribunal nor the Commissioner may substitute his judgment for the Board in instances when the policy or its application is reasonable.

In this particular instance it is not unreasonable for the Board to expect petitioners' compliance with the policy of requiring timely notice to the school of the reasons for absence. Here, no notices were given as to absences, and only three explanatory "pink slips" were provided in school by N.C. on his return.

Nevertheless, the impact of denying N.C. course credit for a Physics course indisputably passed, denying graduation after four years with his class, and jeopardizing college entrance as well as grade point average is out of proportion to the offense. Mr. Roesch testified that the Board agreed that N.C. has satisfied the science requirements for high school graduation. Additionally, the Board did not dispute that N.C. had academically passed the course with an A- in the final exam. Nonetheless, he added that the incomplete would be treated as a 0 grade and be factored into his grade point average. This does not reflect reality. N.C. passed the course and should not now suffer academically for that reason, or be required to re-take a course in which he has demonstrated proficiency. Interpreting Board policy to reasonably evaluate individual circumstances would be itself unreasonable and arbitrary.

Moreover, the credible testimony from L.C., supports the proposition that L.C. did notify the school by phone to report N.C.'s absence because of oral surgery, which would have put the school on notice of two days of absence. There is no evidence to contest the believable position of the petitioners that N.C. was absent for legitimate medical reasons on December 23 for a head injury, which was supported by the notice of a later CAT scan in the emergency room on December 26. Nor is there evidence to contest the mononucleosis absence also supported by medical certification, on February 11, March 3, April 19 and April 26. This would account for five more days of the sixteen absences listed.

While the late arrivals or absences for the driving test on October 10 and October 16 for full day are hardly defensible, the absences for Tae Kwon Do championship in California as well as the absence on return at 2:30 a.m. on January 11 are believable and at least entitled to some weight.

In any event, although there has not been compliance with the strict letter of the Board's rules, it is sufficient that petitioners have provided credible evidence of medical absence of (1) day

for a head injury, (2) days for oral surgery, and (4) days for mononucleosis. It is believable also that there were at least (2) days absence for a national athletic championship. These cumulative absences cannot reasonably be thought to justify the current result: a bar from graduation, loss of academic credit for a course passed, skewing of a grade point average, and placement in college rendered at risk.

In sum, there would be a likelihood of success for petitioners at plenary hearing, petitioners would be irreparably harmed if not granted emergent relief, and, while the Board regulations are not unreasonable, their construction by the Board in the exercise of its discretion *on these peculiar facts* has been arbitrary and unreasonable, within the definition advanced by *Kopera, supra.* Consequently, it should be overturned.

ORDER

I **ORDER** therefore **(a)** that N.C. be permitted to participate in graduation and **(b)** that N.C. be credited with five credits for the physics course taken this year.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

June 25, 1999

DATE

JOSEPH LAVERY, ALJ

OAL DKT. NO. EDU 4627-99
AGENCY DKT. NO. 164-6/99

G.J.C. AND L.C., ON BEHALF OF MINOR CHILD, N.C.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	
RESPONDENT.	:	

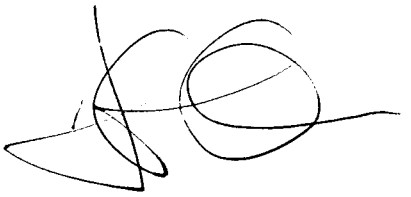
The record and initial decision on motion for emergent relief have been reviewed. Upon such review, the Assistant Commissioner, to whom this matter has been delegated by the Commissioner pursuant to N.J.S.A. 18A:4-34, does not concur with the ALJ that, under the circumstances herein, petitioners have met the criteria for grant of emergent relief as set forth in *Crowe v. DeGioia, supra.*

In particular, the Assistant Commissioner finds that petitioners have not made a preliminary showing of likelihood of success on the ultimate merits of their claim. Petitioners make no allegation that they had inadequate notice of the Board's policies or N.C.'s status with respect to possible loss of credit due to his repeated absence and tardiness. Further, the record is clear that the Board considered the circumstances of N.C.'s absences before applying its policy

to him, and petitioners have made no facial showing that the Board's determination in this regard was an abuse of its lawful discretionary authority.

Accordingly, the Assistant Commissioner finds that petitioners have not demonstrated an entitlement to extraordinary relief and, therefore, reverses the initial decision. The motion for emergent relief is DENIED and this matter shall continue at the Office of Administrative Law for such proceedings as are necessary to determine the underlying claim on its merits.

IT IS SO ORDERED.



ASSISTANT COMMISSIONER

June 25, 1999
Date of Mailing, June 28, 1999

208-99

IN THE MATTER OF THE TENURE	:	
HEARING OF WILLIAM WENISCH,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
UNION CITY, HUDSON COUNTY.	:	DECISION
	:	

June 29, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1420-99
Agency Dkt. No. 564-12/98

Department of Education

IN THE MATTER OF THE TENURE HEARING OF WILLIAM WENISCH, SCHOOL DISTRICT OF UNION CITY HUDSON COUNTY.

Joan M. Damora, Esq., for School District of Union City, Hudson County, petitioner
(Murray, Murray & Corrigan, attorneys)

Gregory T. Syrek, Esq., for William Wenisch, respondent
(Bucceri & Pincus, attorneys)

Record Closed: May 20, 1999 Decided: May 24, 1999

BEFORE **SEBASTIAN GAETA, JR.**, ALJ:

STATEMENT OF CASE

By its resolution of December 22, 1998 the petitioner, School District of Union City, Hudson County, certified to the Commissioner of Education eight charges, pursuant to *N.J.S.A.* 18A:6-11, against respondent William Wenisch, a tenured nonteacher employee. That resolution also suspended respondent, without pay, beginning December 23, 1998.

A Prehearing Order was issued on March 12, 1999 which incorporated the matters discussed in the prehearing conference on February 23, 1999. Hearings were scheduled for May 17, 18, 19 and 20, 1999. Prior to commencement of the hearings, the parties advised that a settlement had been reached in the matter. Pursuant to *N.J.S.A.* 18A:6-18.1, respondent had been restored to full pay on April 22, 1999.

On May 20, 1999, a hearing was conducted to review the settlement. Respondent was placed under oath and testified that each term of the written agreement was read by him and explained to him by his counsel, that all statements of fact were correct and he wished to be bound by the agreement. The agreement was then signed by respondent, William Wenisch, and by respective counsel.

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

(1) The parties have voluntarily agreed to the settlement.

(2) The respondent entered into the agreement with a full understanding of his rights.

(3) The agreement is consistent with the public interest.

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

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

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

May 24, 1999
DATE

Sebastian Gaeta, Jr.
SEBASTIAN GAETA, JR., ALJ

Receipt Acknowledged:

5-26-99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 27 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cb

MURRAY, MURRAY & CORRIGAN
25 Sycamore Avenue
Little Silver, New Jersey 07739
Attorneys for the Petitioner
Union City Board of Education
(732) 747-2300

IN THE MATTER OF THE TENURE HEARING OF WILLIAM WENISCH, BOARD OF EDUCATION OF THE CITY OF UNION CITY, HUDSON COUNTY.	**BEFORE THE HON. SEBASTIAN GAETA JR., ADMINISTRATIVE LAW JUDGE, OFFICE OF ADMINISTRATIVE LAW OF THE STATE OF NEW JERSEY** **DOCKET NO. 1420-99** **STIPULATION OF SETTLEMENT**

THIS STIPULATION OF SETTLEMENT is entered into by and between the Petitioner, Board of Education of the City of Union City (hereinafter "BOARD") and Respondent, William Wenisch (hereinafter referred to as "WENISCH") (the BOARD and WENISCH are hereinafter referred to jointly as the "Parties" and each may be referred to severally as a "Party");

WHEREAS, WENISCH has been continuously employed by the Board since March 1, 1986;

WHEREAS, on or about December 29, 1998, the BOARD certified to the Commissioner of Education charges against WENISCH which, if true, were sufficient to warrant his dismissal;

WHEREAS, WENISCH has been suspended without pay since December 23,1998 and suspended with pay from April 22, 1999;

WHEREAS, on or about January 7, 1999, WENISCH filed an Answer to the charges denying the allegations as stated;

WHEREAS, this matter was listed for hearing before the Honorable Sebastian Gaeta, Jr. ALJ, on May 17, 18,19 and 20, 1999 and the Parties having been urged to confer and to attempt to settle this matter and the Parties having agreed to a means of resolving this dispute in a manner consonant with the public interest; and

WHEREAS, WENISCH and the BOARD have entered into this stipulation with a full understanding of their rights, recognizing that this stipulation and their agreement is subject to the review and approval of the Commissioner of Education;

WHEREAS, WENISCH was a custodian for the Board and had not acquired a teaching certificate, the question of possible revocation of such certificate by the State Board of Examiners being moot;

NOW, THEREFORE, the matter in difference having been amicably adjusted by and between the parties,

IT IS HEREBY STIPULATED AND AGREED AS FOLLOWS:

1. WENISCH will voluntarily tender his resignation of employment to the BOARD to be effective the date this agreement is approved by the Commissioner of Education.

2. In consideration of this resignation the BOARD will withdraw the tenure charges that it has filed against WENISCH and further agrees that it will pay WENISCH $6000.00. Such payment will be made immediately following the BOARD'S approval of this settlement at the next regularly scheduled meeting following approval of this settlement by the Commissioner of Education. This settlement is in the BOARD's best interest as well as the public interest for the following reasons: (a) Such settlement causes the least disruption to the Union City School District in that employees who were scheduled to testify as witnesses would be taken away from their normal responsibilities within the district; (b) Such

settlement avoids a lengthy, expensive hearing at the Office of Administrative Law and possible appeals taken thereafter; (c) The monetary payment is not excessive and bears a reasonable relationship to the Respondent's salary and amount of money which he would receive if tenure charges were pursued.

3. The Parties further agree that this agreement is contingent upon approval by the Office of Administrative Law and the Commissioner of Education. Neither party will take any legal action whatsoever that is inconsistent with this Agreement before the Office of Administrative Law or any other forum.

4. The Parties agree that they, and their officers, agents, and administrators will be bound by a covenant of good faith and fair dealing with respect to performance under this Stipulation.

5. This Stipulation constitutes a full release of any and all claims WENISCH may have against the BOARD. Specifically, WENISCH forever releases the BOARD from any and all complaints, charges, liabilities, demands, debts, accounts, obligations, promises, suits, actions, causes of action, demands in law or equity, including claims for damages (including but not limited to back pay and front pay), equitable relief, and attorney fees or costs, which WENISCH now has, or claims to have, or which WENISCH at any time hereafter may have, or claim to have, whether presently known or unknown, arising at any time, up to and including the date on which he signs the document. WENISCH specifically releases the BOARD from any claims he has or may have had under the New Jersey Law Against Discrimination or the federal Americans with Disabilities Act;

6. The Parties agree that this document constitutes their full understanding. It is agreed that there are no other understandings or agreements (either written or oral) which would have any impact upon the present action.

7. By signing this agreement, the Parties certify that they have had the opportunity to discuss this Stipulation with counsel. They are fully satisfied with the services of their counsel with respect to both this Stipulation and all other aspects of this case and they enter into this Stipulation knowingly, willingly and without any coercion or improper inducements.

8. By signing this agreement, each signatory represents that she or he is a Party or has been duly authorized by a Party to sign on that Party's behalf.

9. The Parties agree that this Stipulation may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

FOR THE UNION CITY BOARD OF EDUCATION

DATED: 5/20/99 By: Joan M. Damora
JOAN M. DAMORA, ESQ.

COUNSEL FOR WILLIAM WENISCH

DATED: 5/20/99 By:
GREGORY T. SYREK, ESQ.

DATED: 5-20-99 By:
WILLIAM WENISCH

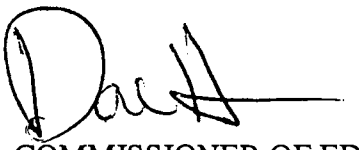
3d

OAL DKT. NO EDU 1420-99
AGENCY DKT. NO. 564-12/98

IN THE MATTER OF THE TENURE	:	
HEARING OF WILLIAM WENISCH,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
UNION CITY, HUDSON COUNTY.	:	DECISION
	:	

The record, recommended stipulation of settlement, and initial decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.[1] The matter is hereby dismissed, subject to compliance with the terms of the settlement.[2]



COMMISSIONER OF EDUCATION

[1] Notwithstanding that term #2 of the settlement indicates that the Board will approve the settlement subsequent to approval by the Commissioner, the record reflects that the Board has approved the agreement and it is "implementation" of such agreement which will occur following acceptance by the Commissioner.

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

June 29, 1999
Date of Mailing, June 29,1999
Corrected Decision Mailed July 8, 19994-

209-99E

V.A., on behalf of minor child, K.M.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF COLLINGSWOOD, CAMDEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

June 29, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING EMERGENT RELIEF
OAL DKT. NO. EDU 2799-99
AGENCY DKT. NO. 97-5/99

V.A., ON BEHALF OF MINOR CHILD, K.M.A.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF COLLINGSWOOD, CAMDEN COUNTY,
Respondent.

J. Shane Creamer, Jr., Esq., on behalf of petitioner (Duane, Morris & Heckscher, attorneys)

Craig D. Bailey, Esq., on behalf of respondent (Capehart & Scatchard, attorneys)

BEFORE **SOLOMON A. METZGER,** ALJ:

This matter arises out of petitioner's contention that her minor son, K.M.A. was arbitrarily expelled from school and should be reinstated on an emergent basis. The Department of Education transmitted the matter to the Office of Administrative Law as a contested case on May 6, 1999, and oral argument was scheduled on May 19, 1999. At that time counsel agreed that

there were no substantive factual disputes for purposes of the emergent relief application[1], and supplementary affidavits and argument were received on May 21, 1999. This decision follows.

K.M.A. was born on April 10, 1983. In February 1999, at age 15, he transferred into Collingswood High School. K.M.A. has no prior disciplinary record at any school.

On the morning of March 23, 1999, K.M.A. was in a computer lab. Toward the end of class the teacher allowed the students some free time to use the computers. At approximately 10:30 a.m., K.M.A. proceeded to change the message on the computer shut down screen to read "if you turn me off i will blow up!!" At approximately 12:15 p.m. the teacher saw this message and reported it to Principal James H. Misek. The computer use was traced to K.M.A. and he was called to the principal's office where he was accused of making a "bomb threat," which he denied. Further investigation developed that K.M.A. showed his handiwork to the student who had been sitting next to him in class. K.M.A. was then escorted to the lab and shown the computer he had worked on, at which point he admitted changing the message. The room was closed off for the day and the police were called, but the school was not evacuated, nor was the bomb squad summoned. Petitioner was contacted, K.M.A. was arrested, and the incident ended at about 1:30 p.m.

Principal Misek summarily suspended KM.A. for ten days, beginning on March 24, 1999, and the terms of suspension were confirmed in a letter to petitioner. An expulsion hearing was conducted by the Board of Education on April 26, 1999. The notice of hearing, delivered on April 22, 1999, indicated that principal Misek and Superintendent James H. Bathurst would be testifying; no summary of their expected testimony was provided. An incident report prepared by Assistant Principal Keith W. Land was attached. Superintendent Bathurst testified at the Board hearing and participated in the decision-making process. Additionally, one witness that the administration sought to call, a Mr. Miles, was excluded after counsel for petitioner objected that he had not been listed as a witness. Nevertheless, one Board member was seen speaking to Mr. Miles privately before the vote was taken.

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[1] As a consequence no tape recording was made of the hearing and counsel rested on their submissions.

Collingswood High School has received multiple bomb threats this school year and a policy has been developed not to evacuate the school immediately in each instance. This is the substance of the record.

Petitioner argues that her son did not receive a preliminary hearing in accordance with *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729 (1975), and did not have a full hearing before the Board within twenty-one days of suspension as required by *R..R. v. Board of Education, Shore Regional High School Dist.*, 109 *N.J. Super.* 337 (1970). Further, the proceeding before the Board was tainted by the Superintendent's involvement in the decision-making process though he also testified, by a Board member speaking to a prospective witness whose testimony had been excluded, and because petitioner was not provided with a summary of expected testimony. Beyond the procedural due process arguments, petitioner believes that she has shown a likelihood of success on the merits, irreparable harm, and that the relative hardships to the parties favor relief. *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). I do not agree.

I perceive no violation of procedural due process with respect to the preliminary hearing. The court in *Goss v. Lopez*, supra, instructed that in the school setting a preliminary hearing could be quite informal and need only advise the student of the allegations and offer an opportunity to respond. Principal Misek did just this when he called K.M.A. in, asked him about the message, heard his denial, investigated further, confronted K.M.A. again and then heard his admission.

The Board did not provide a formal hearing until 34 days after the suspension, but I do not see how K.M.A. was prejudiced by the delay. He conceded his actions early on and thus the Board was not faced with the emergent circumstance of a suspended student professing innocence. The hearing was primarily intended to determine the appropriate penalty, which would likely have been a lengthy suspension even if the Board had opted for something short of expulsion. Moreover, the lower court decision in *R.R.*, is not binding authority, and no appellate case has been cited for the proposition that due process requires a hearing within 21 days. The legislature presently mandates a hearing in school assault cases within 30 calendar days, *N.J.S.A.* 18A:37-2.1, and has never amended the general rule requiring a hearing no later than the second regular meeting of the Board after suspension, *N.J.S.A.* 18A:37-5. Petitioner also relies on *L.T. v. Long Branch City Board of Education*, 96 *N.J.A.R.* 2d (EDU) 125 (1995), to show that the

Commissioner has approved the *R.R.* holding. The facts and law in *L.T.*, do not match our situation. That case involved an assault at a time when the statute called for a hearing within 21 days. The Board had not conducted a hearing until 59 days after suspension, although an intermediate panel reviewed the matter sooner. The student in *L.T.* had been out of school for six months when the case was heard, and importantly, there were some questions about the extent of his culpability. Under those circumstances the Commissioner returned the student to school.

The alleged procedural errors at hearing are overblown. Boards of Education need not provide a student in jeopardy of expulsion with a "full-dress" trial. *Dixon v. Alabama State Board of Education*, 294 F. 2d. 150 (5th Cir. 1961). Petitioner maintains that the Board failed to supply a summary of expected testimony from Superintendent Bathurst and Principal Misek. In *Tibbs v. Board of Education of the Township of Franklin*, 59 *N.J.* 506 (1971), the Supreme Court approved the concurring opinion of Judge Kolofski in the Appellate Division, 114 *N.J. Super.* 287 App. Div. (1971), which held that written summaries were not a substitute for live testimony on key fact questions. The lower court in *R.R.* had earlier reasoned that written summaries were adequate, and petitioner misreads these holdings to require both.

We do not know what the nature of the conversation was between the Board member and Mr. Miles, nor do not know what Mr. Bathurst said to the Board outside of his role as a witness. Without more it is difficult to measure the alleged error, although the process is always enhanced by an atmosphere that creates confidence. Petitioner was represented by counsel, who had an opportunity to examine and cross-examine, submit documents and make argument. Again, K.M.A. had already admitted that he entered the offending message on the computer screen.

We turn then to the *Crowe* standards. Initially, petitioner must show a likelihood of success on the merits. This has not been done. Boards of Education enjoy wide statutory discretion, and their decisions may not be overturned unless arbitrary and capricious. *Thomas v. Morris Bd. of Educ.*, 89 *N.J. Super.* 327, 332 (App. Div. 1965); *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960). The Board acted with the knowledge that there have been a number of bomb scares at the High School this past year. The failure to evacuate the building or call the bomb squad was not, as petitioner would have it, an evidence that the incident was not taken seriously. Rather, it reflects a policy not to evacuate as a first response when the

circumstances do not suggest an impending emergency. Principal Misek's affidavit attests, however, to the steps he took to clarify the situation. The laboratory was closed to classes, an investigation was undertaken, petitioner was called to school and the police were notified. K.M.A. caused a serious disruption that at the least deserved an extended suspension, even if he meant no harm. I cannot say at this stage that expulsion is so harsh a penalty as to be arbitrary.

Based on the foregoing, petitioner's motion for emergent relief is denied. The matter will be scheduled for a plenary hearing on an expedited basis, should the parties wish to so proceed.

This order on application for emergency relief may be adopted, modified or rejected the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

5/25/99
DATE

SOLOMON A. METZGER, ALJ

/caa

OAL DKT. NO. EDU 2799
AGENCY DKT. NO. 97-5/99

V.A., on behalf of minor child, K.M.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF COLLINGSWOOD, CAMDEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

The record of this emergent matter and the initial decision and order of the Administrative Law Judge (ALJ) denying emergent relief have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed. [1]

Petitioner's extensive exception submission essentially recasts and reiterates her arguments presented before the ALJ, again proposing that *R.R. v. Bd. of Ed., Shore Regional H.S., supra,* which states that a formal expulsion hearing must be held within 21 days of a suspension, is dispositive in this matter. Therefore, she asserts, the hearing held by the instant Board some 34 days subsequent to the beginning of K.M.A.'s suspension is violative of his due process rights. (Petitioner's Exceptions to Order Denying Emergent Relief at p. 2) In this regard, petitioner contends that the ALJ "erred as a matter of law" when he concluded that *R.R.* was not binding authority. (*Id.* at p. 5) She presents a number of Commissioner of Education cases, and one Appellate Division decision, for the proposition that "*R.R.* has been relied upon

[1]It is noted that petitioner submitted a reply to the Board's reply exceptions. Since there is no regulatory authority for such a submission, it was not considered by the Commissioner in reaching his determination herein.

and cited with approval," and further declares that she has been unable to locate "any reported decision where *R.R.* has been found to be non-binding authority." (*Id.* at pp. 5-6) Additionally, petitioner points to *M.G. v. Board of Education of the Monmouth Regional High School District*, 92 *N.J.A.R.* 2d (EDU) 364 (1991) where the within ALJ, himself, "referred to *R.R.* as controlling authority." (Petitioner's Exceptions to Order Denying Emergent Relief at p. 6)

Petitioner also renews her contention that the hearing, itself, was not impartial and fair because: 1) the conduct of the superintendent "constitute[d] an improper commingling of investigative, prosecutorial and adjudicative functions," in that he made the decision to recommend expulsion to the Board and, subsequently, testified and participated in the deliberations and the Board's decision to expel K.M.A., and 2) petitioner received short notice with respect to the hearing date and was not provided with summaries or statements of expected testimony prior to the hearing, thus denying her "an opportunity to adequately prepare" for such testimony. (*Id.* at pp. 6-7)

With regard to satisfaction of the *Crowe* standard entitling her to emergent relief in this case, petitioner claims irreparable harm absent her requested relief in that during the entire period of K.M.A.'s suspension (34 days) he received no home instruction from the Board and, subsequent to his expulsion, has received less than 15 hours of such instruction. (Memorandum of Law in Support of Petitioner's Exceptions to Order Denying Emergent Relief at p. 11) Moreover, she asserts, due to the Board's delay in providing K.M.A. with a timely hearing, it is impossible for him to complete the semester at another school. (*Id.* at p. 8) Consequently, absent his readmission to Collingswood High School pending the Commissioner's final determination in this matter, K.M.A. will be required to repeat his junior year. Petitioner further claims a substantial likelihood of prevailing on the merits of this matter due to the "untimely and

procedurally-flawed expulsion hearing," and because the circumstances existing in this matter do not rise to a level which reasonably warrants K.M.A.'s expulsion. (*Id.* at pp. 11-12) Finally, petitioner urges that a balancing of the equities here favors the grant of injunctive relief since K.M.A., a good student, with no prior disciplinary record, stands to lose academic credit for the entire semester and his return to school would pose no risk of harm for the Board. (*Id.* at pp. 12-13)

In reply, although conceding that the formal hearing afforded K.M.A. was held 34 days after his suspension, the Board proclaims that the timing of such hearing did not violate his procedural due process rights. (Board's Reply Exceptions at p. 1)

> K.A.'s federal due process rights were satisfied in that the hearing was held "as soon as practicable" after his suspension. *Goss v. Lopez,* 419 *U.S.* 565 (1975). During the period of K.A.'s suspension school was closed 6 days for spring break (April 2,1999 through April 9, 1999). The first practicable date for conducting the hearing was April 26, 1999, the Board's first meeting after K.A.'s suspension. At this meeting he was provided a formal hearing before the full Board. Thus, the Board satisfied the procedural requirements necessary to expel K.A. from school ***." (*Id.* at p. 1-2)

Likewise, it contends, the hearing provided K.M.A. was in compliance with New Jersey law. In this connection, the Board urges, petitioner's reliance on *R.R., supra*, as controlling in the case at hand is misplaced. (*Id.* at p. 2) It advances that in *R.R.* the court considered the due process rights of a student being disciplined for an assault on another student. "While the court states in dicta that the student was 'entitled to a full hearing affording him procedural due process within a short period of time, no more than 21 days,' the charge in that case concerned an assault." (*Id.* at p. 2) It observes that a statutory timeframe for providing due process in assault cases was, subsequently, established by the legislature (*N.J.S.A.* 18A:37-2.1); such timeframe, initially 21 days after suspension, was amended in 1995 to provide 30 days. The Board points out that this

provision applies solely to instances where a student is charged with assault. "In other instances of disobedience a student may be suspended until the next regular meeting of the board of education. *N.J.S.A.* 18A:37-4." (*Id.*) Here, it posits, because K.M.A. was not charged with assault, the timeframe dictated by *N.J.S.A.* 18A:37-2.1 is inapplicable. Rather, the governing time period is that set forth in *N.J.S.A.* 18A:37-4, with which the Board was in compliance. (*Id.*)

The Board similarly discounts petitioner's argument that K.M.A.'s due process rights were violated because the Board failed to provide a summary of the testimony of its anticipated witnesses. Since petitioner had been provided "with a copy of a memorandum ***outlining the investigation of the bomb threat which led to the apprehension of K.A. and his suspension," and since K.A. had admitted the conduct which formed the basis of the charges, the only open issue was the penalty to be imposed for his actions. As such, petitioner and K.M.A. cannot reasonably claim deprivation of due process by not receiving a detailed recitation of the testimony of anticipated witnesses. (*Id.* at pp. 2-3)

In conclusion, the Board maintains that because it fulfilled its duty to provide K.M.A. with due process in reaching its determination to expel him, petitioner does not have a reasonable likelihood of success on the merits of this matter, necessitating affirmance of the ALJ's decision. (*Id.* at p. 3)

Upon his careful and independent review of the record, the Commissioner affirms the order of the ALJ denying emergent relief in the instant matter. Initially, the Commissioner finds, as did the ALJ, that petitioner's allegations of deficiencies in the procedural due process accorded K.M.A. are without merit. Rather, he concludes that such due process, under the circumstances existing here, fully complied with the dictates of *Goss v. Lopez, supra* and the applicable statutory provision, *N.J.S.A.* 18A:37-4.

In his consideration of this matter, the Commissioner first observes that *R.R.*, dealing with the disciplining of a student specifically charged with assault, which petitioner cites for the proposition that students must be afforded a full hearing before the Board within 21 days of their suspension to determine whether the charged conduct actually occurred, may be of limited precedential value at this point in time, given that *N.J.S.A.* 18A:37-2.1, as amended in 1995, provides 30 calendar days for a hearing in such cases. The Commissioner determines that it is unnecessary to address this issue here since the matter before him does not involve a student charged with an assault. Thus, contrary to the urging of petitioner, to the extent that *R.R.* and its progeny may have relevance to the instant matter, it is to support the general proposition, well established elsewhere, that a board of education contemplating expulsion may not inordinately delay providing students facing a lengthy suspension a formal hearing on the charges against them. The Commissioner is convinced that a contention of dilatoriness on the part of the Board cannot reasonably be made given that K.M.A. was suspended on March 24, 1999 and was accorded a hearing at the Board's next regular meeting on April 26, 1999, in full compliance with *N.J.S.A.* 18A:37-4, the governing statutory provision. Finally, the Commissioner is in agreement with the ALJ's conclusion, on page 4 of his decision, that petitioner's declarations of procedural errors at hearing, i.e., the multiple roles of the superintendent, short notice of the hearing date, and not being provided with summaries of statements of expected testimony prior to the hearing, are "overblown," in light of the fact that K.M.A.'s conduct was admitted and the hearing was conducted solely to determine the appropriate penalty.

Having disposed of petitioner's procedural claim, the Commissioner turns to consideration of the criteria necessary to entitle petitioner to emergent relief in this case. Here, he finds, as did the ALJ, that the requisite standard has not been satisfied. It is well settled that

the grant of emergent relief is considered an extraordinary remedy which can only be awarded when the party seeking such relief demonstrates the existence of **each** of the four separate criteria identified in *Crowe, supra,* i.e., irreparable harm absent the requested relief, settled legal principles governing the right to relief in the controversy, a reasonable probability of ultimate success on the merits, and a balancing of the relative hardships to the parties favoring the grant of temporary relief pending the outcome of a final hearing. Initially, the Commissioner supports the ALJ's determination that petitioner has not demonstrated a likelihood of success on the merits of this matter given the Commissioner's rejection of her procedural arguments as set forth above and the lack of a preliminary showing that the Board's decision was arbitrary, capricious, or unreasonable. Next, although not addressed by the ALJ, the Commissioner duly considered petitioner's attestations that K.M.A. was experiencing irreparable harm since he had, essentially, been without benefit of educational services since his suspension. To allow a fair and full examination of this charge, the Board was directed to supplement the record with details regarding the extent to which home instruction has been/continues to be provided to K.M.A. since the time of his suspension/expulsion. The Board's responsive submission avows:

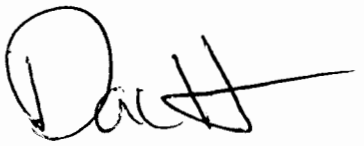
> The Board has provided one hour per week in the following subjects: history, french, english and biology, for a total of three weeks. The Board has contracted with a teacher for geometry, but has yet to receive time sheets from that teacher, so cannot represent at this time how many hours of geometry tutoring have been provided. The Board is committed to an additional eight weeks of each history, french, english and biology, which is the equivalent of tutoring for K.M.A. to the end of the school year.
> (Letter dated June 18, 1999 from Susan S. Hodges, Esq. on behalf of the Board)

While it is duly noted that counsel for petitioner was not provided with a copy of this submission, the Commissioner determines to accept the Board's representation since petitioner is not, under the circumstances, prejudiced by this omission. Specifically, the Commissioner

interprets the Board's representation to mean that the Board is providing, and will continue to provide, K.M.A. with instruction which the Board deems sufficient, if satisfactorily completed, to enable K.M.A. to complete his junior year. Based on this understanding, the Commissioner declines to sustain petitioner's claim of irreparable harm, as K.M.A. is being provided with the opportunity to continue the orderly progression of his education. Finally, in balancing the respective hardships to the parties in this matter, the Commissioner determines that the equities in this matter lie on the side of the Board. One of the major duties of a board of education is to ensure the safety and well-being of the students entrusted into its care. Central to fulfilling this obligation is the necessity of maintaining order and discipline in its schools and providing an environment which is conducive to learning.

Accordingly, the initial decision of the Office of Administrative Law (OAL) denying emergent relief is affirmed, and the Board is directed to provide tutoring in accordance with its representation cited above, as interpreted by the Commissioner. This matter is hereby returned to the OAL for further proceedings, as determined necessary, on petitioner's underlying claim that the board's action to expel K.M.A. was, under the circumstances, an abuse of its discretionary authority. Such proceedings shall be conducted on an expedited basis so as to permit, to the extent possible, resolution of K.M.A.'s status prior to commencement of the 1999-2000 school year.[2]

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

[2] This decision, as the Commissioner's final determination in this interim matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

June 29, 1999

Date of Mailing, June 29, 1999

209-99

EDU #2799-99
C # 209-99E
SB # 34-99

V.A., on behalf of minor child, K.M.A., :

PETITIONER-APPELLANT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF COLLINGSWOOD, CAMDEN COUNTY, : DECISION

RESPONDENT-CROSS APPELLANT :

Decided by the Commissioner of Education, June 29, 1999

For the Petitioner-Appellant, Ellen M. Boylan, Esq. and Lenora M. Lapidus, Esq.

For the Respondent-Cross Appellant, Capehart & Scatchard (Robert A. Muccilli, Esq., of Counsel)

This matter results from a determination by the Board of Education of the Borough of Collingswood (hereinafter "Board") to expel K.M.A., a fifteen year old student with no prior disciplinary record who had transferred into the district from private school in February 1999. The Board's action was based on an incident that occurred on March 23, 1999, during a computer lab for math class. After the lesson was finished, the teacher gave the students free time. K.M.A. used the free time to change the shutdown message on the computer screen from "It is now safe to turn off your computer" to "if you turn me off I will blow up."

A teacher encountered the message about an hour-and-a-half later and reported it to the principal, who investigated the matter. Upon questioning, K.M.A. acknowledged

July 5, 2000

that he had changed the message, but did not confirm that he had changed the wording to "if you turn me off I will blow up." However, a student who sat next to him told the administration that he had seen K.M.A. writing that specific message on the screen and, on March 25, 1999, K.M.A. wrote a letter of apology to the principal confirming that the choice of words was his. K.M.A. also indicated in his letter of apology that he had intended the message to be funny rather than threatening.

Nonetheless, when it had been reported to them, school administrators had perceived the message as a bomb threat. Consequently, K.M.A. had been administratively suspended for ten days by the principal, his mother was called, the police came, and K.M.A. was arrested.[1] Although the computer lab was closed for the day, the school was not evacuated and the bomb squad was not called.

The superintendent met with K.M.A. and his mother on April 13,1999. At the end of that conference, the superintendent indicated that he was going to recommend to the Board that K.M.A. be expelled, as was his administrative practice in cases involving bomb threats.

The Board voted to expel K.M.A. at its meeting on April 29, 1999, noting that he could apply for readmission in September 1999 if he underwent counseling and was found to pose no threat. The superintendent's notice letter of April 29, 1999 indicates that the Board's determination was based on consideration of all of the testimony and evidence that had been presented at the meeting and that the Board had sought to evaluate the case on its own merit.

[1] The principal's letter of March 23, 1999, notifying petitioner of her son's suspension indicated that the suspension was for "using a computer to make a bomb threat and computer vandalism."

On May 5, 1999, K.M.A.'s mother (hereinafter "petitioner") petitioned the Commissioner for review, claiming that the expulsion was arbitrary, capricious, and unreasonable. She also sought emergent relief, contending that her son had not had a preliminary hearing as required by Goss v. Lopez, 419 U.S. 565 (1975), and that the Board's full hearing had not been conducted within the time limit required by New Jersey case law. Petitioner further asserted that the hearing was procedurally deficient because: 1) the superintendent had testified and had also been involved in the decision-making process, and 2) petitioner had not been supplied in advance with a summary of what the witnesses were expected to testify about.

The Administrative Law Judge ("ALJ") recommended that the Commissioner deny petitioner's application for emergent relief. In doing so, he rejected petitioner's procedural arguments and concluded that she had not shown a likelihood of success on the merits of her claim.

In his decision of June 29, 1999, the Commissioner concurred with the ALJ that there was no merit to petitioner's allegations that K.M.A. had not been accorded procedural due process. He also agreed that petitioner had not met the standards articulated in Crowe v. DeGioia, 90 N.J. 126 (1982) so as to be entitled to emergent relief. Although not addressed by the ALJ, the Commissioner also considered petitioner's attestations that her son had essentially been without educational services since his suspension. The Commissioner accepted the Board's representations relating to the provision of home instruction,[2] which he understood to mean that the Board was

[2] In order to fully and fairly examine the petitioner's attestations, the Commissioner had directed the Board to supplement the record with details regarding the extent of the home instruction it had been providing to K.M.A. since his suspension.

providing and would continue to provide sufficient home instruction to enable K.M.A. to complete his junior year. Accordingly, the Commissioner directed the Board to provide home instruction as indicated in its representations, and he returned the matter to the Office of Administrative Law for determination of the underlying claim that the Board's expulsion of K.M.A. was unreasonable under the circumstances.

On July 29, 1999, the petitioner appealed to the State Board of Education from the Commissioner's determination to deny emergent relief. However, at her counsel's request, the matter was placed in abeyance pending the Commissioner's decision in the underlying case.

On July 30, 1999, the petitioner moved to amend her petition to the Commissioner to raise constitutional claims, at which time the American Civil Liberties Union and the Education Law Center entered the case on behalf of the petitioner. On August 25, 1999, the Education Law Center filed an amended petition on behalf of petitioner, claiming therein violations of K.M.A.'s right to a thorough and efficient education under the New Jersey Constitution and equal protection under the Fourteenth Amendment of the United States Constitution.[3]

A plenary hearing was conducted before the ALJ on August 31 and September 21, 1999 on the merits of the petitioner's challenge to K.M.A.'s expulsion. At the hearing, it was established that the Board had provided K.M.A. with home instruction through the summer and that he had received credit for the spring semester. It was also established that three criminal charges had been filed against him as the result of

[3] In addition, petitioner amended the relief she was seeking to include declaratory rulings relating to those claims, as well as a ruling that the Board had violated K.M.A.'s right to procedural due process under the Fourteenth Amendment. Petitioner also noted and preserved her right to claims for damages and attorneys fees under 42 U.S.C. §§1983 and 1988.

the March 23 incident, and that he had pled guilty to making a false alarm. For this offense, he had received nine month's probation and had been required to attend a fire safety program through the County Fire Marshall's office.

On August 4, 6, and 20, 1999, K.M.A. had been evaluated by Dr. Stephen G. Underwood, a psychiatrist, who concluded that K.M.A. posed no danger and should be readmitted to school. K.M.A. was also evaluated by the Camden County Division of the Fire Marshall, which found that K.M.A. was a low risk individual.

On August 23, 1999, petitioner applied to the Board for K.M.A.'s reinstatement, which was considered at the Board's August 30 meeting. At that point, petitioner had explored various options and was planning to send K.M.A. to live with his stepfather in North Carolina if this was necessary.

On September 2, 1999, the Board notified the petitioner that her request for reinstatement had been denied. The Board also indicated that it had no obligation to educate K.M.A. since he was residing in North Carolina, but that if he returned, the Board was prepared to offer him the option of attending an alternative education program. Consequently, K.M.A. stayed in North Carolina and attended public school there during the 1999-2000 school year.

In his Initial Decision of February 2, 2000, the ALJ rejected the Board's argument that the matter was moot because K.M.A. was not domiciled in Collingswood. Then, stressing the broad policymaking discretion afforded to district boards of education, the ALJ assessed the factual circumstances to evaluate whether the Board's determination to expel K.M.A. was arbitrary and capricious.

Under this standard and on the assumption that the Board took each case on its own merits, the ALJ concluded that expulsion was too harsh a remedy in this instance. In so concluding, the ALJ stressed that K.M.A. had never been in any trouble at any school prior to this incident and that he had not been motivated by a nefarious intent. The ALJ also stressed that K.M.A. had paid a considerable price for his lack of forethought by being arrested and pleading guilty to making a false alarm, by being out of school from March 23, 1999 to the end of school, and by relocating out-of-state to live with his stepfather. In addition, K.M.A. had been evaluated by a psychiatrist during the summer of 1999, and the Board had the psychiatrist's report when it denied readmission. The ALJ rejected the Board's argument that its determination not to readmit K.M.A. was reasonable because K.M.A. had not obtained counseling, finding that the record reflected no specific directive from the Board. In short, the ALJ determined that under the circumstances, suspension until the end of the 1998-99 school year was warranted, but that the Board's action in permanently expelling K.M.A. "from the mainstream" was arbitrary and capricious. Initial Decision, slip op. at 9. Since the ALJ concluded that K.M.A.'s expulsion violated the education laws, he found it unnecessary to address the petitioner's constitutional arguments at length.

By his decision of March 20, 2000, the Commissioner adopted the ALJ's decision on the basis of his own review of the record, including the transcripts. In addition, the Commissioner emphasized that because of the timing of K.M.A.'s arrival in the district in 1998-99, the circumstances here included the fact that he was unaware of the administration's practice of recommending expulsion to the Board in all cases involving bomb threats. For this reason as well, the Commissioner concurred with the ALJ that

permanently severing K.M.A.'s entitlement to a free public education in the district was not a reasonable sanction. Hence, the Commissioner directed that K.M.A.'s record reflect that he was entitled to reinstatement for the 1999-2000 school year. However, without any discussion, the Commissioner added that if K.M.A. applied for readmission, the Board could conduct an evaluation as to whether a return to the regular school environment or an "alternative placement" was warranted. Commissioner's Decision, slip op. at 15.

On April 14, 2000, the petitioner filed a notice of appeal to the State Board from the Commissioner's decision on the merits, and on April 19, 2000, the Board filed a cross-appeal. On May 15, 2000, the petitioner filed a brief in support of both her appeal from the Commissioner's decision of June 29, 1999 denying emergent relief and from the Commissioner's decision of March 20, 2000, in which he had decided the merits of the dispute.

Because our decision will determine where K.M.A. will attend school this fall, and at petitioner's request, we have expedited our consideration of this matter. Accordingly, we adjusted the briefing schedule so that the Board's brief in support of its cross-appeal was filed on June 21, 2000, and petitioner's reply brief on June 26.

In her appeal, petitioner renews her challenge to the constitutionality of the Board's decision to permanently expel K.M.A. As she did before the ALJ and Commissioner, petitioner contends that by not holding a full disciplinary hearing within 21 days of the initial suspension and by failing to provide a written summary of the proposed witness' testimony in advance of the hearing, the Board had violated the due

process clause of the Fourteenth Amendment of the United States Constitution.[4] In addition, she challenges the Commissioner's determination that the Board could make K.M.A.'s reinstatement subject to an alternative placement, arguing that this determination is arbitrary, capricious and unreasonable under the circumstances.

The Board argues that its decision to expel K.M.A. was not arbitrary, capricious, or unreasonable. It maintains that because, as the ALJ found in denying emergent relief, K.M.A.'s procedural rights were not violated, petitioner's appeal should be denied. It urges affirmance of the Commissioner's directive relating to an evaluation of K.M.A. by the Board.

After careful consideration of the record, including the transcripts, and for the reasons expressed by the ALJ and the Commissioner, as well as those expressed herein, we affirm the Commissioner's determination that the Board's action in permanently expelling K.M.A. from school was arbitrary and unreasonable under the circumstances presented.

Based on our review of the record, we fully concur with the ALJ that K.M.A.'s conduct in changing the computer message was not the result of any nefarious intent. Rather, as reflected by the testimony, K.M.A.'s conduct was intended as a prank, and not as a bomb threat. Tr. 8/31/99, at 72-3 to 72-9. Nonetheless, we find that the school administrators' initial perception that the message might, in fact, be a bomb threat was reasonable under the circumstances. However, we also find that the record demonstrates that such initial perception was dispelled once the matter was investigated. Not only does the testimony show that the principal was aware that there

[4] We note that petitioner has not in this appeal challenged the constitutional sufficiency of K.M.A.'s initial suspension by the principal.

was not a bomb, tr. 8/31/99, at 180-1 to 180-16, 194-21 to 195-5, but the fact that the bomb squad was not called and the building was not evacuated also indicates that the administration had concluded that there was no bomb. In this respect, we stress that had the principal believed that the message represented a serious threat to the safety of the students, his responsibility for their safety would have compelled him to evacuate the building. Tr. 8/31/99, at 184-6 to 184-16. Moreover, although the computer lab was closed for the day, that was the extent of any disruption to the school.

Furthermore, as the ALJ found, K.M.A. had not had any disciplinary problems in any of the schools he had attended. While K.M.A. indicated that he was not prepared to make the commitment to academic work that Bishop Eustice, where he was previously a student, demanded of its students, tr. 8/31/99, at 79-1 to 79-5, it was his choice to transfer and there is nothing in the record to suggest that he had any academic problems in middle school. To the contrary, he was in the gifted and talented program when he attended Collingswood Middle School. Tr. 8/31/99, at 12-17 to 12-22.

Like the ALJ and the Commissioner, we emphasize that the determination to expel K.M.A. was made by the Board and not by the principal or the superintendent. Petitioner made no showing that the Board failed to fulfill its obligation to consider K.M.A.'s case on an individual basis.[5] As the testimony reflects, while school administrators followed a "zero tolerance" policy, such policy was not one that had been adopted by the Board. Tr. 8/31/99, at 202-3 to 202-10; tr. 9/21/99, at 102-23 to 103-4, 103-7 to 103-11. At the same time, we cannot ignore that, as found by the ALJ, the timing of K.M.A.'s transfer into Collingswood High School was such that neither he nor

[5] We note that the petitioner did not provide any transcripts of the hearing held before the Board.

his mother had been provided with notice of the district's administrative policy by school officials. Tr. 8/31/99, at 202-11 to 202-16, 203-4 to 203-24; tr. 9/21/99, at 29-6 to 29-18.

In sum, we affirm the Commissioner's determination that the permanent expulsion of K.M.A. was arbitrary, capricious, and unreasonable in these circumstances, and we agree that suspension from the date of the incident at issue, March 23, 1999, through the end of the 1998-99 school year was the appropriate sanction for K.M.A.'s conduct.

We, however, modify the relief to which K.M.A. is entitled. Under the circumstances, we preclude the Board from mandating that K.M.A. attend an alternative education program such as Gloucester County Alternative School and direct that the Board readmit K.M.A. to the regular education program provided at Collingswood High School. As the petitioner argues, such alternative programs are designed for students who have difficulty succeeding in a regular school setting because of persistent behavioral or educational problems, often related to drugs or alcohol. In that the evaluation conducted by Dr. Underwood concludes that K.M.A. does not have such problems and is no danger, given the nature of the conduct involved, and because this is the only incident in which K.M.A. has been involved that has required disciplinary action, we conclude on the basis of the record that requiring K.M.A. to attend an alternative education program would be arbitrary.

Therefore, for the reasons stated herein as well as those expressed by the ALJ and the Commissioner, we set aside the Board's determination to permanently expel K.M.A. from school. Rather, we have concluded, as did the ALJ, that suspension from March 23, 1999 through the end of the 1998-99 school year was the appropriate

sanction under the circumstances. As set forth in the ALJ's decision, K.M.A. has already paid a considerable price for his conduct by his exclusion from school during the 1998-99 school year, his arrest and guilty plea for making a false alarm, and the fact that, because he was not reinstated for the 1999-2000 school year, he had to relocate to North Carolina to live with his stepfather in order to attend public school. Initial Decision, slip op. at 9. Hence, from both an educational and legal perspective, it is appropriate at this point that K.M.A. be readmitted to the regular education program at Collingswood High School.

In view of our determination that the Board's action in expelling K.M.A. was arbitrary and unreasonable and as the ALJ and Commissioner concluded, it is not necessary for us to address the petitioner's constitutional claims at length in the context of this appeal. We, however, note that although the Board contends that the Commissioner's decision denying emergent relief correctly resolved petitioner's claims of procedural deficiencies raised in this appeal, the petitioner has not directly challenged the totality of the Commissioner's decision denying emergent relief. Rather, as set forth in her brief, the petitioner's constitutional claims are limited to the timeliness of the Board hearing and its failure to provide a summary of witness testimony in advance.

Arnold G. Hyndman abstained.

July 5, 2000

Date of mailing JUL 07 2000

209-99

EDU #2799-99
C # 209-99E
C # 94-00
SB # 34-99

V.A., on behalf of minor child, K.M.A.,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF COLLINGSWOOD, CAMDEN COUNTY,	:	DECISION ON MOTION
RESPONDENT-CROSS/APPELLANT.	:	

Decided by the Commissioner of Education, June 29, 1999

Decided by the Commissioner of Education, March 20, 2000

Decided by the State Board of Education, July 5, 2000

For the Petitioner-Appellant, Ellen M. Boylan, Esq. and Lenora M. Lapidus, Esq.

For the Respondent-Cross/Appellant, Capehart & Scatchard (Robert A. Muccilli, Esq., of Counsel)

On July 5, 2000, we rendered our decision in this matter, holding, as had the Administrative Law Judge ("ALJ") and the Commissioner, that the action of the Board of Education of the Borough of Collingswood (hereinafter "Board" or "Collingswood Board") in permanently expelling K.M.A. from Collingswood High School was arbitrary and unreasonable under the circumstances. As set forth in our decision, the Board's action resulted from an incident that had occurred on March 23, 1999, during a computer lab for math class. During free time in the lab, K.M.A. had changed the shutdown message

Oct. 4, 2000

on the computer screen from "it is now safe to turn off your computer" to "if you turn me off I will blow up."

School administrators perceived the message as a bomb threat and following a conference with K.M.A. and his mother, the superintendent recommended to the Board that K.M.A. be expelled. The Board voted to expel K.M.A. at its meeting on April 29, 1999, noting that he could apply for readmission in the fall if he underwent counseling and was found to pose no threat.

K.M.A.'s mother challenged the Board's action by filing a petition with the Commissioner of Education and by seeking emergent relief.

In his decision of June 29, 1999, the Commissioner denied petitioner's application for emergent relief. In doing so, he concurred with the ALJ that there was no merit to allegations made by petitioner that K.M.A. had not been accorded procedural due process.

On July 29, 1999, the petitioner appealed to the State Board of Education from the Commissioner's determination to deny emergent relief. However, at the request of petitioner's counsel, the matter was placed in abeyance pending the Commissioner's decision in the underlying case.

On July 30, 1999, the petitioner moved to amend her petition to the Commissioner to raise constitutional claims, at which time the American Civil Liberties Union and the Education Law Center entered the case on behalf of the petitioner. On August 25, 1999, the Education Law Center filed an amended petition on behalf of the petitioner, claiming therein violations of K.M.A.'s right to a thorough and efficient

education under the New Jersey Constitution and equal protection under the Fourteenth Amendment of the United States Constitution.[1]

On August 23, 1999, petitioner applied to the Board for K.M.A.'s reinstatement, which was considered at the Board's August 30 meeting. On September 2, 1999, the Board notified the petitioner that her request for reinstatement had been denied.

Following a plenary hearing on the merits of the controversy, the ALJ found the Board's action in expelling K.M.A. was arbitrary and unreasonable. Since he concluded that K.M.A.'s expulsion violated the education laws, the ALJ found it unnecessary to address the petitioner's constitutional arguments at length.

Based on his review of the record, the Commissioner concurred with the ALJ that K.M.A.'s expulsion was arbitrary.

In her appeal to the State Board, petitioner renewed her challenge to the constitutionality of the Board's decision to permanently expel K.M.A. As she did before the ALJ and the Commissioner, petitioner contended that by not holding a full disciplinary hearing within 21 days of the initial suspension and by failing to provide a written summary of the proposed witnesses' testimony in advance of the hearing, the Board had violated the due process clause of the Fourteenth Amendment of the United States Constitution. In addition, she challenged the Commissioner's determination that the Board could make K.M.A.'s reinstatement subject to an alternative placement, arguing that this determination was arbitrary, capricious and unreasonable under the circumstances.

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[1] In addition, petitioner amended the relief she was seeking to include declaratory rulings relating to those claims, as well as a ruling that the Board had violated K.M.A.'s right to procedural due process under the Fourteenth Amendment. Petitioner also noted and preserved her right to claims for damages and attorneys fees under 42 U.S.C. §§1983 and 1988.

Upon review of the record, the State Board concurred with the ALJ and the Commissioner that K.M.A.'s conduct was not the result of any nefarious intent. Rather, the State Board found that, as reflected by the testimony, K.M.A.'s conduct was intended as a prank, not as a bomb threat. Nonetheless, the State Board found that the school administrators' initial perception that the message might, in fact, be a bomb threat was reasonable under the circumstances. However, the State Board further concluded that such perception was quickly dispelled once the matter was investigated.

Although the State Board agreed with the Commissioner that K.M.A.'s permanent expulsion was unreasonable under the circumstances, it modified the relief granted to K.M.A. The State Board directed that the Collingswood Board readmit K.M.A. to the regular education program at Collingswood High School, and it precluded the Board from mandating that K.M.A. attend an alternative education program.

In view of our determination that the Board's action in expelling K.M.A. was arbitrary and unreasonable, we concluded that it was not necessary for us to address the petitioner's constitutional claims at length in the context of the appeal before us. We, however, noted that petitioner's constitutional claims were limited to the timeliness of the Board hearing and its failure to provide a summary of witness testimony in advance.

On July 19, 2000, petitioner moved for reconsideration of that portion of the State Board's decision that declined to decide her constitutional claims. Petitioner argued that although the Commissioner and the State Board did not have the authority to award attorney fees, she was entitled to vindicate her son's constitutional rights so as to seek those fees in an appropriate forum subsequent to a final administrative ruling. She

contended that the claims challenged district-wide policies and practices affecting many children and were therefore not moot.

Initially, we grant the petitioner's motion to reconsider. However, for the reasons that follow, we decline to alter our previous decision so as to rest that decision on constitutional grounds.

It is well settled that a court should not reach constitutional questions unless necessary to the disposition of the litigation. E.g., O'Keefe v. Passaic Valley Water Com'n, 132 N.J. 234, 241-242 (1993). Quite simply, the fact that the State Board determined that the Collingswood Board's expulsion of K.M.A. was in violation of the education laws made it unnecessary for us to reach the constitutional questions raised by the petitioner in order to dispose of the matter before us. Petitioner's desire to ultimately collect attorney fees under 42 U.S.C. §§1983 and 1988 did not change the character of the appeal that was before the State Board. Nor did it alter the scope of our jurisdiction. In this respect, we stress that we do not have the jurisdiction to decide claims made under §1983, and that we do not have the authority to award attorney fees pursuant to §1988.

Nor, despite petitioner's assertions, did the appeal involve a challenge to the Board's policies or practices. There is no indication in the record that the procedural defects alleged by petitioner in the appeal were the result of any Board policy or practice, and petitioner has not provided any support for this assertion in her motion for reconsideration. Accordingly, there is no indication that any other students will be affected by our determination that it was not necessary to rule on the constitutional issues.

Consideration of the brief filed in H.R. v. Rahway Board of Education, Commissioner David C. Hespe, and the State Board of Education, EDU #5449-CON, which petitioner has submitted in support of her motion, does not change our conclusion. Although filed on behalf of the Commissioner and the State Board, this is a brief in support of a motion for summary judgment in a case currently pending before the Office of Administrative Law. As such, it is not pertinent to the matter now before us.

Moreover, petitioner has not shown the necessity of setting aside the Commissioner's analysis of her constitutional claims. As the Commissioner stressed, R.R. v Bd. of Ed., Shore Reg. H.S., 109 N.J. Super. 337 (App. Div. 1970), held that a student charged specifically with assault had to be afforded a full hearing before the district board within 21 days of suspension pursuant to N.J.S.A. 18A:37-2.1 as then in effect. That statute applies only to students charged with assault and, in any event, was amended in 1995 to provide that such hearing must be provided within 30 days of suspension, rather than 21.

The case now before us involved a perceived bomb threat and not an assault. Consequently, the controlling statutes are N.J.S.A. 18A:37-4 and N.J.S.A. 18A:37-5, which provide that a hearing must be conducted by the second regular board meeting following an administrative suspension. As found by the Commissioner, K.M.A. was afforded a full hearing at the next regular meeting of the Collingswood Board in full compliance with N.J.S.A. 18A:37-4.

Similarly, there is no merit to the petitioners' claim that under the circumstances presented, due process entitled her to a summary of the witnesses' testimony prior to

the Board hearing. Tibbs v. Bd. of Ed. of Tp. of Franklin, 114 N.J. Super. 287 (App. Div. 1971), aff'd, 59 N.J. 506 (1971), upon which petitioner relies, does not confer any such entitlement on the petitioner.

Tibbs involved the expulsion of five students for allegedly assaulting two other students. In a per curiam decision, the Appellate Division reversed the expulsions, stating only that it was doing so "for failure to produce the accusing witnesses for testimony and cross-examination." Tibbs, 114 N.J. Super. at 288. The Appellate Division's decision was accompanied by three concurring opinions. The Supreme Court also issued a per curiam decision in the case, affirming the Appellate Division's decision for the reasons expressed in the concurring opinion of Judge Kolovsky. 59 N.J. 506, 507 (1971).

Neither the language of the decisions in Tibbs nor Judge Kolovsky's concurrence hold that a student is entitled to a summary of witness testimony in advance of a full board hearing. Rather, as explicated in Judge Kolovsky's concurrence, Tibbs centered on the due process requirement that "a respondent charged with misconduct in a hearing before a governmental agency be given the opportunity to confront and cross-examine adverse witnesses where the decision of the governmental agency will turn on questions of fact." 114 N.J. Super. at 301. While recognizing that the Commissioner had previously held that accused students were entitled to be given at least the names of the witnesses against them and copies of their statements and affidavits, Judge Kolovsky's concurrence articulated the due process requirement that such witnesses appear in person so that, in the absence of an appearance, the witnesses' statements could not be considered or relied on by the board. Id. at 300.

As the Administrative Law Judge in this case concluded, Tibbs does not hold that an accused student is automatically entitled to a summary of the witnesses' testimony where the witness appears in person. Initial Decision on emergent relief, slip op. at 4. Further, as the Commissioner stressed, K.M.A.'s conduct in this case was admitted and the hearing was solely to determine the appropriate penalty. Commissioner's Decision of June 29, 2000, slip op. at 10.

In sum, although we note the presence of petitioner's constitutional claims and have provided our insights, Abbott v. Burke, 100 N.J. 269, 298-99 (1985); Bd. of Ed. v. Neptune Educ. Ass'n., 293 N.J. Super. 1, 9 (App. Div. 1996), we decline to alter our determination that it was unnecessary for us to decide those issues.

October 4, 2000

Date of mailing OCT 06 2000

210-99

SHARON PADEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

June 30, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11348-97

AGENCY DKT. NO. 420-10/97

SHARON PADEN,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,

Respondent

Charles I. Auffant, Esq., for petitioner

Cherie L. Maxwell, Esq., for respondent (Sills, Cummis, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: May 7, 1999 Decided: May 12, 1999

BEFORE **EDITH KLINGER**, ALJ:

On November 26, 1997, this matter was transmitted to the Office of Administrative Law for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13. A hearing was scheduled for November 23, 1998.

Prior to the date of hearing, the parties advised the undersigned that they had resolved this matter. On May 7, 1999, the parties submitted the attached Stipulation of Settlement indicating the terms of agreement which are incorporated herein by reference.

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

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

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

I **CONCLUDE** that the agreement meets the safeguard requirements of *N.J.A.C.* 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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

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

May 11, 1999
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

5-19-99
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 20 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

md

CHARLES I. AUFFANT
Attorney at Law
661 Franklin Avenue
Nutley, New Jersey 07110
973-661-4545
Attorney for Petitioner

SHARON PADEN ,	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW**
Petitioner,	**OAL DOCKET NO. EDOR-11348-97N** **AGENCY REFERENCE NO. 420-10/97**
vs.	***CIVIL ACTION***
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK **Respondent,**	**STIPULATION OF SETTLEMENT**

The State-Operated School District of the City of Newark ("District") and Sharon Paden, Petitioner agree to the following terms and conditions in full settlement of this matter:

WHEREAS, the parties agree that it is in the public interest to enter into this agreement in resolution of said appeal in order to avoid the uncertainty and expense of litigation, and

WHEREAS, the parties further agree that the terms of this agreement will not present any risk of haem to students and/or the safe operation of the school district,

NOW THEREFORE, the parties agree as follows:

1. The District shall pay Petitioner one half of the salary increment withheld from her for the 1996-1997 school year. This payment shall be made within a reasonable time after the

RA

full execution of this agreement. Said partial increment shall be restored to Petitioner's future salary calculations thereafter.

2. Petitioner acknowledges that the payments reflected in this agreement constitute the full financial obligation of the district in this matter and that she shall receive no additional payments. In exchange for the above consideration, petitioner, on behalf of herself, her heirs, successors and assigns, hereby fully releases and forever discharges the District, its representatives, agents officers and employees, for any and actions, claims and liabilities arising from the withholding of her increment for the 1996-1997 school year which was the subject matter of the above referenced action.

3. Upon receipt of the payment referenced above, Petitioner agrees to withdraw her appeal, with prejudice, Docket No. EDUOR 11348-97N, Agency Ref: No. 420-10/97

4. This agreement is subject to the approval of the State District Superintendent.

5. The parties enter this agreement voluntarily and without coercion after consultation with their respective counsel.

Ms Sharon Paden 2/20/99

SHARON PADEN
Dated:

State-Operated School District of the City of Newark

Beverly L. Hall

By:
Dated: 4/29/99

OAL DKT. NO. EDU 11348-97
AGENCY DKT. NO. 420-10/97

SHARON PADEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, stipulation of settlement, and initial decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

June 30, 1999
Date of Mailing, June 30, 1999

211-99

EDWARD J. FLAHERTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner appealed respondent's denial of his application for a school administrator license.

The ALJ denied petitioner's request for relief, concluding that petitioner did not meet the requirements for issuance of a certificate of eligibility since he does not hold the master's degree in one of the recognized fields of leadership or management and does not possess the level of education or experience equal to graduate study in communications or law.

The Commissioner concurred with the determination of the ALJ that the State Board of Examiners' decision denying petitioner's application for issuance of a School Administrator Certificate of Eligibility was not arbitrary, capricious or unreasonable and dismissed the petition.

June 30,1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5327-98

AGENCY DKT. NO. 105-4/98

EDWARD J. FLAHERTY,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION,

STATE BOARD OF EXAMINERS,

Respondent.

Edward J. Flaherty, *pro se*

Jack S. Senechal, DAG., for respondent
(Peter Verniero, Attorney General of New Jersey, attorney)

Record Closed: March 31, 1999 Decided: May 17,1999

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

Statement of the Case

This is an appeal from the denial of petitioner's application for a school administrator license.[1] Basically, the licensing route is a three-step process. Initially, the applicant must obtain a certificate of eligibility from the Office of Licensing and Academic Credentials. *N.J.A.C.* 6:11-9.4(a)(1). An applicant who lacks the required educational qualifications for issuance of such certificate may submit evidence of alternative education and/or experience for review by the State Board of Examiners ("Examiners"). *N.J.A.C.* 6:11-3.24 to -3.30. Once an applicant has satisfied the first hurdle, the next step involves passing a written examination of knowledge, undergoing a simulated performance assessment, and obtaining an offer of employment from a school district. *N.J.A.C.* 6:11-9.4(a)(2).. The last step is successful completion of a one-year residence program under a provisional certificate. *N.J.A.*C. 6:11-9.4(b).

Petitioner Edward J. Flaherty ("Flaherty") seeks substitution of his educational background and experience for the formal academic requirements of a school administrator certificate. The Examiners denied his request on two grounds: first, that his undergraduate and post-graduate degrees from Stevens Institute of Technology are not equivalent to the required master's degree "in one of the recognized fields of leadership and management;" and, second, that his education and experience do not satisfy the requirement of study in the areas of "communications" and "law." *N.J.A.C.* 6: 11-9.4(a)(1). If the Examiners deny the request to substitute alternative education or experience, the applicant has the right of appeal to the Commissioner of Education ("Commissioner.") *N.J.A.C.* 6:11-3.28.

[1] A certificate with a school-administrator endorsement is required for any position that involves services as a district-level officer in a public school district. *N.J.A.C.* 6:11-9.3(a).

Procedural History

On June 24, 1997, Flaherty filed his application for licensure, together with copies of his college and graduate school transcripts, with the county superintendent's office. Thereafter, on September 10, 1997, the Examiners sent a letter to Flaherty requesting additional information. On October 3, 1997, Flaherty submitted a revised packet of materials, including supporting letters and details of his volunteer activities. At its meeting on December 11, 1997, the Examiners conducted a review of the materials provided by Flaherty. On that date, Flaherty appeared before the Examiners and made a brief oral presentation. By decision rendered on February 26, 1998, the Examiners voted unanimously to deny petitioner's request for issuance of a certificate of eligibility.

Flaherty filed the present appeal to the Commissioner on April 14, 1998. One month later, on May 19, 1998, the Examiners filed its answer. Subsequently, on June 3, 1998, the Commissioner transmitted this matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The OAL held a hearing on February 9, 1999. Upon receipt of post-hearing briefs, the record closed on March 31, 1999. Witnesses and exhibits are listed in the appendix.

Findings of Fact

All of the material facts are undisputed. **I FIND**:

Edward Flaherty is a consulting engineer by profession. He earned a mechanical engineering degree with honors from Stevens Institute of Technology in 1949 and a master of science degree from the same institution in 1954. Until his recent retirement, he served nearly forty-years as founder and chief executive officer of The Energy Companies, a group of affiliated companies providing engineering and technical services for major industrial, commercial and governmental clients. In this capacity, he has gained practical experience in management of world-wide business

operations, quantitative decision-making, accounting and financial practices, and handling personnel actions.

Significantly, Flaherty received no formal training in the field of education and has never held a position in any public or private school. However, he is interested in educational affairs and has participated in volunteer activities designed to improve local education. He was instrumental in forming an organization known as Volunteers In Service to Education, which provides free-of-charge tutoring services to students in the Montclair community. In addition, he is an active member of the Montclair Tax Union, a citizens' committee dedicated to ensuring that taxpayers receive appropriate value for their educational dollars. For the last five years, Flaherty has published an "educational almanac" pinpointing areas of possible waste in the school budget and recommending potential savings.

Although Flaherty seems to regard his rejection as an implicit criticism of his alma mater, the Examiners never questioned the value of Flaherty's training as an engineer. Proofs indicate that the Stevens engineering curriculum may indeed be "more intensive and more extensive than just about every other engineering program in the country." When Flaherty obtained his mechanical engineering degree in 1949, he accumulated 410 credit hours compared to a usual undergraduate program of around 130 credit hours. A letter from Arthur Shapiro, the current provost of Stevens Institute, explains that candidates for the ME degree "were required to take courses not only in all the major engineering disciplines, but also eight courses in the humanities and social sciences and a year of 'economics.'" Without referring to any syllabus or course description, Provost Shapiro alleges that the economics course "covered" the topics of business, management and leadership. Nothing on the record, however, lends support to the assertion that the two semesters of economics were more than a typical undergraduate survey course. Certainly there is an inadequate basis from which to conclude that Flaherty's limited exposure to economics is tantamount to an advanced degree in a recognized field of leadership or management. Moreover, Flaherty does not contend that his master of science degree dealt with the study of management and leadership. A transcript of the coursework leading to Flaherty's master's degree

reveals only technical and scientific subjects such as advanced calculus, vector analysis, and the kinetics of combustion.

Insofar as the study of communications is concerned, Flaherty has never taken any course in public speaking, advertising, journalism, radio and television, broadcasting, public relations or similar subject. Instead, Flaherty's only basis for a waiver is that he "has been communicating [for his entire working life.]" As evidence of his supposed expertise in this subject, Flaherty cites his dealings with clients, lobbying activities before the state legislature, preparation of written reports, authorship of training manuals, publication of newsletters and distribution of mass-market mailings. Other than being self-taught, however, Flaherty does not appear to have served any apprenticeship or received any instruction in this field.

Likewise, Flaherty does not have a legal degree or any training in the law. According to his testimony, Flaherty had personal involvement with construction and business law, including litigation involving the Buy America Act, the Fair Labor Standards Act, Worker's Compensation and the Bankruptcy Act. Thirty years ago, he served as an arbitrator for the American Arbitration Association on a dispute regarding construction work for the 1964 World's Fair. He also served on an advisory committee which helped develop alternate dispute resolution procedures for the court system. Nonetheless, Flaherty is not well versed in many of the legal concepts relevant to operation of a school district, including collective bargaining, civil rights, academic freedom, due process and equal protection. Again, his exposure to the legal arena is largely limited to his professional experience as an engineer.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that Flaherty does not meet the requirements for issuance of a certificate of eligibility.

No person shall be appointed as or perform the duties of superintendent of schools unless he or she holds an appropriate certificate prescribed by the State Board of Education. *N.J.S.A.* 18A:17-17. Issuance of a certificate is conditioned upon fulfillment of certain academic requirements, usually the completion of coursework or acquisition of a relevant higher degree. *Dennery v. Board of Educ.*, 131 *N.J.* 626, 634 (1993). Requirements for various certificates are set forth in regulations promulgated by the State Board. *N.J.S.A.* 18A:6-38. Pursuant to *N.J.A.C.* 6:11-9. 4(a), a candidate for the provisional certificate as a school administrator shall be required to:

> 1. Hold a master's degree or its equivalent from an accredited institution in one of the recognized fields of leadership or management, such as educational administration, public administration, business administration, leadership or management science. Study shall be completed, either within the master's program or in addition to it, in each of the following topics:
>
> i. Leadership and human resource management;
> ii. Communications;
> iii. Quantitative decision-making;
> iv. Finance; and
> v. Law.

Any applicant who lacks the required preparation may apply to the Examiners for substitution of alternative education and/or experience, except that the requirement of a passing score on a state-mandated test cannot be waived. *N.J.A.C.* 6:11-3.24. After review of the Flaherty's submissions, the Examiners determined that his two degrees from Stevens Institute did not cover "the core material which would be included in a master's degree program in leadership or management." While the Examiners were willing to recognize his experience in several of the required subject areas, they did not accept his experience in lieu of graduate study in communications and law. Specifically, the Examiners did not consider his experience as commensurate with a graduate course in communications, which would include "such topics as analyzing style, understanding the breadth of communications systems, and the ability to analyze audience members and their needs." Similarly, the Examiners did not regard his experience as interchangeable with a graduate course in law, which would cover much more than just the elements of construction and business law.

At the outset, there is a dichotomy in the caselaw on the appropriate standard of review of the Examiners' decision. Some of the Commissioner's decisions declare that the Examiners' determination cannot be overturned unless it is arbitrary, capricious or unreasonable. *Fisher v. State Bd. of Examiners*, 96 *N.J.A.R.*2d (EDU) 561 (Comm'r April 8, 1996); *Williams v. State Bd. of Examiners*, 95 *N.J.A.R.*2d (EDU) 58 (Comm'r Oct. 12, 1994). At least one reported case, however, adopts a broader scope of review and suggests that the Commissioner may make independent findings and conclusions of his own. *Salley v. Bd. of Examiners*, 97 *N.J.A.R.*2d (EDU) 257 (Comm'r Dec. 13, 1996). Regardless of which standard is followed here, the Examiners' decision must be affirmed, since even an independent review of the record would reach the same result.

Generally, the regulations contemplate that an applicant must attend an integrated, coherent program to comply with the requirement of a master's degree. Work experience coupled with successful completion of isolated courses are insufficient to satisfy the requirement of a master's degree "or its equivalent." *Williams*, *supra*, at 60. Simply put, Flaherty does not hold the master's degree in "one of the recognized fields of leadership or management" required by the regulation. His entry-level economics course taken in partial fulfillment of an undergraduate degree does not constitute the equivalent of a graduate degree in a field of leadership or management. On this ground alone, Flaherty does not qualify for a superintendent's certificate.

Furthermore, as the record amply demonstrates, Flaherty does not possess the level of education or experience equal to graduate study in communications and law. Flaherty's haphazard acquaintance with these topics arising in the context of occupational or volunteer activities does not approximate the depth and breadth of knowledge that an organized study of these subjects would demand. Thus, he should not be allowed to substitute his engineering background or volunteer work for the rigorous preparation necessary to become a chief school administrator.

Lastly, Flaherty attacks the validity of the regulations and challenges the composition of the State Board of Examiners. At the hearing, he expressed displeasure

with what he perceives as "insider bias" of the educational establishment and the separation of school management from what he regards as "the real world." Judges, however, must apply the law as it is written and cannot substitute their own personal preferences. Properly-adopted agency rules have the full force and effect of law. *State v. Atlantic City Elec. Co.*, 23 *N.J.* 259, 270 (1957). Courts are not free to substitute their judgment as to the wisdom of a particular administrative action so long as that action is statutorily authorized and not otherwise defective because arbitrary or unreasonable. *New Jersey Guild of Hearing Aid Dispensers v. Long*, 75 *N.J.* 544, 562-563 (1978). Here the action of the Examiners is well within their statutory authority and fully consistent with the legislative goal of setting suitable qualifications for professional educators. The agency's interpretation of its governing regulations and their application to the particular facts is reasonable and well-supported in the record. Membership of the Examiners is prescribed by statute and, therefore, not subject to administrative review. *N.J.S.A.* 18A:6-34. Accordingly, there is no legal basis to set aside the Examiners' action.

Order

It is **ORDERED** that petitioner's request for relief is denied.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 17, 1999
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

5-20-99
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 20 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

List of Witnesses

1. Margaret L. Smith, coordinator of licensing programs, New Jersey Department of Education

2. Edward J. Flaherty

List of Exhibits

No.	Description
P-1	Bound volume containing various materials submitted by petitioner in support of his application, dated February 9, 1999
P-2 Id.	Copy of monogram entitled The Montclair, New Jersey Advanced Placement Program prepared by the Montclair Tax Union, dated January 1, 1998
R-1 to R-8	Copy of application for school administrator certificate, stamped received on January 24, 1997
R-9 to R-91	Copy of application for review of alternative education and experiences for the position of school administrator, dated September 3, 1997
R-92 to R-94	Copy of New Jersey Board of Examiners decision entitled *In re Edward J. Flaherty,* dated February 26, 1998

R-95 to
R-103 Copy of petition of appeal, dated April 15, 1998

R-104 Copy of letter to Edward J. Flaherty from the Department of Education, dated May 27, 1998

R-105 to
R-109 Copy of respondent's answer to petition of appeal, dated May 19, 1998

OAL DKT. NO. EDU 5327-98
AGENCY DKT. NO. 105-4/98

EDWARD J. FLAHERTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were timely filed pursuant to *N.J.A.C.* 1:1-18.4 and duly considered by the Commissioner in reaching his determination herein.

Petitioner's exceptions assert that "[t]he OAL-DECISION seems incomplete, and/or unbalanced in several respects, and lacking the needed recommended study of PETITIONER'S submittal [sic] material; much of this material cannot be comprehended by mere casual-reading or skimming." (Petitioner's Exceptions at p. 1) In support of this contention, petitioner presents a page-by-page dissection of the initial decision, noting areas where the ALJ makes no mention of, and/or elaboration on, certain specific materials advanced in petitioner's submissions below which, in his opinion, are significant and relevant to this matter. Some of the materials referenced include petitioner's Brief dated March 3, 1999, wherein he provides comments on previous State Board of Examiner cases; statistical data contained in Appendices

A, B and C of his Petition of Appeal dated February 9, 1999; information with respect to petitioner's organization and building of "the VOLUNTEERS IN SERVICE TO EDUCATION (VISTE)-Program to provide *** tutoring for local Montclair-area students"; petitioner's organization and building of the Montclair Tax Union "which publishes yearly performance/cost-data allowing local citizens if interested, to understand where their tax money goes"; and petitioner's work with the Essex County Alternate Dispute Resolution Procedures Committee. (*Id.* at pp. 2-4) Petitioner, apparently, takes the position that, since these pieces of information and the others outlined in his exceptions were not detailed in the initial decision, they were not adequately considered by the ALJ.

Upon his review and independent consideration of the full record in this matter, the Commissioner concurs with the determination of the ALJ that the State Board of Examiners' decision denying petitioner's application for issuance of a School Administrator Certificate of Eligibility was not arbitrary, capricious, or unreasonable and is, therefore, appropriately upheld.[1]

Accordingly, the initial decision of the OAL is affirmed for the reasons stated therein and the instant Petition of Appeal is hereby dismissed.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1]The Commissioner clarifies that *Dr. Columbus Salley and the Board of Education of the City of Orange Township, Essex County v. Board of Examiners, Department of Education, State of New Jersey*, 97 *N.J.A.R.* 2d (EDU) 257, referenced on page 7 of the initial decision, was decided by the Commissioner utilizing the arbitrary, capricious and unreasonable standard.

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

June 30, 1999

Date of Mailing, June 30, 1999

212-99

MANVILLE EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MANVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

June 30,1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 00427-99S

AGENCY DKT. NO. 544-12/98

MANVILLE EDUCATION ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF MANVILLE, SOMERSET COUNTY,

Respondent.

Kathleen A. Naprstek, Esq., for petitioner (Zazzali, Zazzali, Fagella and Nowak, attorneys)

Raymond R. Trombadore, Esq., for respondent (Raymond R. and David W. Trombadore, attorneys)

Record Closed: May 14, 1999 Decided: May 18, 1999

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from the filing of a Petition of Appeal by the Manville Education Association, ("petitioner") with the Commissioner of Education on December 7, 1998, asserting that the Board of Education of Manville ("respondent"), had violated *N.J.A.C.* 6:3-4.3 by invalidating individual professional improvement plans and implementing standardized

professional improvement plans in their place. The matter was transmitted to the Office of Administrative Law on February 3, 1999, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached Stipulation of Dismissal with Prejudice indicating the terms of settlement.

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

1. The parties have voluntarily agreed to the settlement on the record.

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

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

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

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

May 18, 1999
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

5-20-99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 21 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

mjm
Attachment

RECEIVED
May 14 9 35 AM '99
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
One Riverfront Plaza
Newark, New Jersey 07102
(973) 623-1822
Attorneys for Petitioner

MANVILLE EDUCATION ASSOCIATION, Petitioner v. BOARD OF EDUCATION OF MANVILLE, SOMERSET COUNTY Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY Agency Ref. No. 544-12/98 OAL Dkt. No. EDUOA 00427-99S STIPULATION OF DISMISSAL WITH PREJUDICE

The matter in dispute in the above-entitled action having been amicably resolved by and between the parties as per the terms set forth in the annexed memorandum of Francis X. Heelan, Superintendent of Schools for the respondent Board of Education of Manville, dated May 5, 1999, it is hereby stipulated and agreed that the Petition of Appeal be and is hereby dismissed with prejudice without costs against either party.

Dated: May 11, 1999

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
Attorneys for Petitioner

By: Kathleen A. Naprstek
Kathleen A. Naprstek, Esq.

RAYMOND R. & DAVID W. TROMBADORE, P.C.
Attorneys for Respondent

By: Raymond R. Trombadore
Raymond R. Trombadore, Esq.

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

3a

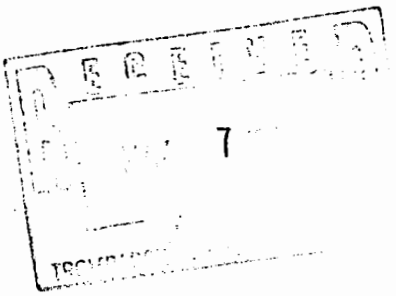
MANVILLE PUBLIC SCHOOLS

410 Brooks Boulevard
Manville, New Jersey 08835

Francis X. Heelan, Ed. D.
Superintendent of Schools

Telephone
231-8545

May 5, 1999



Mr. Raymond R. Trombadore, Esq.
33 East High Street
Somerville, NJ 08876

Dear Mr. Trombadore:

In accordance with our meeting on May 4, 1999 to improve processes for teacher professional improvement plans, the following procedures will be adopted as a means of soliciting enhanced teacher feedback.

First, a Focus Group of teachers and administrators will be established for school year 99-00 to evaluate and improve the system for Teacher Performance Evaluation. Second, the President and Vice President of the Manville Education Association will be invited to participate at the Leadership Team summer retreat in August, 1999 for the purpose of setting district strategic goals and measures for school year 99-00. Third, the Job Improvement Targets on Form E will be eliminated beginning with the Spring of 1999. Fourth, input from faculty on the 99-00 district strategic goals will be solicited in the May or June meetings. Fifth, the professional improvement plans for teachers will be formulated in September once the strategic goals have been established.

These improved processes will move Manville School District along the path of shared decision-making and will hopefully result in more relevant professional improvement plans for teachers.

Respectfully submitted,

Francis X. Heelan

Francis X. Heelan, Ed.D.
Superintendent of Schools

OAL DKT. NO. EDU 427-99
AGENCY DKT. NO. 544-12/98

MANVILLE EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MANVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, stipulation of dismissal with prejudice, and initial decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

The Commissioner notes that in settlement of the within matter the parties have agreed on a shared process for the development of Professional Improvement Plans for teaching staff members. The parties are hereby directed to insure that such developed procedures are consistent with the Commissioner's recent decision in the matter entitled *Education Association of Passaic v. Board of Education of the City of Passaic, Passaic County*, dated April 26, 1999.

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

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

June 30, 1999
Date of Mailing, June 30, 1999

213-99E

ALASKA SERVICES, INC., PETITIONER,	:	
	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY, RESPONDENT.	:	

July 2, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING MOTION
FOR EMERGENT RELIEF
OAL DKT. NO. EDU 4686-99
AGENCY DKT. NO. 171-6/99

ALASKA SERVICES, INC.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,

Respondent.

Abraham Borenstein, Esq., for petitioner (Bloom, Borenstein, attorneys)

Robin McMahon, Esq., for respondent (Martin R,. Pachman, attorney)

Record Closed: June 30, 1999 Decided: July 1, 1999

BEFORE **KATHRYN A. CLARK**, ALJ:

PROCEDURAL HISTORY

This matter was opened by the petitioner, Alaska Services, Inc. ("Alaska") on an application for an Order granting emergent relief, pursuant to *N.J.A.C.* 6:24-1.5. The relief requested is for a stay in the awarding and/or commencement of a contract for custodial services by respondent, East Brunswick Board of Education ("the Board"). This new contract was

originally due to commence at 12:01 a.m., July 1, 1999. However, the new contract has yet to be awarded and likely, will not commence until after the next meeting of the Board of Education of East Brunswick on July 8, 1999. Irrespective of this, petitioner claims it will suffer irreparable harm if their existing contract is not extended past 12:00 a.m. July 1, 1999.

STATEMENT OF THE CASE

On May 7, 1998, the Board issued an advertisement for bids to provide custodial services for its 9 schools and administration building, which were due May 29, 1998 (1998 bid). The advertisement for bids contained the following paragraph:

> B. QUALIFICATIONS FOR BIDDERS
>
> The following are the minimum requirements to qualify for bidding:
>
> * * * * *
>
> 8. Bidder must be doing business in a minimum of three (3) public school districts of equal or greater volume performing custodial services.

This contract (1998 contract) was awarded to Alaska, for the period July 1, 1998 through June 30, 1999.

On May 13, 1999, the Board issued an advertisement for bids to provide custodial services for its 9 schools and administration building, which were due May 28, 1999 (1999 bid). The 1999 bid specification contained the same language regarding qualifications for bidders as the 1998 bid specification:

> B. QUALIFICATIONS FOR BIDDERS
>
> The following are the minimum requirements to qualify for bidding:
>
> * * * * *
>
> 8. Bidder must be doing business in a minimum of three (3) public school districts of equal or greater volume performing custodial services.

No contract was awarded, the bids were canceled, and the Board issued a revised advertisement for bids on June 4, 1999 (1999 rebid). The 1999 rebid specifications were revised:

> B. QUALIFICATIONS FOR BIDDERS
>
> The following are the minimum requirements to qualify for bidding:
>
> * * * * *
>
> 8. Bidder must submit evidence at time of bid of currently being under contract to provide custodial services in a minimum of 2 public school districts equal or greater in size than the East Brunswick School District in number of buildings and square feet.

Only one bidder was qualified. The School District, as of the date of this emergent petition, still is in negotiations with this one bidder. The School Board's counsel stated her understanding that, if the negotiations are successful, a new contract for custodial services for 1999-2000 will be presented to the Board for their action at their next regularly scheduled meeting of July 8, 1999.

ARGUMENTS OF THE PARTIES

Alaska asks that the Board be stayed from entering a new contract, that the revised specifications be declared null and void, that the Board be required to readvertise the bid without the revised specification, and that it be awarded attorney's fees and such other relief as is just and proper.

Alaska's president, Kevin Fay, states that Alaska had responsibly performed the 1998 contract, and Fay alleges that he had been informed by Don Hewins that Alaska's contract would be renewed for 1999-2000, with an increase in the contract fee. Despite this, the Board advertised for bids, and Alaska entered a bid, which Fay believes was the lowest qualified and/or responsible bid. The bids were canceled, and Fay states that he was told by Mr. Hewins that the Board wanted to intentionally eliminate some bidders ("the riff raff"), but Fay claims he was told that Alaska would be eligible under the revised specifications. Alaska was not eligible under the revised specifications, and Fay said that Alaska did not bid under the revised specifications

Fay claims that Alaska will be forced to terminate the services of their 18 employees who presently service the East Brunswick School District. The petitioner claims respondent intentionally violated *N.J.S.A.* 18A:18A-15e, in that it knowingly revised the specification to exclude all but one company, and the revision was not directly related to the purpose, function or activity for which the contract was made.

The Board's witness, Donald Hewins, Director of Support Services, in his certification states that he had discussed a possible extension of Alaska's contract into 1999-2000 with Fay, and a possible price increase (per *N.J.S.A.* 18A:18A-42h), but that the District's Buildings and Grounds Committee decided that the 1999-2000 contract should be bid. Accordingly, the bid was advertised and 6 companies responded. One bidder showed more than 3 comparably sized districts under contract, and its bid was well over the amount budgeted for custodial services.. Another bidder showed 2 comparably sized districts under contract. Alaska showed only its contract with respondent East Brunswick as a contract of comparable size[1]. The other bidders could not show any comparable size contracts. All bids were rejected for failure to meet qualifications and price.

Hewins testified that the Buildings and Grounds Committee revised the specification in order to attract additional qualified bidders[2]. Hewins said that he had assured Fay that he would discuss Alaska's situation with them. However, the Buildings and Grounds Committee decided that, while it was comfortable with reducing the requirement to 2 comparably sized districts, it would not reduce its requirement to only 1.

Hewins said that the change in the specifications were meant to clarify the specification, and to expand the number of qualified applicants, and to attempt to define "comparable size" in a meaningful way. Despite this effort, only one qualified bidder submitted a bid on the "rebid". This bidder's price is still in excess of the budgeted allocation for custodial services. All bids were again rejected, and negotiations are under way pursuant to *N.J.S.A.* 18A:18A-5(16)d.

---

[1] Alaska had lost its other two contracts of school districts of comparable size before the 1999 bid was advertised.

[2] In his certification, Hewins denies saying that the specifications were revised to eliminate "riff raff" or any potential bidders. He states that the revision took place to expand the potential pool of qualified bidders.

FINDINGS OF FACT

Having had the opportunity to observe and to judge the demeanor and credibility of all witnesses in their testimony, and upon review of all the evidence and exhibits submitted, and drawing reasonable inferences therefrom, I **FIND** the following as **FACT** by a preponderance of the credible evidence:

1 Alaska entered a bid for the 1999-2000 contract even though it did not meet the requirements for bidders, which were the same requirements for bidders as were in its earlier 1998-1999 contract. Alaska did not challenge the requirement for bidders of having 3 comparably sized school districts under contract.

2. Alaska was not the lowest qualified bidder for the 1999-2000 contract.

3. The revision of the Qualification for Bidders specification took place on the orders of the Buildings and Grounds Committee, and was approved by the School Board.

4. The Buildings and Grounds Committee consists of 3 School Board members, the President of the School Board (on an Ad Hoc basis), the School District Superintendent, and Donald Hewins, as Director of Support Services.

5. The revision of the Qualification for Bidders specification was intended to attract additional qualified bidders, clarified the specification, and tried to define "comparable size" in a meaningful way.

6. Respondent did not revised the Qualification for Bidders specification to exclude all but one company. That revision was directly related to the purpose, function or activity for which the contract was made, by expanding the pool of qualified bidders.

LEGAL DISCUSSION

The motion does not meet the standards for emergent relief. Alaska was not able to meet the original requirement in the May 13 advertisement for bids. Its situation was only alleviated by the subsequent revision to the Qualification for Bidders specification. It was not irreparably harmed by any action of the Board, either in using its 1998 standard again in 1999, or in lessening its requirement.

Petitioner cannot show a reasonable likelihood of success on the merits. Outside of demanding that the Board reduce its requirement to 1 comparably sized school district, the petitioner has little possibility of success. The Board had a right to ask to see at least 2 comparably sized school districts, to assure itself that the bidder had a likelihood of being able, not only do the job, but to be fiscally sound enough to be able to complete the contract.

The material facts are not in dispute. The only significant fact in dispute is the assurances made to Alaska, upon which assurances Alaska could not have relied to secure a contract to which it was not otherwise entitled, even if such assurances are ultimately proven to have been made.

Lastly, as to the balancing of equities, the school district has a right to have a responsible, qualified bidder as its contractor. To impose a stay on a contract that is not even yet in existence, and may indeed, not be in existence if the negotiations are not successful, would be confusing as well as tie the hands of the district. Alaska had no valid claim to the 1999-2000 contract from the first set of bids in 1999. To create the appearance of a valid claim be imposing a stay on the district's actions is counterproductive.

Petitioner alleged, but did not show, bad faith on the part of respondent. It cannot be laid at respondent's door that petitioner could no longer show 2 (if not 3) other comparably sized school districts under contract. And petitioner cannot allege that the Buildings and Grounds Committee's refusal to lower the requirement to 1 comparably sized school district is bad faith. No bad faith was shown. And the School District should be allowed to know that its bidder has

other contracts, not only to show that it can perform the job, but to assure itself that the bidder is financially stable enough to be able to carry out the contract.

The negotiations to achieve a better price with the only qualified bidder on the rebid may yet prove unsuccessful, and the Board may yet have to take some other action to achieve its goal. This is pure speculation, but such additional action may yet open up the contract process to Alaska.

The job prospects of the 18 employees of Alaska are of concern on a human level, but such is the nature of jobs under a contract that is rebid periodically, and may ultimately go to another contractor.

ORDER

It is therefore **ORDERED** that the motion for emergent relief be **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days, following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

July 1, 1999
DATE

Kathryn A. Clark
KATHRYN A. CLARK, ALJ

OAL DKT. NO. EDU 4686-99
AGENCY DKT. NO. 191-6/99

ALASKA SERVICES, INC., PETITIONER,	:	
	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY, RESPONDENT.	:	

The record of this emergent matter and the order of the Office of Administrative Law (OAL) have been reviewed. Upon such review, the Commissioner concurs, for the reasons expressed in the order, that petitioner has failed to satisfy the standard for obtaining emergent relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the Motion for Emergent Relief is denied. The underlying claim on the merits shall proceed at the OAL as necessary to bring it to closure.[1]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] This decision, as the Commissioner's final determination on application for emergent relief, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.
July 2, 1999
Date of Mailing, July 6, 1999

214-99

PASSAIC COUNTY ELKS CEREBRAL PALSY TREATMENT CENTER BOARD OF TRUSTEES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the audit decision of respondent determining that transactions between petitioner and the Passaic County Elks Crippled Children's Committee, Inc. are between related parties and not at arm's length, so as to require disallowance of certain costs in determining tuition rates.

The ALJ granted summary decision to respondent, finding that there were no genuine issues of material fact and respondent was entitled to prevail as a matter of law.

The Commissioner concurred with and adopted as his own the recommendation of the ALJ to dismiss the petition.

July 6, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION ON MOTION FOR SUMMARY JUDGMENT
OAL DKT. NO. EDU 1371-98
AGENCY DKT. NO. 422-11/97

PASSAIC COUNTY ELKS CEREBRAL PALSY TREATMENT CENTER BOARD OF TRUSTEES,
Petitioner,
v.
DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,
Respondent

Malcolm J. McPherson, Jr., Esq. for petitioner

Arlene Goldfus Lutz, Deputy Attorney General
(Peter Veniero, Attorney General of New Jersey, attorney)

BEFORE **IRENE JONES**, ALJ:

Petitioner, Passaic County Elks Cerebral Palsy Treatment Center Board of Trustees appeals the audit decision of the respondent, the New Jersey Department of Education, Division of Finance that determined that transactions between the petitioner and the Passaic County Elks Crippled Children's Committee, Inc., are between related parties and thus are not arms length transactions. This determination required the petitioner to change its name to remove any reference to Elks; to remove and not allow

members of the Elks on the Board of Trustees; and to amend its constitution and by laws by deleting certain language and particular street address, thus allowing the petitioner to lease or purchase another property.

Upon receipt of the audit, the petitioner filed a petition with the Commissioner of Education requesting that the audited be amended to a finding of non-related party status; that its audited financial statements be accepted; removal of conditioned approval status; stay of any refunds due to the sending school pending the outcome of the instant hearing.

On January 28, 1998, the Department of Education transmitted the petition to the Office of Administrative Law for a hearing as a contested case pursuant to *N.J.S.A.* 14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13. A telephone prehearing conference was held and the parties agreed that the matter was suitable for summary disposition. Thereafter, the parties filed briefs in support of their respective positions at which time the record closed.

UNDISPUTED FACTS

I **FIND** the following **FACTS**:

The Passaic County Elks Cerebral Palsy Treatment Center Board of Trustees, Inc. ("Petitioner"), operates a private school for handicapped students. It provides education and related services to handicapped pupils sent from various public schools districts who are unable to educate them through other means. The petitioner's school consists of a primary program located at 1481 Main Avenue, Clifton, N.J. that provides education to multiple handicapped children ages preschool through twelve (12). Pursuant to a July 1996 lease agreement, petitioner leases the primary school premises from the Passaic County Elks Crippled Children's Committee, Inc. (Committee).

Petitioner also operates a high school program for multiple handicapped children ages thirteen (13) through seventeen (17), located at 15 Union Avenue, Clifton, N.J. Pursuant to a May 1993 lease agreement, petitioner leases the high school premises from Richard W. Kanter.

In 1949, the Committee, located at 1487 Main Avenue, Clifton, N.J became a N.J. incorporation, for the sole purpose of maintaining an institution for the training, treatment and care of children with cerebral palsy and orthopedic handicaps. In 1963, the Committee filed an amended Certificate of Incorporation and specified its purpose as "[t]he maintenance of the institution known as "Passaic County Elks Cerebral Palsy Treatment Center," and for the training, treatment and care of cerebral palsy children and orthopedically handicapped children."

In 1985, petitioner became a separate corporation designated as The Passaic County Elks Cerebral Palsy Treatment Center Board of Trustees, Inc., having as its sole purpose the management of all matters relating to the Passaic County Elks Cerebral Palsy Treatment Center. Pursuant to the Constitutions and By-Laws of both the Committee and the petitioner, common officers and directors were required in each corporation. In 1995, however, the respective constitutions and by laws were amended to remove all relationship between the two corporations. These revisions precluded the corporations from having the same or common officers, directors or members, and specifically prohibited any member of the Committee from being an officer, director or member of petitioner's corporation. Thereafter, in July 1996, petitioner entered into its lease agreement with the Committee wherein it rented the primary school premises at 1481 Main Avenue, Clifton, NJ. for a five-year term.

Pursuant to statutory and regulatory provisions, the State Department of Education ("Department") required petitioner, along with all private schools for handicapped children, to submit annual audited financial statements for review. In August 1997, the Department reviewed petitioner's 1995-96 school year transactions for the primary school and determined that the audit was not in compliance. The Department further found that petitioner and the Committee were related parties and

ruled that the lease agreement was not an arms-length transaction. As such, it was determined that the $265,587 in rental costs that petitioner paid to the Committee, was improperly included as a allowable cost in the school's tuition rate. The Department concluded that: (1) under the Committee's by-laws and constitution, members must be a Elk in one of six area lodges[1] ; (2) under Petitioner's by-laws and constitution, members must be an Elk in one of the same six constituent lodges[2] ; and (3) Article 2(e) of Petitioner's constitution and by-laws specifically describes its purpose as follows: "To maintain and supervise the established Training Center located at 1481 Main Avenue, Clifton, .N.J.[3]

SUMMARY DECISION STANDARD

N.J.A.C. 1:1-12. 5(a) provides that a party may move for summary decision upon all or any of the substantive issues in a case at any time after a case is deemed contested. In considering respondent's motion for summary decision, it must be determined whether "the papers and discovery . . . together with the affidavits. . . show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." *N.J.A.C.* 1:1-12.5(b).

The Supreme Court has held that when deciding a motion for summary judgment under *R.*4:46-2,

> . . . [a] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to

[1] These six lodges include: (a) Fairlawn-Paterson; (b) Clifton; (c) Pompton Lakes; (d) Passaic Valley; (e) Wayne; or (f) Hawthorne.

[2] Petitioner's constitution also allows representatives of each constituent lodge to select one citizen from their respective communities to serve on the Board of Trustees; auch citizen may or may not be an ELK.

[3] In other words, the Department alleged that this provision expressly required Petitioner to lease the Committee's building (i.e., Petitioner's constitution prohibitions it from leasing an alternate facility for its primary school).

> permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.
>
> [*Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520, 540 (1995).]

The essential question is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one sided that one party must prevail as a matter of law." *Id.* at 533.

Pursuant to *N.J.A.C.* 1:1-12.5(b) in order for a adverse party to prevail it must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. Here, the petitioner must raise factual issues which are sufficient to lead a rational factfinder to rule in its favor if a trial were held.

THE LAW

The State Legislature has provided for the education of handicapped children in Chapter 46 of the school laws, *N.J.S.A.* 18A:46-1 through 46. *N.J.S.A.* 18A:46-14, enumerates the types of facilities and programs that may be utilized for such education, it provides in its pertinent part:

> The facilities and programs of education required under this chapter shall be provided by one or more of the following:
>
> * * *
>
> g. Sending children capable of benefiting from a day school instructional program to privately operated day classes, in New Jersey or, with the approval of the commissioner to meet particular circumstances, in any other state in the United States, the services of which are nonsectarian whenever in the judgment of the board of education with the consent of the commissioner it is impractical to provide services pursuant to subsection a., b., c., d., e. or f. otherwise. [*N.J.S.A.* 18A:46-14(g)

Thus, public schools having handicapped students whom they are unable to educate through other means, may send these students to approved private schools for handicapped children, provided that the first six options found in *N.J.S.A.* 18A:46-14(a) through (f) are not otherwise available. A private school receiving handicapped students from a local public school district may not charge the local board tuition that exceeds the actual cost per pupil as determined under rules prescribed by the commissioner [of education] and approved by the State Board of Education. *N.J.S.A.* 18A:46-21.

The Legislature has vested the Commissioner and the State Board of Education ("State Board"), with authority to promulgate rules and regulations to provide quality educational opportunities to handicapped children. *N.J.S.A.* 18A:46-15(a) states that the commissioner with the consent of the State board shall, according to the rules and regulations prescribed by him and approved by the State Board, approve all special facilities and education programs which meet the requirements of [Chapter 46]. Likewise, *N.J.S.A.* 18A:46-19 states that "[t]he commissioner may require at such time, and in the manner and on forms prescribed by him, such educational, financial and statistical reports as he may deem necessary to carry out the purpose of [Chapter 46]." CF: *N.J.S.A.* 18A:46-15 and -16 which detail the State Board's broad authority to adopt regulations in furtherance of the implementation of school laws.

In exercising this rulemaking authority, the Commissioner, with the approval and consent of the State Board, has promulgated rules and regulations governing tuition for private schools for the handicapped, found at *N.J.A.C.* 6:20-4.1 through 4-11. The primary regulation at issue herein is *N.J.A.C.* 6:20-4.4(a)(45) that concerns "non-allowable costs" which may not be included in the tuition rate calculations set forth in *N.J.A.C.* 6:20-4.1, the tuition rates charged by private schools to the "sending" public schools). In pertinent part, this regulation states:

> (a) A cost which is not allowable in the calculation of the certified actual cost per pupil includes the following:
>
> * * *

> 45. Costs related to transactions between related parties in which one party to the transaction is able to control or substantially influence the actions of the other. Such transactions are defined by the relationship of the parties and include, but are not limited to, those between divisions of an institution; institutions or organizations under common control through common officers, directors, or members; and an institution and a director, trustee, officer, or key employee of the institution or his or her immediate family either directly or through corporations, trusts, or similar arrangements in which they hold a controlling interest. Such costs shall include, but not be limited to:
>
> I. Rental cost for buildings and equipment in excess of the actual allocated costs of ownership (such as a straight line depreciation, mortgage interest, real estate taxes, property insurance and maintenance costs) incurred by the related property owner including a 2.5 percent return calculated on the actual costs of ownership incurred by the related party. The lease agreement shall include a list of anticipated costs to be incurred by the property owner, prepared in the format supplied by the Commissioner, signed by the property owner and notarized;
>
> * * * *
>
> [*N.J.A.C.* 6:20-4.4(a)(45)]

N.J.A.C. 6:20-4.8 details the audit requirements and procedures utilized in determining the costs per pupil, tuition rates and any non-allowable costs. *In Council of Private Schools v. Cooperman,* 205 *N.J. Super* 544 (App. Div. 1985), the Court sustained the regulations finding that they were not ultra vires or "facially confiscatory," and were "reasonably designed." Although, the Appellate Division did not foreclose the possibility of a particular private school from questioning the reasonableness of the regulations "as applied," the court nonetheless held that the regulations were facially valid.

In the instant matter, the ultimate determination of this controversy depends on whether petitioner and the committee are related parties. Further, whether the lease agreement between petitioner and the committee was an arms-length transaction. In

Saxon Constr. and Mgmt. Corp. v. Masterclean of North Carolina, Inc., 273 *N.J. Super* 231, 235 (App. Div. 1994), *cert. denied,* 137 *N.J.* 314 (1994), the Court aptly noted the settled principle in contracts law that parties bargaining at arms length may generally contract as they wish. The hallmarks of an arms-length transaction have been described as follows:

> [i]t involves (a) actions of essentially unrelated willing parties, each being relatively free to act in what each perceives to be his or her own self-interest, (b) action which are voluntary (as opposed to being under compulsion or duress), and (c) actions which generally take place in an open market.

In re Chomakas, 170 *B.R.* 585, 593 (Bankr. E.D. Mich. 1993), an arms-length transaction was defined as

> a transaction negotiated by unrelated parties, each acting in his or her own self interest; the basis for a fair market value determination. Commonly applied in areas of taxation when there are dealings between related corporations, e.g. parent and subsidiary. . . . The standard under which unrelated parties, each acting in his or her own best interest, would carry out a particular transaction. For example, if a corporation sells property to it sole shareholder for $10,000, in testing whether $10,000 is an 'arm's length' price it must be ascertained for how much the corporation could have sold the property to a disinterested third party in a bargained transaction.
>
> [Cf: Black's Law Dictionary 100 (5th ed. 1979).]

N.J.A.C. 6:20-4.4(a)(45) provides that transactions between divisions of an institution are considered transactions between related parties. In *Asplund v. Marjohn Corp.*, 66 *N.J. Super.* 255 (App. Div. 1961), the Appellate Division provided the following guidance for defining a related institution:

> An 'institution' is broadly defined as an established or organized society or corporation, either public or private in character. . . . Although the precise meaning of the term may vary according to the operative context. . . it seems universally accepted that 'institution' imports a substantial degree of internal organization and legally sanctioned stability.
>
> [*Asplund*, 66 *N.J. Super* at 263 (emphasis added).]

See also 18 *N.J.R.* 1237 (June 16, 1986) where the State Board discussed the problem of related parties and non-arms-length transactions in its proposed amendment to *N.J.A.C.* 6:20-4.4. Of particular relevance, the State Board noted the following in its Summary Statement:

> As of July 1, 1985, 21 private schools for the handicapped had set up commonly owned or controlled corporations. The private schools then either transferred title assets, used by the private school for the handicapped, to the related corporations or had the related corporations purchase fixed assets to be used by the private school for the handicapped. The related corporations collect rentals from the private schools for use of the fixed assets vested in the private school. This procedure also allows the related corporation to set the fixed assets without reimbursing the program for tuition funds expended for such fixed assets. Such transactions between related parties are entered at less-than-arm's length.
>
> It appears that the only purpose or activity of these corporations is renting buildings and equipment to the related private school for the handicapped. Such corporations give the appearance of being straw corporations used solely to disguise activities which would otherwise be nonallowable under *N.J.A.C.* 6:20-4.4, to divert fund intended for the education of handicapped pupils for other uses and to circumvent the surcharge and working capital restrictions contained in *N.J.A.C.* 6:20-4.5 ad 6:20-4.6.
>
> The State Board of Education, pursuant to the authority of *N.J.S.A.* 18A:4-15 and 18A:46-21, proposes to amend the rule pertaining to Tuition for Private Schools for the Handicapped, Non-allowable Costs, *N.J.A.C.* 6:20-4.4. The

> proposed amendments ensure that the tuition rates charged New Jersey public school district boards of education by private schools for the handicapped are based on the cost of service, and are reflective of an open competitive market by restricting transactions not at arm's length. A not-at-arms length transaction would be limited to the cost of ownership incurred by the elated party including a 2.5 percent return calculated on the actual costs of ownership incurred by the related party.
>
> [18 *N.J.R.* 1237 (emphasis added).]

Under the foregoing standards, I **FIND** that the respondent has correctly determined that petitioner and the Committee are related parties and that their lease agreement was not an arms-length transaction. Notwithstanding both corporations efforts to divest themselves of common control, the fact remains that they are both divisions of an "institution" known as the Elks, which is a "established or organized society. . . [with] a substantial degree of internal organization and legally sanctioned stability. *Asplund,* at 263. As respondent succinctly argues:

> Although divided into lodges and separate corporations, the members are all Elks. As such, they have similar goals and interest. They seek to advance and enhance the purposes of their society. Thus, regardless of whether a person is a member of a lodge, the Committee, or the Center, the fact remains that the threshold requirement is membership in the Elk [sic]. The members of the boards of the Center and the Committee are not free to act in their self-interest; the overarching interesting of all Elks is the success of the Center.
>
> [Resp't. Br., at 16-17]

I further **FIND** that members in both corporations must be Elks, drawn from the limited pool of the six constituent lodges. Although the Constitution allows for up to six citizens, who may or may not be Elks, to serve on the Board of Trustees, this does not adequately take the corporations out of the "related party" realm. In this regard, see *Cerebral Palsy School and Treatment Center of Camden County, Inc. v. State of N.J., Dep't. of Educ., Div. of Finance*, 1988 *S.L.D.* 1693 (June 10, 1988), *aff'd. Comm. Ed.*

Comm. Ed. (July 19, 1988), where it was found that two exceptions to common membership on respective boards did not destroy the common control of both corporations.

Finally, I **FIND** Article 2(e) of the Constitution and By-Laws, requiring the Training Center to be located at 1481 Main Street, Clifton, N.J., is further dispositive evidence that the lease agreement was between related parties and was not an arms-length transaction. Petitioner was bound by its internal governing documents to lease the 1481 Main Street premises owned by the Committee, for use as its primary school location. Thus, it was not free to negotiate a lease in the open market, for an alternate site, even if it was in its self-interest to do so. In short, the hallmarks of an arms-length transaction detailed in *Chomakas, supra*, were not met.

Thus, for the foregoing reasons, I **CONCLUDE** there are no genuine issues of material fact and that the respondent is entitled to prevail as a matter of law. Accordingly, respondent's motion for summary decision is hereby **GRANTED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

5/18/99
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

May 21, 1999
DATE

D. M. Antonantes Jr.
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 25 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

OAL DKT. NO. EDU 1371-98
AGENCY DKT. NO. 422-11/97

PASSAIC COUNTY ELKS CEREBRAL PALSY TREATMENT CENTER BOARD OF TRUSTEES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	

The record and initial decision issued by the Office of Administrative Law have been reviewed. Petitioner's exceptions were untimely filed pursuant to *N.J.A.C.* 1:1-18.4. [1]

Upon comprehensive review of the record in this matter, the Commissioner concurs with and adopts as his own the recommendation of the Administrative Law Judge to dismiss the Petition of Appeal for the reasons set forth in the initial decision.

Accordingly, for the reasons expressed in the initial decision, this matter is hereby dismissed.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] In accordance with *N.J.A.C.* 1:1-18.4, exceptions may be filed within thirteen (13) days from the date on which the initial decision was mailed to the parties. In the instant matter, the initial decision was mailed to the parties on May 25, 1999. Consequently, exceptions had to be filed no later than June 7, 1999. Petitioner's exceptions were mailed on June 17, 1999 and received by the Commissioner on June 18, 1999; therefore, they are deemed untimely.

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

July 6, 1999
Date of Mailing, July 6, 1999

214-99

EDU #1371-98
C # 214-99
SB # 35-99

PASSAIC COUNTY ELKS CEREBRAL PALSY TREATMENT CENTER BOARD OF TRUSTEES,

PETITIONER-APPELLANT,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, July 6, 1999

For the Petitioner-Appellant, Malcolm J. McPherson, Jr., Esq.

For the Respondent-Respondent, Arlene G. Lutz, Deputy Attorney General
(John J. Farmer, Jr., Attorney General of New Jersey)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. In so doing, we grant the respondent's motion to suppress the appellant's reply brief to the extent that it includes a 1986 memorandum from a former assistant commissioner which was not contained in the record of this matter. We have therefore disregarded all references in the reply brief to such memorandum.

December 1, 1999

Date of mailing DEC 03 1999

216-99

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

July 7, 1999

AGENCY DKT. NO. 127-5/99

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

For the District, Thomas W. Sumners, Jr., Esq. (Sumners, George & Dortch, P.C.)

For Respondent, Michael T. Barrett, Esq. (Bergman & Barrett)

This matter having been opened before the Commissioner of Education on May 27, 1999 through certification of tenure charges of unbecoming conduct and other just cause against respondent, a tenured teacher, by the School District of the City of Trenton; and

The respondent having been served by the District on May 27, 1999, via certified mail, return receipt requested, and regular mail, and counsel designated by the District as respondent's representative by regular mail, with a copy of the charges, the Statement of Evidence and the Certificate of Determination; and

The Commissioner having directed respondent, via both certified and regular mail on May 28, 1999, with a copy of such directive, sent by regular mail, to counsel designated by the District as respondent's representative, to file an Answer to the tenure charges against him; and

Whereas, such communication clearly provides respondent notice that, pursuant to *P.L.* 1998, *c.* 42, effective July 1, 1998, an individual against whom tenure charges are

certified shall have 15 days from the date the charges are certified to the Commissioner to submit a written response to the charges, and that failure to answer within the prescribed period will, absent granting of an extension for good cause shown, result in the charges being deemed admitted and the Commissioner deciding the matter on summary judgment pursuant to *N.J.A.C.* 6:24-1.4(e); and

The certified mail confirmation of delivery of the May 28, 1999 communication to respondent has not been returned to the Commissioner and the regular mail copy has not been returned as undeliverable; and

Counsel for respondent submitted an Answer to the charges on June 15, 1999 (postmarked June 14, 1999) and, subsequently, filed a second Answer on June 17, 1999 (postmarked June 16, 1999), both submissions being untimely filed, and no request for an extension of time, for good cause, within which to file having been made; and

In that no timely reply has been received from respondent in response to the District's charges, each count of the charges against respondent is deemed to be admitted; and

The Commissioner's review of the tenure charges certified against respondent by the District and the Statement of Evidence in support of those charges indicate unbecoming conduct and other just cause in that respondent, on a number of occasions, used inappropriate language of a sexual nature during his French class, made inappropriate sexual comments to certain individual students, and made inappropriate physical contact with a minor student; and

Deeming such charges to be admitted, and noting that respondent has not replied to the specific allegations contained therein, the Commissioner finds that respondent's actions constitute unbecoming conduct and other just cause; and

The Commissioner further finds such charges sufficient to warrant the penalty of removal; now, therefore,

IT IS ORDERED this _____day of July 1999 that summary judgment shall be granted to the District, and Henry Allegretti shall be dismissed from his tenured teaching position in the District's employ as of the date of this order.*

This matter shall be referred to the State Board of Examiners for action, as that body deems appropriate, against respondent's teaching certificate(s).

COMMISSIONER OF EDUCATION

---

*This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education, pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.* within 30 days of its filing. Commissioner decisions are deemed filed three days after date of mailing to the parties.

July 7, 1999
Date of Mailing, July 7, 1999

217-99

IN THE MATTER OF THE TENURE	:	
HEARING OF SANDRA JOYNER,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

July 7, 1999

AGENCY DKT. NO. 121-5/99

IN THE MATTER OF THE TENURE	:	
HEARING OF SANDRA JOYNER,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

For the District, Joseph Verga, Esq.

This matter having been opened before the Commissioner of Education on May 20, 1999 through certification of tenure charges of chronic and excessive absenteeism, unbecoming conduct, and abandonment of position by the State-operated School District of the City of Newark; and

The respondent having been served by the District on May 13, 1999, via certified mail, return receipt requested, and regular mail, with a copy of the charges, the Statement of Evidence and the Certificate of Determination; and

The Commissioner having directed respondent, via both certified and regular mail on May 21, 1999, to file an Answer to the tenure charges against her; and

Whereas, such communication clearly provides respondent notice that, pursuant to *P.L.* 1998, *c.* 42, effective July 1, 1998, an individual against whom tenure charges are certified shall have 15 days from the date the charges are certified to the Commissioner to submit a written response to the charges, and that failure to answer within the prescribed period will, absent granting of an extension for good cause shown, result in the charges being deemed

admitted and the Commissioner deciding the matter on summary judgment pursuant to *N.J.A.C.* 6:24-1.4(e); and

The certified mail confirmation of delivery of the May 21, 1999 communication to respondent has not been returned to the Commissioner and the regular mail copy has not been returned as undeliverable; and

In that no reply has been received from respondent in response to the District's charges, each count of the charges against respondent is deemed to be admitted; and

The Commissioner's review of the tenure charges certified against respondent by the District and the Statement of Evidence in support of those charges indicate: 1) incapacity and/or unbecoming conduct due to her excessive absenteeism in that between January 1997 to March 1999 respondent was absent from her duties 265 days, thereby disrupting the delivery of education and continuity of instruction to the pupils of the Newark Public Schools; 2) unbecoming conduct in that during the period of absences set forth above, respondent submitted Sick Day Donor Program Request Forms, pursuant to which certain staff had purported to give respondent use of their sick days. Such forms, however, were either altered or contained forged signatures. Respondent thereupon submitted the altered Sick Day Donor Program Requests to the District's Division of Health Services and was credited with and received payment for these sick days, resulting in a theft and improper payment of public funds; and 3) abandonment of position in that respondent submitted an Employee's Medical Certificate Form to the District's Office of Health Services on February 5, 1999 which indicated that her expected date of return to work would be March 1, 1999. To date, respondent has not returned to work, nor has she contacted the District to advise of her whereabouts; and

Deeming such charges to be admitted, and noting that respondent has not replied to the specific allegations contained therein, the Commissioner finds that respondent's actions constitute unbecoming conduct and abandonment of position; and

The Commissioner further finds such charges sufficient to warrant the penalty of removal; now, therefore

IT IS ORDERED this 7 day of July 1999 that summary judgment shall be granted to the District, and Sandra Joyner shall be dismissed from her tenured teaching position in the District's employ as of the date of this order.*

This matter shall be referred to the State Board of Examiners for action, as that body deems appropriate, against respondent's teaching certificate(s).

COMMISSIONER OF EDUCATION

*This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education, pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 et seq., within 30 days of its filing. Commissioner decisions are deemed filed three days after date of mailing to the parties.

July 7,1999
Date of Mailing, July 7, 1999

218-99 SEC

IN THE MATTER OF	:	
PATRICIANNE G. WILDER,	:	COMMISSIONER OF EDUCATION
VICTORY GARDENS BOARD	:	DECISION
OF EDUCATION, MORRIS	:	
COUNTY.	:	
_____	:	

July 7, 1999

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
PATRICIANNE G. WILDER,	:	
Victory Gardens Board of Education	:	**SEC Docket No.: T11-99**
Morris County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Patricianne G. Wilder was elected to serve a three-year term on the Victory Gardens Board of Education in April 1998; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on December 17, 1998; and

WHEREAS, the NJSBA conducted seven training sessions between April 1998 and April 1999 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held in March 1999; and

WHEREAS, the Commission issued an Order on April 26, 1999, directing Ms. Wilder to Show Cause why she had not attended training up until that time; and

WHEREAS, Ms. Wilder failed to respond; and

WHEREAS, the Commission notified her that the Commission would discuss this matter at its May 26, 1999 meeting, that she had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission has considered that Ms. Wilder failed to offer any reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 1998 to April 1999 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds it appropriate to remove a board member who has failed to comply with the act and has offered no reasons for her failure to do so;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Ms. Wilder violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education remove her from the board.

Dated: May 26, 1999

Paul C. Garbarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on May 26, 1999.

Lisa James-Beavers, Executive Director

Ljb/T1199.doc

AGENCY DKT. NO. 143-6/99

IN THE MATTER OF	:	
PATRICIANNE G. WILDER,	:	COMMISSIONER OF EDUCATION
VICTORY GARDENS BOARD	:	DECISION
OF EDUCATION, MORRIS	:	
COUNTY.	:	
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6:3-9.4; and

Whereas the School Ethics Commission sent ample notice to the above-named Board member of her failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on April 26, 1999, the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, the above-named Board member failed to respond to such Order; and

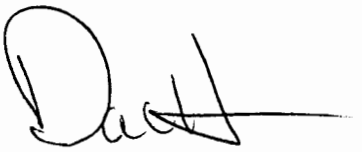
Whereas, the Commission voted on May 26, 1999, to recommend removal of the above-named Board member for failure to attend the required training program for the one year allowed for such attendance in violation of State statute, and upon the above-named Board member's failure to offer reason for her non-attendance, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on June 7, 1999, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, no response was forthcoming; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is removed from office as of the date of this decision.



COMMISSIONER OF EDUCATION

July 7, 1999
Date of Mailing, July 7, 1999

ROCCO DI MAGGIO,	:	
	:	
PETITIONER,		
	:	
V.		COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, a teaching staff member, alleged that respondent Board violated his tenure and seniority rights when it reassigned him from a twelve-month position to a ten-month position and prorated his annual salary to reflect his ten-month work schedule as opposed to the twelve-month work schedule in his prior assignment.

The ALJ granted petitioner's motion for summary decision, concluding that if the full-time assignment to which petitioner's tenure and seniority rights entitle him is a ten-month as opposed to previous twelve-month employment, *N.J.S.A.*18A:28-9, when read in conjunction with *N.J.S.A.* 18A:28-5, prevented the Board from reducing petitioner's annual salary.

In light of the Appellate Division's recent decision in *Carpenito, supra*, the Commissioner reversed the decision of the ALJ and granted summary decision to respondent, concurring with respondent that it was permissible for the Board to reduce petitioner's salary upon abolishment of his twelve-month position and reassignment to a ten-month position as part of a bona fide reduction in force.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 6389-97

AGENCY DKT. NO. 257-7/97

ROCCO DI MAGGIO,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF TRENTON, COUNTY OF MERCER,

Respondent.

Steven R. Cohen, Esq., and **Keith Waldman,** Esq., for petitioner (Selikoff and Cohen, attorneys)

Thomas W. Sumners, Jr., Esq., and **Giuffre M. Hollingsworth,** Esq., for respondent (Sumners, George & Dortch, attorneys)

Record Closed: November 23, 1998 Decided: May 24, 1999[1]

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter commenced on July 11, 1997 when Rocco DiMaggio (hereinafter petitioner) filed a petition of appeal with the Commissioner of Education seeking a determination that the

[1] Extensions of time for issuing the decision in this matter were requested and granted pursuant to *N.J.S.A.* 52:14B-10(c).

Board of Education of the City of Trenton (hereinafter respondent) had violated his tenure and seniority rights when it reassigned him from a twelve-month position to a ten-month position, effective September 1, 1997. An answer on behalf of respondent was filed on July 22, 1997 and on July 30, 1997, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 to -13.

The matter was reassigned to the undersigned on September 23, 1997 after Kathryn A. Clark, the administrative law judge originally assigned to the case, issued an order recusing herself.

A prehearing conference was scheduled and was conducted on November 10, 1997, together with a number of other matters which were being consolidated for determination. A separate supplemental prehearing conference was scheduled in the above-captioned matter on November 20, 1997, at which time it was determined that consolidation was not appropriate. An amended answer was filed on behalf of respondent on December 15, 1997. Thereafter, numerous telephone conference calls took place to ascertain the status of this matter while the parties were engaged in settlement negotiations. On or about September 10, 1998, the parties entered into a stipulation and consent order resolving the petition of appeal in part and establishing a briefing schedule for the remaining issue. An amendment to the agreement was forwarded on September 24, 1998, and on October 28, 1998 the undersigned entered an amended consent order to reflect the changes set forth in the September 24, 1998 letter. That order is attached hereto and made a part hereof as if set forth herein at length.

In accordance with the terms of the Consent Order, counsel for petitioner submitted a motion for summary decision, together with supporting papers. Responding papers and a cross-motion for summary decision were filed on behalf of respondent, and petitioner filed a reply. Oral argument on the motions took place by telephone conference call on November 23, 1998, whereupon the record closed.

FINDINGS OF FACT

The facts relevant to a determination of this matter are not in dispute and I therefore **FIND** the following as uncontested facts.

By letter dated May 1, 1997, respondent notified petitioner as follows:

> Due to economy and a Reduction In Force, the Board of Education, on Monday, April 28, 1997, approved the Superintendent's recommendation to reassign you from the position of Teacher Specialist, assigned to Trenton High Vocational School, to Auto Mechanics Teacher (Small Engine), location to be determined, effective September 1, 1997.

In fact, the position petitioner held prior to respondent's actions which resulted in the within matter was Job Placement Coordinator at Trenton Central High School, a twelve-month position which was characterized by respondent as a "teacher specialist position" and which required only an instructional certificate. Immediately prior to assuming the position Job Placement Coordinator, petitioner had held the position of Cooperative Industrial/Education Coordinator, a ten-month position which required an educational services certification with a cooperative industrial education endorsement.

On June 30, 1997, petitioner was reassigned to a ten-month position (teacher of auto mechanics/small engines). In so doing, respondent maintained petitioner's rate of salary and level of monthly compensation. In effect, however, petitioner's annual salary was reduced because his compensation was prorated to reflect his ten-month work schedule as opposed to the twelve-month work schedule in his prior assignment.

In the attached amended consent order entered October 28, 1998, the parties agreed that effective September 1, 1998 respondent would place petitioner in the position teacher of auto mechanics/small engines at Central High School and would place him on a preferred eligible list for teacher-specialist, CIE coordinator and Job Placement Coordinator.

The parties further agreed that the only remaining issue in the case was whether respondent was required to maintain petitioner's annual salary frozen or "red circled" at its former level until the annual salary on the salary guide for teacher of auto mechanics became equal to or greater than the annual salary for his twelve-month assignment as teacher specialist.

APPLICABLE LAW AND DISCUSSION

The once classic statement of the standard for granting or denying summary judgment set forth in *Judson v. Peoples Bank and Trust Co. of Westfield*, 17 *N.J.* 67 (1954), was recently modified in *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520 (1995). Therein the Court held that the standard to be applied is now the same as the standard for determining motions for involuntary dismissal under *R.* 4:37-2(b) and for determining motions for judgment under *R.* 4:40-1 and *R.* 4:40-2. Trial courts considering motions for summary judgment are now required to engage in the same type of evaluation, analysis or sifting of evidential materials in light of the burden of persuasion that applies if the matter goes to trial. The Court explained:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.". . . Credibility determinations will continue to be made by a jury and not a judge. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of *Rule* 4:46-2. . . . The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law, . . ., the trial court should not hesitate to grant summary judgment. (citations omitted) *Id.* at 540.

The Court noted that to send a case to trial knowing that a rational decision-maker could reach but one conclusion was indeed "worthless" and would "serve no useful purpose." The purpose of

this new standard, the decision explained, was to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves.

In the present matter, the parties stipulate that none of the material facts are in dispute and accordingly, this matter is ripe for summary decision.

A determination of the issue in the within matter requires reconciliation of two competing interests reflected in two separate statutory provisions. The first, *N.J.S.A.* 18A:28-5, defines the tenure rights of teaching staff members who have satisfied certain conditions and have obtained tenure in the district and provides in pertinent part that those persons:

> . . . shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by (*N.J.S.A.* 18A:6-9 *et* seq.) . . .

Tenure is a legislative status, not a contractual one, and the statutory rights enumerated attach to a "position" in the public schools in a particular district. *Howley v. Ewing Bd. of Ed.*, 6 *N.J.A.R.* 509, 515-516. The other statutory provision implicated in the within matter reflects the competing interests of the school district and provides:

> Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education *to reduce the number of teaching staff members, employed in the district* whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.
>
> [Emphasis added; *N.J.A.C.* 18A:28-9]

The case upon which petitioner primarily relies in support of his position that he is entitled to continue to receive his previous salary notwithstanding that it was for twelve months

of work rather than his current ten-month schedule is *Ivey Avery, et al. v. Bd. of Ed. of the Cty. of Trenton*, Comm'n decision 573-97, Nov. 3, 1997 (unreported) (appeal pending to the State Bd. of Ed.). In that case, when the Trenton Board of Education (notably also the respondent herein) abolished certain "teacher-specialist" positions, purportedly for reasons of economy or efficiency, wherein the teachers had been employed on a twelve-month basis and had reassigned those teaching staff members to classroom teaching assignments on a ten-month basis, the Commissioner of Education determined, contrary to the opinion of the administrative law judge, that in fact no reduction in force had occurred because the Board had not "reduce(d) the number of teaching staff members employed in the district" either by termination of employment or by diminution of full-time positions to part-time positions. Commissioner Klagholz further concluded that because petitioners had not lost their full-time employment, the seniority regulations promulgated to effectuate a reduction in force conducted pursuant to *N.J.S.A.* 18A:28-9 did not apply. He explained:

> Rather, the Commissioner finds that the Board acted pursuant to its managerial prerogative to transfer teaching staff members. Petitioners, who acquired tenure as teachers, and not as "teacher/specialists," were transferred within the scope of their certificates to alternative teaching assignments, *i.e.*, as classroom teachers. The Commissioner recognizes that a "tenured teacher may be 'transferred' or reassigned within the scope of the endorsements on his or her Instructional Certificate *** but may not be transferred involuntarily from one position to another." *Howley and Bookholdt v. Ewing Township Board of Education*, 1982 *S.L.D.* 1328, 1340, aff'd State Board June 1, 1983. Here, petitioners cannot claim that the classroom teaching assignments are different "positions" for the purpose of a tenure analysis. "***[T]he Commissioner has consistently maintained that, with unrecognized titles, the scope of a position for purposes of tenure entitlement is that of the endorsement(s) required to hold it.***" *MacMillan*, *supra*, at 22. The teacher/specialist positions formerly held by petitioners merely required that they hold instructional certificates, with no specific endorsements. Not unlike the State Board's observations in *Williams*, the certification required of the teacher/specialist and of these classroom teachers is the same, tenure as a teacher can be accrued in both titles, and the duties to be performed as classroom teachers "are of no less importance from an educational standpoint." *Williams*, *supra*, at 158.

The Commissioner then ordered that the petitioners be compensated with the same salary and emoluments they had enjoyed in their employment as "teacher-specialists" and noted that respondent could elect to freeze petitioners' salaries until such time as their compensation was in accord with the teachers salary guide for those employed on a ten-month basis. In the *Williams* case cited by the Commissioner (*Williams v. Plainfield Bd. of Ed.*, 1979 *S.L.D.* 220, aff'd in part and rev'd in part, State Bd. of Ed., 1980 S.L.D. 1552, *aff'd* 176 *N.J. Super.* 154 (App. Div. 1980), *certif. denied*, 87 *N.J.* 306 (1981), the petitioner, a tenured principal, had been involuntarily transferred from a high school principal to an elementary school principal's position. The "transfer" was one done pursuant to the Board's authority in *N.J.S.A.* 18A:25-1 and was not a violation of petitioner's tenure rights since she was simply "transferred from one principalship to another." The action of the Board in that matter, however, was not taken as the result of a reduction in force but rather was occasioned because of the district's dissatisfaction with her performance as a high school principal. The State Board in its opinion held that a twelve-month high school principal by reason of holding a certificate to serve as principal at any grade level was subject to reassignment at her board's discretion to a ten-month elementary principalship notwithstanding the fact that the salary scale for high school principals was somewhat different from the salary scale for elementary principals. Noting that Williams' salary had not been reduced in the new assignment, the State Board decision explained:

> Moreover, to require a board of education to pay all transferred tenured personnel in accordance with future salary schedules which might be adopted for their respective earlier positions would cause endless confusion in negotiations and administration of employee contracts.
>
> Court decisions have also indicated that tenure rights do not include future salary expectations. In *Greenway v. Camden Board of Education*, 129 *N.J.L.* 47 (Sup. Ct. 1942), a tenured high school teacher was transferred to the junior high school. He contended that his transfer constituted a reduction in salary because the maximum salary prescribed for the former job exceeded that fixed for the junior high or intermediate school. The annual salary paid to the teacher, however, was the same after as before the transfer. Upholding the action of the board of education and rejecting the teacher's claim that he had vested

rights in the high school salary increments, the Supreme Court said (*N.J.L.* at pg. 47):

> The failure to receive an increase of salary does not constitute a reduction.

> In our view, salary expectancies at any given moment do not determine rank; nothing in the tenure statutes states or implies that two otherwise comparable positions must have identical salary expectancies before an incumbent may be transferred from one to the other. Compensation is treated separately in the tenure laws. So long as it is not reduced, a tenured employee has not suffered a loss of tenure rights merely because he is transferred to a job which has a comparable rank, albeit a lesser salary expectancy.

The Commissioner's conclusion in *Avery, supra,* that the petitioners were merely transferred from one full-time assignment within their tenured position to another full-time assignment within their tenured position, albeit one assignment was on a twelve-month calendar year and the other on a ten-month academic year, and that no reduction in force within the meaning of *N.J.S.A.* 18A:28-9 occurred, is supported by the recent decision of the Appellate Division in *State v. Communication Workers*, 285 *N.J. Super.* 541 (App. Div. 1995) *certif. denied* 143 *N.J.* 519 (1996), wherein the court concluded that the Department of Environmental Protection had effectuated a legitimate layoff when it abolished approximately one-half of all forty-hour work-week positions, and affected employees, who were entitled to exercise bumping rights, moved to newly created thirty-five hour work-week positions. Rejecting the argument of the Communication Workers Association that the State could not couch a decision to reduce the work hours of its employees without negotiation in terms of a "layoff" and "rehire," the court distinguished its opinion in *In re Piscataway Tp. Bd. of Ed.*, 164 *N.J. Super.* 98 (App. Div. 1978). In that case, the Appellate Division had held that an employer ordinarily has the duty to negotiate before implementing a reduction in its employees' workday or workweek or workyear and stated in pertinent part:

> The Board here argues that economy motivated the action complained of and that there is no material difference between the Board's right to cut staff and the right to cut months of

> service of staff personnel where the economy motive is common to both exercises. We disagree. While cutting staff pursuant to *N. J. S. A.* 18A:28-9 would be permissible unilaterally without prior negotiation, see *Union Cty. Bd. of Ed. v. Union City Teach. Ass'n*, 145 *N.J. Super.* 435 (App. Div. 1976), certif. den. 71 *N. J.* 348 (1977), but *cf. State of New Jersey v. State Supervisory Employees Ass'n*, 78 *N. J.* 54 (1978), there cannot be the slightest doubt that cutting the work year, with the consequence of reducing annual compensation of retained personnel who customarily, and under the existing contract, work the full year (subject to normal vacations), and without prior negotiation with the employees affected, is in violation of both the text and the spirit of the Employer-Employee Relations Act. *Cf. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n*, 78 *N. J.* 25 (1978).

The *Piscataway* court ordered back pay for all the employees affected by the Board's resolution which had reduced the yearly term of employment for a number of principals from twelve months to ten months, entailing a proportionate reduction in salary of such persons. Recognizing the continued validity of *Piscataway*, the Court in *State v. Communication Workers, supra,* explained:

> *Piscataway*, *supra*, is distinguishable because this case involves the State and thereby implicates a specific statutory and regulatory scheme under which the State's conduct constitutes a layoff.
>
> We recognize that the statute and regulation do not mandate that DEP conduct layoffs, and that absent any imperative that the employer act a given way, prior case law supports CWA's assertion that the regulations do not preempt negotiations on the subject of a workweek reduction. Nonetheless, we are satisfied that the regulations mandating, as they do, that the DOP Commissioner act to determine and designate lateral, demotional and specific reemployment rights for all affected titles prior to the layoff, demonstrates that a comprehensive and legitimate plan to equate the present action of the State with a layoff is legitimate and within the statutory authority. *See N.J.A.C* 4A:8-1.1 *et seq.* Thus, PERC's decision was neither arbitrary nor capricious.

Accordingly, at least in the education context, an employer may not through a reduction in force reduce the salaries of full-time employees by abolishing their twelve-month employment and reassigning them to ten-month employment within the same position title.

Over the years decisions in the education context have been in inconsistent with respect to this issue.

In support of his position that a tenured teaching staff member cannot be reduced in salary in an involuntary transfer stemming from a RIF, petitioner cites *D'Alonzo v. West Orange Board of Ed.*, C.D. 162-85, May 13, 1985 (unreported) aff'd. *State Board of Education*, September 4, 1985 (unreported) and *Stolte v. Willingboro Board of Ed.*, 1981 S.L.D. 770. In *D'Alonzo*, the petitioner, a high school assistant principal, was reassigned after his particular employment was abolished to an assistant principal's position at a junior high school. Although the Commissioner barred petitioner's seniority claims as untimely, he nevertheless held that the Board was obligated to pay the petitioner at least the same salary he had received at the high school:

> *N.J.S.A.* 18A:28-5 prohibits reduction in compensation except for the reasons stated and in the manner prescribed therein. This does not preclude, however, that he be compensated pursuant to the salary guide for junior high assistant principals (P-3) as long as the salary is not less than $45,450. Notwithstanding this determination, his salary may be maintained at that level until such time as it accords with the junior high school assistant principal's salary guide. C.D. at 11 (citations omitted).

In *Stolte, supra,* the petitioner served as an assistant principal and as a result of a legitimate reduction in force that particular employment was abolished and he was reassigned to the position physical education teacher to which he was entitled pursuant to his seniority rights. Following the reassignment the petitioner received the same salary he would have received as a principal, but his salary was frozen at its existing level and he was not advanced on the guide. He petitioned the Commissioner claiming he should have advanced on the guide. The administrative law judge rejected this argument and found that the board had acted

appropriately when it froze his salary at its existing level until the teaching salary guide caught up to his previous salary as an assistant principal. The Commissioner affirmed the findings and determinations rendered in the initial decision. In Both *D'Alonzo* and *Stolte,* the legitimacy of the reduction in force for reasons of economy, efficiency or other good cause was not challenged. Likewise in the within matter, no one has challenged the legitimacy of the reduction in force for economic reasons. Respondent distinguishes *Stolte* and *D'Alonzo* from the within matter in that the petitioners in both of those cases continued to work either the same academic year or the same calendar year in the reassigned positions. A number of prior decisions of the Commissioner of Education which would support respondent's position have ruled that when twelve-month positions were abolished and ten-month positions were created instead that a reduction in force had occurred and concomitant salary reductions were appropriate. See, *e.g.*, *Cinnaminson Teachers Assoc. v. Board of Ed. of the Township of Cinnaminson*, 1983 S.L.D. 758; *Swaluk v. Highland Park Boro. Bd. of Ed.*, 1986 S.L.D. 1519 and *Nazario v. Board of Ed. of the City of Bridgeton,* OAL Dkt. No. EDU 4996-79, adopted Commissioner of Education, May 24, 1982. None of these decisions, however, mention the Appellate Division decision in *In re Piscataway Township Board of Ed., supra.* In *Messick v. Board of Education of the Borough of Haddonfield*, 1982 S.L.D. 620, the Commissioner affirmed the findings and determination of the administrative law judge who had approved a reduction in salary where the board had abolished petitioner's twelve-month position and had established a ten-month position instead. In that case, however, the administrative law judge did address *Piscataway* as follows:

> In addition to complying with *N.J.S.A.* 18A:28-9, the Board negotiated with the petitioner's representative prior to abolishing the twelve-month position. In the case of *In re Piscataway Township Bd. of Ed.*, 164 *N.J. Super.* 98 (App. Div. 1978), the court affirmed the decision of the New Jersey Public Employment Relations Commission which held that a school board unilaterally reducing employment of a number of principals from 12 months to 10 months with a proportionate reduction in salary was guilty of an unfair practice in violation of *N.J.S.A.* 34:13A-5.4(a)(1) and (a)(5). While this decision seems contrary to the consistent holdings of the Commissioner of Education, the Board nevertheless negotiated with the HEA over the proposed change in the terms and conditions of employment. Consequently, if there was a duty to negotiate under the facts of

> this case, the Board met that duty as well as having acted in accordance with the Commissioner's decisions.
>
> The import of the above case is that if a school board, has an obligation to negotiate reductions in work year and pay, it also has the right to carry out those reductions. In the present matter, there is no contention that the Board failed to meet any obligation in that regard and the testimony establishes that, in fact, negotiations were carried out.

Finally, in *East Brunswick Education Association v. East Brunswick Board of Education*, 1981 S.L.D. 1280, the Commissioner determined that the teaching staff member had been properly reassigned to a newly created ten-month elementary guidance counselor position when his twelve-month elementary guidance counselor position had been abolished in a RIF. The Commissioner adopted Judge Errickson's decision which had reasoned:

> Petitioner's "particular employment," as referred to by *N.J.A.C.* 6:3-1.10(b), which was abolished by the Board's April 16 action, was that of a twelve-month elementary guidance counselor. That same rule of the State Board of Education specifies that when ones "particular employment shall be abolished in a category, he shall be given that employment in the *same* category to which he is entitled by seniority. . . ." Since the Board on April 16 simultaneously established ten-month elementary guidance positions, petitioner had claim by reason of seniority to employment in the *same* category in one of those ten-month guidance positions. This ten-month position is not considered in the operations of schools to be a part-time or less than full-time position. Since such was available and since petitioner lays no claim in this action to any twelve-month guidance position which may exist in the district, I **CONCLUDE** that the Board's action appointing him to the ten-month position was a proper exercise of its discretionary authority.

With respect to the salary issue, although he did not use the term "redline" or "freeze" Judge Errickson cited *Williams v. Board of Plainfield, supra,* for the proposition that a board may appoint a former twelve-month tenured employee to a ten-month position in the same category of employment so long as the salary is not reduced even though the ten-month position has a lower salary expectation. *Id.* at 1286.

The reduction of a full-time teaching staff member to a part-time employee has uniformly been considered a reduction in force with an appropriate concomitant salary reduction. *Bednar v. Westwood Bd. of Educ.*, 221 *N.J. Super.* 239, 240 (App. Div. 1987); *Klinger v. Cranbury Tp. Bd. of Ed.*, 190 *N.J. Super.* 354, 357 (App. Div. 1982); *Popovich v. Bd. of Ed. of Wharton*, 1975 *S.L.D.* 737, 745.

It is simply not possible to reconcile all of the foregoing inconsistent decisions. What does appear from a composite analysis, however, is that although at first blush there would seem to be no logical explanation for regarding a reduction from full-time employment to part-time employment as a RIF and refusing to consider a twelve-month position to a ten-month position in the same regard, in fact there is justification for the disparate treatment. As noted by Judge Errickson in his opinion in *East Brunswick Education Association, supra*, a ten-month position is not considered in the operations of schools to be part-time or less than a full-time position. See also *N.J.A.C.* 6:3-5.1(f) which provides in pertinent part "For purposes of calculating seniority entitlement, there shall be no distinction between academic years and calendar years." Accordingly, when a teaching staff member is reassigned within the scope of his tenured position from twelve-month employment to ten-month employment, he moves from one full-time assignment to another full-time assignment. Accordingly, there has been no reduction in the number of teaching staff members. This legitimate distinction between full-time employment and part-time employment is emphasized by the decision of the Commissioner in *Adele Vexler v. Board of Ed. of Red Bank*, 1980 S.L.D. 272. Therein the Commissioner determined that refusal by a school psychologist of part-time employment after her full-time position was abolished did not free the Red Bank Board of Education of its obligation to place Vexler on a preferred eligibility list.

In the present matter, the parties agree that petitioner's employment as Job Placement Coordinator was abolished as part of a legitimate reduction in force for reasons of economic efficiency. His tenure rights which attach to the position of "teacher" entitled him to reassignment to another full-time position within the same category. The parties have agreed that petitioner's reassignment as teacher of auto mechanics/small engines complies with the

board's obligation and petitioner's rights. In fact, respondent could have transferred petitioner to the ten-month position teacher of auto mechanics and had respondent done so, pursuant to *Williams v.Plainfield Board of Ed.*, *supra*, it would have been required to redline his salary in the ten-month assignment until it caught up on the guide with his prior twelve-month compensation. Unlike the teaching staff member in *Vexler, supra*, who was free to refuse reassignment to a part-time position and simultaneously maintain her place on the preferred eligibility list for a full-time position, neither petitioner nor Jeannette Williams could have refused the ten-month assignment and still have maintained their tenure rights.

Based upon all of the foregoing, I **CONCLUDE** that the approach which best balances the competing interests of teaching staff members and boards of education is the one adopted most recently by the Commissioner in *Avery, supra*, and directed by Judge Errickson in the *East Brunswick Board of Education* case, *supra*, *i.e.*, if the full-time assignment to which petitioner's tenure and seniority rights entitle him is a ten-month employment as opposed to previous twelve-month employment, *N.J.S.A.* 18A:28-9, when read in conjunction with *N.J.S.A.* 18A:28-5, prevents the Board of Education from reducing the annual salary of that teaching staff member. This approach implements the intention of the statutory scheme to provide teaching staff members with both job security and salary protection and at the same time permits the board to make adjustments required by reasons of economy or changing enrollments. As pointed out during oral argument by petitioner's counsel, the board has still accomplished savings by eliminating the salary of the previous holder of the 10-month teacher of auto mechanics position who was "bumped" by petitioner and by eliminating the requirement of future salary increases to petitioner for a substantial period of time until the 10-month guide reaches his prior compensation.

For the foregoing reasons, it is hereby **ORDERED** that petitioner's motion for summary decision is **GRANTED**. Respondent is ordered to restore petitioner's salary and benefits to those he received during the 1996-97 school year and to reimburse petitioner for back pay and benefits. Such salary and benefits must at least be maintained until such time as petitioner's salary level corresponds with the salary guide for the assigned position on a ten-month basis.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 24, 1999
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

May 24, 1999
DATE

Debbie Antonaitis
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 25 1999
DATE

Barbara A Hennel
OFFICE OF ADMINISTRATIVE LAW

cc

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

AMENDED CONSENT ORDER

OAL DKT. NO. EDU 6389-97

AGENCY DKT. NO. 257-7/97

ROCCO DIMAGGIO,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF TRENTON, COUNTY OF MERCER,

Respondent.

This matter having been the subject of a Consent Order executed by the undersigned on October 9, 1998 (copy attached), and the parties having thereafter submitted amendments thereto, dated September 29, 1998 (copy attached),

It is hereby **ORDERED** that the October 9, 1998 Consent Order is amended to reflect the changes set forth in the attached September 24, 1998 letter.

This order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** either upon interlocutory review, pursuant to N.J.A.C. 1:1-14.10, or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

Oct. 28, 1998
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

cc

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RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

1998 SEP 24 A 9:23

SELIKOFF & COHEN, P.A.
307 Fellowship Road, Suite 314
Mt. Laurel, New Jersey 08054-1233
(609) 778-6055
Counsel for Petitioner,
Rocco DiMaggio

RECEIVED
STATE OF NEW JERSEY
1998 OCT -6 P 12:07

ROCCO DiMAGGIO, an individual,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF TRENTON, COUNTY OF MERCER,

Respondent.

BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY

DOCKET NO. EDUOR-06389-97S
AGENCY DOCKET NO. 257-7/97

STIPULATION AND CONSENT ORDER RESOLVING PETITION IN PART AND ESTABLISHING BRIEFING SCHEDULE FOR REMAINING ISSUE

THIS MATTER, having been initiated upon Petition of Appeal of Petitioner Rocco DiMaggio to the Commissioner of Education, alleging that Respondent Board of Education of the City of Trenton, County of Mercer, violated his tenure and recall rights by reducing his employment and compensation from twelve months to ten months and the Commissioner having referred the matter for hearing to the Office of Administrative Law ("OAL"); and the OAL having assigned the matter to the Honorable M. Kathleen Duncan, A.L.J., and DiMaggio, having appeared by and through his counsel, Keith Waldman, Esquire, of Selikoff & Cohen, P.A. and Respondent, having appeared by and through its counsel, Thomas W. Sumners, Jr., Esq., of Sumners, George & Dortch, P.C., and the Parties having mutually agreed upon a partial settlement of this matter without the necessity of hearing; and the OAL having reviewed the terms of the settlement and believing that it is a fair and just resolution of this matter;

IT IS HEREBY STIPULATED AND AGREED AS FOLLOWS:

1. Effective September 1, 1998, the Board will place DiMaggio in the position CIE Coordinator, a position to which the Parties acknowledge he is entitled by virtue of his tenure, seniority and qualifications. The Board will place DiMaggio on a preferred eligible list for teacher-specialist and job placement coordinator consistent with his tenure, seniority and qualifications.

2. The only remaining issue in this case is whether the Education Laws, regulations and the decisional law of the Commissioner of Education require that the Board maintain DiMaggio's annual salary including longevity payments frozen or "red circled" at its former level as a teacher-specialist until the annual salary on the CIE Coordinator guide (including longevity) becomes equal to or greater than the annual salary for teacher-specialist (including longevity), at which time he is to receive salary (including longevity) in accordance with the CIE Coordinator guide.

3. The Parties will submit their initial briefs on this remaining issue on or before September 8, 1998 and their reply briefs on or before September 25, 1998, at which time the case will be decided on the basis of the Parties' written submissions.

4. The Parties waive a hearing on any other issue in this case.

5. The Parties agree that this agreement constitutes their full understanding. It is agreed that there are no oral understandings or other agreements (written or oral) which would have any impact upon the present action.

6. The Parties further agree that this agreement shall be contingent upon approval by the Commissioner of Education. Neither Party will take any legal action whatsoever that is inconsistent with this Agreement before the Office of Administrative Law or any other forum.

7. The Parties agree that their performance under this agreement will be governed by a covenant of good faith and fair dealing and neither will do anything to deprive the other of the full benefit of the agreement.

8. The Parties agree that this Stipulation may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

Kathleen A Zieger
WITNESS

Rocco A DiMaggio
ROCCO DiMAGGIO

DATED: 8/12/98

CITY OF TRENTON BOARD OF EDUCATION

Amaglia M. Ellis
WITNESS

By: Abdul-Malik Ali
Abdul-Malik Ali
Board President
(Print name and title here)
A duly authorized officer of the Board

DATED: 8/10/98

Thomas W. Simmons Jr.

15d

IT IS on this 9th day of Oct, 1998, ORDERED AND ADJUDGED as follows:

1. The foregoing Stipulation be and hereby is adopted as a Consent Order by the Office of Administrative Law.

2. This Stipulation and Consent Order may be reviewed by the Commissioner of Education either upon interlocutory review, pursuant to N.J.A.C. 1:1-14.10, or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

M. Kathleen Duncan

M. KATHLEEN DUNCAN, A.L.J.

...\PART-SET.ORD

Selikoff & Cohen, P.A.
Counselors at Law

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Telefax: 609-778-6056
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Joel S. Selikoff
Member of NJ and DC Bars

Steven R. Cohen
Member of NJ, PA and DC Bars

Carol H. Alling
* Michael C. Damm
* Keith Waldman

* Members of NJ and PA Bars

VIA FAX AND FIRST CLASS MAIL

September 24, 1998

THOMAS W. SUMNERS JR., ESQ.
Sumners, Council, George & Dortch
120 Sanhican Drive, Suite 300
Box 7824
Trenton, New Jersey 08618

RE: ROCCO DiMAGGIO, PETITIONER vs. BOARD OF EDUCATION
OF THE CITY OF TRENTON, MERCER COUNTY
OAL DOCKET NO. EDUOR-06389-97S AGENCY DOCKET NO. 257-7/97
Amendment of Stipulation and Consent Order
Our File No. 3857

Dear Mr. Sumners:

Please let this letter serve to confirm that, upon countersignature of this letter, the Trenton Board of Education and Rocco DiMaggio (jointly, the "Parties") agree that the Stipulation and Consent Order be amended as follows:

Paragraph 1: Delete the words "CIE Coordinator" and substitute in their place the words "Teacher of Auto Mechanics/Small Engines at Central High School." Change the last sentence to read, "The Board will place DiMaggio on a preferred eligible list for Teacher-Specialist, CIE Coordinator and Job Placement Coordinator consistent with his tenure, seniority and qualifications."

Paragraph 2: The words "CIE Coordinator" are to be replaced with the words "Teacher of Auto Mechanics/ Small Engines."

It is the Parties' understanding that Mr. DiMaggio's placement in the Teacher of Auto Mechanics/Small Engines position is the result of involuntary transfer arising from the reduction in force. As a result, paragraphs three through eight of the Agreement remain in tact. The Parties further understand that this amendment in no way changes the need for determination of the outstanding salary issue pursuant to paragraphs two through three of the Stipulation and Consent Order.

The Parties also agree that upon execution of this letter, a copy may be forwarded directly to Administrative Law Judge Duncan so that she may conform the Stipulation and Consent Order accordingly. The parties understand that their agreement is subject to and dependent upon approval by the Commissioner of Education.

Please countersign below to acknowledge that this is your understanding of the Agreement as modified.

Very truly yours,
SELIKOFF & COHEN, P.A.

BY: _____
KEITH WALDMAN

KW:kaz
c :Maureen Cronin, NJEA Reg. #8
Mr. Rocco DiMaggio

We agree to the above-referenced amendment to the Stipulation and Consent Order in this matter, and request that the form of order be amended accordingly.

City of Trenton
Board of Education

_____
ROCCO DiMAGGIO

BY: _____
THOMAS W. SUMNERS JR., ESQ.
Board Solicitor
A duly authorized
representative of the Board

...\DIMAGGIO\SUMNRS8.LTR

ROCCO DI MAGGIO,	:	
	:	
PETITIONER,		
	:	
V.		COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision issued by the Office of Administrative Law have been reviewed. Respondent's exceptions and petitioner's reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Respondent's exceptions essentially reiterate those arguments contained in its Brief previously considered by the Administrative Law Judge (ALJ); therefore, they shall not be repeated herein. Additionally, respondent argues that the cases primarily relied on by the ALJ to reach her determination that prorating petitioner's salary was prohibited can each be readily distinguished from the facts in the instant matter. Consequently, it is respondent's position that the ALJ misapplied relevant standards to the matter and erroneously granted petitioner's motion for summary judgment. More specifically, respondent urges that *Cinnaminson, supra, Swaluk, supra* and *Nazario, supra* support its proposition that it is appropriate to prorate an employee's salary where his or her twelve-month position is abolished in connection with a bona fide reduction in force and the employee is reassigned to a ten-month position based on his or her seniority and certification.

As to the *Piscataway* matter relied upon by the ALJ, respondent argues, *inter alia,* that:

> Significantly, the [Piscataway] board did not take the challenged action pursuant to a bona fide reduction in force. Instead the involved board asserted that there was no material difference between the exercise of its right to cut the number of staff members pursuant to a reduction in force and its right to cut the number of months of service since both were motivated by economic concerns. The court specifically rejected the board's argument and found that the reduction of work hours (evidencing a change in the terms and conditions of employment) in the absence of a bona fide reduction of force violated the Employer-Employee Relations Act. *** Clearly, the aforementioned decision is not inconsistent with those in which the Commissioner upheld pro-rated reductions in salary where a reduction in force resulted in a twelve-month employee being assigned to a ten-month position. In the instant matter, unlike the case in *Piscataway,* the facts clearly establish that the action taken by the Board was consistent with a bona fide reduction in force. Consequently, the Board did not deviate from the Commissioner's prior decisions. Moreover, given the court's finding that the Piscataway board did not act pursuant to a bona fide reduction in force, the ruling in *Piscataway* did not in any way undermine the Commissioner's prior holdings. (Respondent's Exceptions at pp. 4-5) (citations omitted)

Respondent further avers that an examination of *Messick, supra* confirms the above conclusions. It deems it significant that in the *Messick* case, which involved the reduction of a term of employment from twelve to ten months, the action was taken in connection with a bona fide reduction in force (*Messick, supra* at 624-625), as well as through negotiations with the petitioner's bargaining unit. As to this, respondent points out that in upholding the prorating of Messick's salary and the reduction in the months of her employment, the ALJ therein concluded that the action was consistent with *N.J.S.A.* 18A: 28-9 and the Employee-Employer Relations Act. Respondent further points out that the ALJ in *Messick* questioned the decision in *Piscataway* because it appeared inconsistent with the Commissioner's prior decisions since it seemed to require negotiations prior to a reduction in salary upon reassignment of an employee to a ten-month position. Respondent goes on to state that "it is the position of the Board that the

decision in Piscataway did not require negotiation where the proportional decrease in salary resulted from a bona fide reduction in force. As such, *Messick* and *Piscataway* remain consistent with the prior decisions of the Commissioner of Education." (*Id.* at 6).

Petitioner characterizes the Board's exceptions as insubstantial and contends that the initial decision is a well-reasoned analysis which carefully balances the competing legislative purposes behind the statutes relevant herein (*N.J.S.A.* 18A:28-5 and 28-9). He also asserts, *inter alia,* that respondent's position starts with the false premise that paying him 5/6 of his current salary is not a reduction in salary and rejects the Board's claim that as long as his monthly salary is not reduced, no reduction in compensation has occurred. Petitioner further maintains that the Board's exceptions overstate and mischaracterize *Cinnaminson, supra, Swaluk, supra and Nazario, supra,* averring that the ALJ herein recognized that those cases involved the abolishment of 12-month positions and the creation of 10-month positions, a circumstance which he argues did not happen herein. Moreover, it is respondent's contention that the ALJ's analysis of *Avery, supra, Piscataway, supra, State v. Communications Workers, supra* and *Messick, supra* is sound.

Upon a thorough, comprehensive review of the record in this matter, the broad array of seemingly inconsistent decisions related to the issues presented in the instant matter and the recommended decision of the ALJ, the Commissioner declines to adopt the ALJ's recommended decision granting summary decision to petitioner for the reasons set forth below.

Initially, the Commissioner would like to emphasize that the ALJ is absolutely correct when stating that it is simply impossible to reconcile all of the many inconsistent decisions set forth in the initial decision relative to a Board's alteration of an employee's work year and the impact such action has on salary entitlements, and he commends the ALJ for her comprehensive analysis of that body of case law which spans several decades.

In determining how to apply this diverse body of case law to the dispute herein, the ALJ opted for reliance primarily on the Commissioner's decision in *Avery, supra.* In that case, the Commissioner's holding was premised upon the conclusion that the petitioners therein had *not* been subject to a reduction in force but had merely been transferred from one full-time (twelve-month) teacher position to another full-time (ten-month) teacher position. Consequently, it was determined that they had impermissibly suffered a reduction of their salary when the respondent Board, which as it happens is the same as in the instant matter, had acted to prorate their salaries for ten months of employment based on their twelve-month salaries.

The instant matter, however, as well as the Commissioner's decision in *Avery, supra,* must now be viewed in light of the Appellate Division decision issued on June 29, 1999, subsequent to the filing of the initial decision, in the matter entitled *Edward Carpenito v. Board of Education of the Borough of Rumson, Monmouth County*, decided by Commissioner August 21, 1996, *rev'd* State Board February 4, 1998, *rev'd* New Jersey Superior Court, Appellate Division, Docket No. A-3731-97T3, wherein the court's determination refined the concepts of transfer and reduction in force to hold that when a board of education acts to abolish a teaching staff member's position pursuant to *N.J.S.A.* 18A:28-9 and reassigns that individual to another position with no loss of tangible employment benefit, that action does *not* constitute a reduction in force, but is instead tantamount to a *transfer.*

Applying the court's holding to the fact pattern here, the Commissioner must conclude that petitioner was subject to a reduction in force and not, as might be concluded based upon *Avery, supra*, a transfer. Petitioner's teacher position was abolished pursuant to *N.J.S.A.* 18A:28-9 and he was reassigned to another teacher position, but, unlike the petitioner in *Carpenito*, petitioner herein *did* in fact suffer a loss of tangible employment benefit, specifically, a reduction in his work year/hours and a concomitant reduction in his annual salary.

Consequently, under the principles articulated by the court in *Carpenito*, the Board's action herein cannot be deemed to be tantamount to a transfer, but must instead be construed as a reduction in force. Indeed, the parties themselves do not dispute that petitioner's position of Job Placement Coordinator was abolished by the Board pursuant to the authority granted by *N.J.S.A.* 18A: 28-9 as part of a legitimate reduction in force for reasons of economic efficiency.

The factual circumstances in the instant matter are likewise distinguishable from those in *Williams, supra,* and *Piscataway, supra,* again, because the petitioners in those matters were not subjected to a reduction in force pursuant to *N.J.S.A.* 18A: 28-9, as has occurred herein. The petitioner in *Williams* was *transferred* by the Board therein from a twelve-month position as principal to a ten-month position as principal because of dissatisfaction with her performance, while the petitioners in *Piscataway* had their work hours reduced *in the absence of* an underlying reduction in force so that the board's action was found to have constituted an impermissible alteration of terms and conditions of employment.

As correctly argued by respondent, there is ample case law which supports the proposition that a reduction in a tenured staff member's salary/compensation and benefits is permissible when it is a result of a board's action to effectuate a reduction in force pursuant to its authority under *N.J.S.A.* 18A:28-9. Thus, it was permissible for respondent in the instant matter to reduce petitioner's annual salary, given that the position to which he was entitled based on his tenure and seniority was a ten-month position as opposed to a twelve-month one as held prior to the reduction in force effectuated by the Board, and particularly in light of the fact that the Board maintained petitioner's *rate* of salary based on his prior twelve-month position. *See Casey v. Board of Education of the Township of Cinnaminson,* 95 *N.J.A.R.*2d (EDU) 585.

Consequently, the Commissioner concurs with respondent's position that it was appropriate for it to prorate petitioner's salary upon abolishment of his twelve-month position

and reassignment to a ten-month position. Accordingly, for the reasons expressed herein, the Commissioner grants summary decision to the City of Trenton Board of Education. [1]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

July 8, 1999
Date of Mailing, July 8, 1999

D.F., on behalf of minor child, E.F.,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE PARK, UNION COUNTY,	:	
RESPONDENT,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UNION COUNTY VOCATIONAL-TECHNICAL SCHOOLS, UNION COUNTY,	:	DECISION
INTERVENOR,	:	
J.S. AND E.S., on behalf of minor child, C.S.; K.K. AND E.K., on behalf of minor child, C.K.; J.N. AND M.N., on behalf of minor child, C.N.; AND A.C. AND J.C., on behalf of minor child, A.C.,	:	
INTERVENORS.	:	

SYNOPSIS

Petitioning parent alleged respondent Board of Education of the Borough of Roselle Park (Roselle Park) improperly refused to provide or pay for transportation and tuition costs for her minor child to attend the Union County Magnet High School for Science, Mathematics and Technology (Union County Magnet High School). Union County Vocational-Technical Schools Board of Education (UCVTS), which operates the Union County Vocational-Technical Schools, including the Union County Magnet High School, and other parents, on behalf of their respective children who attend the Union County Magnet High School, were permitted to intervene.

At the OAL, intervenor UCVTS moved for summary decision, asserting that *N.J.S.A* 18A:54-20.1(a) requires respondent Roselle Park to pay the cost of tuition and school transportation for its pupils attending the Union County Magnet High School. The ALJ granted summary decision to UCVTS, concluding that Roselle Park does not maintain a vocational school and *N.J.S.A.* 18A: 54-20.1(a) requires that county pupils who attend a school of their county vocational school district shall have their tuition and transportation costs paid by their home school district unless that district maintains its own vocational school.

The Commissioner concurred with the ALJ that UCVTS is entitled to summary judgment, finding no evidence that Roselle Park offered a program comparable to that of Union County Magnet High School. Taking judicial notice of the New Jersey Department of Education's *Directory of Verified Occupational Educational Programs*, the Commissioner found that of the three vocational programs offered by Roselle Park, only one overlapped with the menu of approved vocational programs offered by UCVTS and that program was not the subject of the within controversy. Thus, the Commissioner ordered respondent Roselle Park to pay the tuition and transportation costs for petitioner's child and intervenors' minor children for the respective dates of their attendance.

July 9, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING
SUMMARY DECISION
OAL DKT. NO. EDU 5903-98
(Formerly EDU 11035-97)
AGENCY DKT. NO. 407-10/97

D.F. on behalf of minor child, E.F.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE PARK, UNION COUNTY

Respondent,

UNION COUNTY VOCATIONAL - TECHNICAL SCHOOLS BOARDS OF EDUCATION,

Intervenor.

J.S. and E.S. on behalf of their minor child, C.S.;
K.K. and E.K. on behalf of their minor child, C.K.;
and J.N. and M.N. on behalf of their minor child, C.N.;
and A.C. and J.C. on behalf of their minor child, A.C.

Intervenors

D.F. petitioner, *pro se*

Edward J. Kologi, Esq., for the intervenor, Union County Vocational - Technical Schools Board of Education, Union County

J.S. and **E.S.**; **K.K.** and **E.K.**; **J.N.** and **M.N.**; **A.C.** and **J.C.**; intervenors, *pro se*

Steven S. Glickman, Esq.
(Ruderman and Glickman, attorneys) for respondent Board of Education of Borough of Roselle Park, Union County

Record Closed: May 14, 1999 Decided: May 24, 1999

BEFORE **SEBASTIAN GAETA**, ALJ:

PROCEDURAL HISTORY

On October 24, 1997 D.F., on behalf of her minor child E.F., filed a petition with the Commissioner of Education to hear and determine controversies which had arisen with respondent, the Board of Education of the Borough of Roselle Park (Roselle Park). The issues, as framed by D.F., are:

1. E.F. was accepted for admission to the Union County Magnet High School for Science, Mathematics and Technology, and

2. The Roselle Park Board of Education has refused to transport and pay tuition for said E.F..

D.F. asserted that the refusal by Roselle Park was in direct conflict with *N.J.S.A.* 18A:54-20.1 and *N.J.A.C.* 6:43-3.11.

By separate Orders the Union County Vocational - Technical Schools Board of Education (Union County Vo - Tech) and other parents, on behalf of their respective children who attend the Union County Magnet High School for Science, Mathematics and Technology (Union County Magnet High School), were permitted to intervene pursuant to *N.J.A.C.* 1:1-16.4.

On October 15, 1998, the Administrative Law Judge Ordered that the respondent, Roselle Park continue to provide school transportation for the children of the petitioner and the intervenor parents to the Union County Magnet School pending decision in this matter.

On April 13, 1999 intervenor, Union County Vo-Tech submitted a Motion for Summary Decision, pursuant to *N.J.A.C.* 1:1-12.5. Respondent, Roselle Park submitted its letter brief in opposition to the Motion for Summary Decision.

Oral argument on the motion was heard on May 14, 1999.

FACTS

The undisputed material facts are:

1. Intervenor Union County Vocational-Technical Schools Board of Education operates the Union County Vocational - Technical Schools, 1776 Raritan Board, Scotch Plains, Union County, New Jersey.

2. The Union County Vocational - Technical Schools includes, *inter alia*, a Magnet High School of Science, Mathematics and Technology.

3. Respondent Roselle Park Board of Education operates the Roselle Park School District which is situated within the County of Union.

4. The *pro se* Petitioners herein are students residing in the Roselle Park School District who have applied for, have been accepted to, and who attend the Union County Vocational - Technical Schools Magnet High School, Mathematics and Technology.

5. The Roselle Park School District does not maintain a Vocational School.

6. The Roselle Park District has and continues to pay tuition and transportation costs for all students attending the Union County Vocational - Technical Schools, exclusive of the Magnet High School of Science, Mathematics and Technology.

7. The Roselle Park School District has refused to provide or pay for transportation and tuition for Roselle Park students attending the Union County Vocational - Technical Schools Magnet High School of Science, Mathematics and Technology.

DISCUSSION

Union County Vo -Tech asserts that *N.J.S.A.* 18A;54-20.1a requires that respondent, Roselle Park pay the cost of tuition and school transportation for its pupils attending the Union County Magnet High School. That statute provides in part:

> The Board of Education of each School District . . . in any County where there is a County Vocational District shall send to any of the Schools of the County Vocational School District each pupil who resides in the School District . . . and who has applied for admission to and has been accepted for attendance at any of the Schools of the County Vocational School District. The Board of Education shall pay tuition for each of these pupils to the County Vocational School District . . . the provisions of this section shall not apply to the Board of Educator of a School District. . . maintaining a Vocational School. . .

Inasmuch as the pupils are attending a county vocational school operated by Union County Vo-Tech and Roselle Park does not maintain its own vocational school, Union County Vo-Tech, on behalf of itself and the pro se parties, contend that the operation of the statute clearly requires respondent to pay the tuition and transportation costs of these pupils.

Roselle Park opposes summary decision. It argues that there are material issues of fact whether the Union County Magnet High School offers a true vocational program and qualifies as a county vocational school for which a board of education, without its own vocational school, must pay the costs of its pupils who attend that school. If the Union County Magnet High School does not qualify, then *N.J.A.C.* 6:43-3.11(a) applies. That regulation provides:

> (a) Pupils shall be permitted to enroll in programs of vocational instruction offered by district boards of education other than their resident district so long as the resident district board of education does not offer a comparable type of program and space is available for additional enrollees in the programs offered by the receiving district board of education

In his affidavit, William Clarke, Superintendent of Schools for Roselle Park School District states:

> I have reviewed the various course curriculae of both the Magnet School and the Roselle Park School District. The Roselle Park School district's curriculum provides more than a comparable program to that provided by the Magnet School and therefore, according to law, the Roselle Park School District does not have to send its students to the Magnet School.

A summary decision in administrative law cases under *N.J.A.C.* 1:1-12.5 are essentially the same as for summary judgment in Superior Court. *N.J.A.C.* 1:1-12.5(b); See *Judson v. People's Bank & Trust Co.,* 17 *N.J.* 67 (1954).

I **CONCLUDE** there is no genuine issue of fact and summary decision is appropriate.

Although there may be an issue of fact as to whether the Union County Magnet High School comports with the statutory standards and expectations for a county vocational school, any such issue does not affect the resolution of this matter.

N.J.S.A. 18A;54-20.1 requires that county pupils, who attend a school of their county vocational school district, shall have their tuition paid by their home school district, unless their home school district maintains its own vocational school.

Respondent, Roselle Park does not maintain a vocational school and the clear mandate of the statute requires that it pay tuition (and transportation) for the children of the intervenor parents who attend the Union County Magnet High School, operated by its County Vocational District. Any challenge that the Union County Magnet High School is not providing an appropriate vocational education is properly directed to the Commissioner of Education. Should the Commissioner agree, it is within the authority of the Commissioner to require that the Union County Magnet School conform its curricula to provide an appropriate vocational education.

ORDER

It is **ORDERED** that respondent, Board of Education of the Borough of Roselle Park, Union County pay the tuition and transportation costs for the minor child of petitioner and the minor children of the intervenor parents for the respective periods such children may attend the Union County Magnet High School.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 25, 1999
DATE

Sebastian Gaeta
SEBASTIAN GAETA, ALJ

Receipt Acknowledged:

May 28, 1999
DATE

D. N. Centanastis Jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 1 1999
DATE

Barbara A Harnett
OFFICE OF ADMINISTRATIVE LAW

sej

OAL DKT. NO. EDU 5903-98
(Formerly EDU 11035-97)
AGENCY DKT. NO. 407-10/97

D.F., on behalf of minor child, E.F.,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE PARK, UNION COUNTY,	:	
RESPONDENT,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UNION COUNTY VOCATIONAL-TECHNICAL SCHOOLS, UNION COUNTY,	:	DECISION
INTERVENOR,	:	
J.S. AND E.S., on behalf of minor child, C.S.; K.K. AND E.K., on behalf of minor child, C.K.; J.N. AND M.N., on behalf of minor child, C.N.; AND A.C. AND J.C., on behalf of minor child, A.C.,	:	
INTERVENORS.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and a reply submitted on behalf of Intervenor Board of Education of the Union County Vocational-Technical Schools (UCVTS) are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4.

Respondent maintains that the UCVTS failed to meet the standards necessary to support a motion for summary decision, pursuant to *N.J.A.C.* 1:1-12.5, contending, *inter alia*, that there is a disputed issue of material fact as to whether it is mandated by law to pay tuition and transportation costs for its students attending the magnet school. (Respondent's Brief in Support of Exceptions at pp. 4, 5) In this regard, respondent posits that the Administrative Law Judge (ALJ) failed to consider the factual disputes set forth in its prior argument raised before the OAL: namely, the UCVTS Magnet High School program does not fall within the definition of "vocational education," in accordance with *N.J.S.A.* 18A:54-1, and, therefore, neither *N.J.S.A.* 18A:54-20.1(a) nor *N.J.A.C.* 6:43-3.11 is applicable. Further, since the ALJ did not determine whether the UCVTS Magnet High School program falls within the statutory definition of "vocational education," respondent reasons that the ALJ improperly applied *N.J.S.A.* 18A:54-20.1(a), "since [the] statute requires payment for students attending a vocational program." (*Id.* at p. 5) Here, respondent

> readily admits that Magnet Schools are not "inherently" outside of the definition of vocational education. Likewise, Respondent submits that Magnet Schools are not automatically found to be within the statutory definition of vocational education. In the present case, there is at least a factual dispute as to whether Intervenor *** has properly linked its program to "advance preparation in specified vocational-technical fields." Respondent will present, and presently submits through the attached Affidavit of William Clarke, *** testimony and documentary evidence indicating that Intervenor's Magnet School has represented itself as providing a program "that will prepare the graduate for a four-year baccalaureate degree program," without reference to "advance preparation in specified vocational/technical fields." (Respondent's Exceptions, Tab 1 at pp. 11-12, citing to portions of *M.R., by his guardian ad litem, J.N., AND K.K., by his guardian ad litem, F.K. v. Board of Education of the Borough of Pompton Lakes, Passaic County*, Commissioner Decision, July 29, 1997, remanded State Board of Education December 3, 1997)

Respondent additionally contends that its curriculum provides "more than a comparable program to that provided by the Magnet School and therefore, according to law, the Roselle Park School District does not have to send its students to the Magnet School." (Affidavit of William Clarke, Superintendent of Schools for the Roselle Park School District (Clarke Affidavit), Respondent's Exceptions, Tab 2 at p.2) That this issue remains a disputed material fact, is, according to respondent, reason to dismiss Intervenor UCVTS's Motion for Summary Decision. (Respondent's Brief in Support of Exceptions at p. 7)

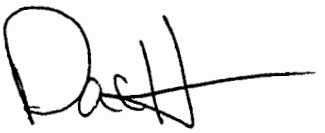
In reply, the UCVTS asserts that the ALJ's decision was both straightforward and correct. The UCVTS reasons that, since it operates, as one of its schools, a Magnet High School for Science, Mathematics and Technology, *N.J.S.A.* 18A:54-20.1(a) mandates that respondent bear the tuition and transportation costs for those students who are accepted into its programs. The UCVTS recognizes that "[t]he sole exception would be if the sending District had its own Vocational School, which Roselle Park indisputably does not." (Intervenor's Reply at p. 1) The UCVTS urges, therefore, that the initial decision be affirmed in all respects.

Upon careful and independent review, the Commissioner concurs that Intervenor UCVTS is entitled to summary decision. As the parties note, petitioner's entitlement to attend the magnet school in question would be prohibited if the respondent Board offered "a comparable type of program***." (*N.J.A.C.* 6:43-3.11(a)) In this analysis, the Commissioner takes judicial notice of the New Jersey Department of Education's *Directory of Verified Occupational Education Programs*, as revised for 1995, PTM No. 1123.00, which indicates, at page 38, that the respondent Board offers three vocational programs, approved in accordance with *N.J.A.C.* 6:43-8.1 *et seq.* Only *one* of those programs, Office Systems Technology,

overlaps with the menu of approved vocational programs offered by the UCVTS.[1] Clearly, as the record herein indicates, the program in Office Systems Technology is *not* the program which is the subject of the within controversy, as offered through the Union County Magnet High School for Science, Mathematics and Technology.[2] Thus, notwithstanding respondent's assertion that it offers a "comparable program" to that of the magnet high school, there is no evidence that such a program has been so approved. Respondent cannot, therefore, invoke *N.J.A.C.* 6:43-3.11(a) to prevent petitioner from attending the Union County Magnet High School for Science, Mathematics and Technology,[3] and summary judgment, therefore, is properly granted to Intervenor UCVTS.

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein and amplified above. Respondent is hereby ordered to pay the tuition and transportation costs for E.F., petitioner's minor child, as well as the minor children of the Intervenor parents for the respective periods of their attendance.[4]

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

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[1] Although the UCVTS identifies its program as "Word Processing," both the UCVTS program and the vocational program offered by the Roselle Park Borough School District carry the same Classification of Instructional Programs (CIP) code, 520401, and are, therefore, "comparable."

[2] It is noted that petitioner refers to the program as "Engineering and Design Technology." (Petition of Appeal at p. 2) Additionally, in the appendix to the Clarke Affidavit, the magnet high school's program is identified as including four years of laboratory science, four years of mathematics and four years of technology offerings, referenced as "Computer Aided Drafting and Design." (Clarke Affidavit, Appendix, at pp. 1, 4)

[3] However, respondent may arguably pre-empt a student's entitlement to attend the vocational program in Word Processing operated by the UCVTS.

[4] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

July 9, 1999
Date of Mailing, July 9, 1999

221-99

FATEMAH FIROZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

July 9,1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. No. EDU 11349-97

AGENCY DKT. No. 404-10/97

FATEMAH FIROZ,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK, ESSEX COUNTY,

Respondent.

Robert T. Pickett, Esq., for petitioner

Cherie L. Maxwell, Esq., and **Kelly Ann Guariglia**, Esq., for respondent
(Sills Cummis Radin Tischman Epstein & Gross, attorneys)

Record Closed: May 10, 1999 Decided: May 20, 1999

BEFORE **DIANA C. SUKOVICH,** ALJ:

Petitioner filed a petition with the State Department of Education (DOE) on October 23, 1997, contesting the withholding by respondent of petitioner's increment for the 1997-98 school year. The DOE transmitted the matter to the Office of Administrative Law on November 26, 1997 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to 13.

Conferences were conducted throughout the proceedings. The parties filed an executed Stipulation of Settlement, Waiver, and Release on May 10, 1999, on which date the record was closed.

Having reviewed the terms of the Stipulation of Settlement, which is attached hereto and made part hereof, I **FIND** as follows:

1. The parties voluntarily have agreed to the terms and conditions of the settlement as evidenced by the signatures contained thereon.

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

Therefore, I **ORDER** that the parties comply with the terms of the settlement and that these proceedings be and are hereby **CONCLUDED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

August 27, 1999
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

5-26-99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 27 1999
DATE

Barbara A Hamer
OFFICE OF ADMINISTRATIVE LAW

\mvh

SILLS CUMMIS RADIN TISCHMAN
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One Riverfront Plaza
Newark, New Jersey 07102-5400
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Attorneys for State Operated
School District of the City of Newark

COMMISSIONER OF EDUCATION
OAL Docket No. EDUOR 11349-97N
Agency Ref. No. 404-10/97

Fatemah Firoz,

Petitioner,

-vs-

State-Operated School District for the City of Newark,

Respondent.

STIPULATION OF SETTLEMENT, WAIVER AND RELEASE

The State-Operated School District of the City of Newark ("Newark" or "District") and Fatemah Firoz ("Petitioner" or "Firoz") agree to the following terms in full resolution of this matter:

WHEREAS, Firoz disputes the bases for the increment withholding for the 1997-1998 school year, and

WHEREAS, Firoz also has outstanding litigation entitled *Fatemah Firoz v. State-Operated School District for the City of Newark*, OAL Docket No. EDUOR 11656-98N, Agency

Ref. No. 496-11/98, which is an appeal from an increment withholding for the 1998-1999 school year, and

WHEREAS, in November 1997 Firoz filed an EEOC Charge of Discrimination against Respondent District, and

WHEREAS, the parties further agree that it is in the public interest to enter into this agreement in resolution of said charges in order to avoid the uncertainty and expense of litigation,

NOW, THEREFORE, the parties agree as follows:

1. Upon approval of this Agreement, Firoz will withdraw her appeals of the 1997-1998 and 1998-99 increment withholdings, with prejudice.

2. The 1998-1999 increment withholding shall remain in effect until the end of the 1998-1999 school year, at which time Newark will review Firoz' observations and evaluations. If Firoz' annual summative evaluation reflects a satisfactory rating, Firoz shall be placed back on the appropriate level of the salary guide, effective September 1, 1999, as if neither increment (for the 1997-1998 and 1998-1999 school years) withholding had occurred. If her 1998-1999 annual summative evaluation reflects a satisfactory rating, Firoz will also have her 1998-1999 increment retroactively restored to September 1, 1998.

3. Upon request, the District will provide Firoz with resources during the remainder of the 1998-1999 school year, towards the goal of enabling Firoz to achieve a satisfactory level of performance, and will work cooperatively with Firoz, towards the goal of her achieving a satisfactory level of performance, which will benefit both parties in this matter. The District will

not issue a 90-day inefficiency charge during this period, pending the results of Firoz' annual summative evaluation.

4. Upon approval of this Agreement, Firoz will withdraw her EEOC complaint of November 1997, and any pending matter in the New Jersey Division on Civil Rights, with prejudice, and will release any and all claims of discrimination she may have for any act or omission through the date of this Agreement.

This agreement is subject to the approval of the State District Superintendent and the Commissioner of Education.

The parties enter this agreement voluntarily and without coercion, after consultation with their respective counsel.

Robert N. C. Nott
Attorney for Petitioner

Dated: 3/15/99

State-Operated School District of the City of Newark

Beverly L. Hall
By:

Dated: 4/29/99

OAL DKT. NO. EDU 11349-97
AGENCY DKT. NO. 404-10/97

FATEMAH FIROZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, recommended stipulation of settlement, waiver and release, and initial decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

July 9, 1999
Date of Mailing, 7/9/99

FRED M. SCHIAVONE CONSTRUCTION, INC.	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE KINGSWAY REGIONAL SCHOOL DISTRICT, GLOUCESTER COUNTY AND OGREN CONSTRUCTION,	:	
RESPONDENTS.	:	

July 9, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING MOTION FOR EMERGENT RELIEF

OAL DKT. NO. EDU 4490-99

AGENCY DKT. NO. 157-6/99

FRED M. SCHIAVONE CONSTRUCTION., INC.,

Petitioner,

v.

KINGSWAY BOARD OF EDUCATION and OGREN CONSTRUCTION COMPANY,

Respondents.

Charles R. Ianuzzi, Esq., for petitioner

Raymond Zane, Esq., for respondent Ocean Township School (Zane & Lozuke, attorneys)

Nathan Van Embden, Esq., for respondent Ogren Construction

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

Petitioner Fred M. Schiavone Construction, Inc., alleges that it is the lowest responsible bidder for public work to be performed for respondent Kingsway Board of Education (BOE). Petitioner claims that the BOE wrongfully awarded a contract for such work to respondent Ogren Construction and petitioner claims that it should be awarded the contract. Petitioner moves for emergent relief, i.e., orders restraining respondents from proceeding with activities and work pursuant to such award.

Respondents deny that the BOE acted improperly and they submit that petitioner has failed to meet its burden for emergent relief. More particularly, respondent Ogren submits that petitioner's bid for the BOE's contract, if added to petitioner's uncompleted contracts, would have exceeded its (petitioner's) classification and aggregate rating limit, so that it appeared that petitioner was not capable of performing the BOE's contract work, the contract should not have been awarded to petitioner and the BOE lawfully awarded the contract to it (Ogren). See N.J.S.A. 18A:18A-1 et seq., N.J.A.C. 6:24-1.5, N.J.S.A. 52:35-1 et seq., N.J.A.C. 17:19-1.1 et seq.

PROCEDURAL HISTORY

On June 11, 1999, petitioner's verified petition, notice of motion, exhibits, etc., were filed with the Department of Education. N.J.S.A. 18A:6-9. The Department transmitted the matter to the Office of Administrative Law (OAL) where, on June 15, 1996, it was filed as a contested case. N.J.S.A. 52:14B-2(b). On June 25, 1999, respondent Ogren's papers in opposition to the motion were filed in the OAL. On June 25, 1999, the motion was heard in the OAL in Trenton (Hamilton Township).

FINDINGS OF FACT

The BOE advertised for bids for construction (additions and renovation) on its school buildings by way of five prime contracts: 1. general construction, site work, and all work not included in other contracts; 2. heating, ventilation and air conditioning; 3. electrical; 4. plumbing,

drainage and fire protection; and 5. structural and steel. General construction was to begin July 19, 1999. Bidders were required to list the total amount of uncompleted contracts. The BOE made bid information and forms available, including a from entitled, "Total of Uncompleted Contracts". Bids and three bid alternates were to be submitted by May 18, 1999. P-1, P-A.

Effective March 5, 1999, petitioner's rating limit classification for bidding on public contracts was $7,000,000. See N.J.S.A. 52:35-1 et seq., N.J.A.C. 17:19-1.1 et seq.

Petitioner timely submitted the following: base bid: $4,797,691, alternate 1: add $170,230, alternate 2: add $92,555, and alternate 3: add $31,000; for a total of $5,091,476. P-1, P-A, RO-1. On the "Total of Uncompleted Contracts" form, petitioner certified that its amount of uncompleted work on contracts was $1,888,517 (the amount was entered over "white-out"). P-C, RBOE-1. Respondent Ogren timely submitted the following: base bid: $4,876,000, alternate 1: $166,000, alternate 2: $90,000, alternate 3: $31,0000; for a total of $5,163,000. P-D. During the argument of this motion, the parties stipulated that petitioner's was the lowest bid and Ogren's was next lowest.

During the argument of this motion, petitioner represented that, on May 18, 1999, the BOE's architect telephoned Fred Schiavone, petitioner's president, and advised him that petitioner was the low bidder. However, the BOE represented that, seeing the petitioner's bid papers, e.g., the whited-cut amount of uncompleted work on contracts, and knowing that petitioner was involved in other substantial construction projects, the BOE's employees and architect were concerned that the award of the BOE's contract could exceed petitioner's rating limit, so they made inquiries in that regard.

Following the BOE's inquiries, by letter dated May 24, 1999, the North Wildwood Board of Education advised Andrew Eubanks, the BOE's business administrator, that petitioner had $1,000,274 in uncompleted contract work due to that district. RBOE-2. And, by FAXed message dated May 25, 1999, the Gloucester County Special Services School District advised Mr. Eubanks that petitioner had a total contract of $4,425,200 on which there were payments of $1,184,736, leaving a balance of $3,240,264. RBOE-3.

Mr. Schiavone alleges that, on June 1, 1999, Mr. Eubanks contacted him and advised him of the following: The BOE needed documentation relative to petitioner's statement of the total of uncompleted contracts and he (Eubanks) had contacted the Gloucester County Special Services School and North Wildwood in that regard. P-1.

Mr. Schiavone also alleges that, on the morning of June 1, 1999, petitioner forwarded a letter to Mr. Eubanks' attention:

> We understand that some question has been raised concerning the amount of our Total Amount of Uncompleted Contracts form submitted with our bid . . . . We provided no specific clarification with the bid because the documents indicate that any modifications or clarification shall be a basis for rejection of the proposal. In accordance with [N.J.A.C.] 17:19-2.12(b) . . . this letter shall serve as clarification of how we computed our Total of Uncompleted Contracts.
>
> As of the bid date, May 18, 1999, our uncompleted contracts on hand consist of the following:
>
> **Addition and Renovations to Margaret Mace Elementary School, North Wildwood, NJ**

Original Contract Sum	$1,737.575.00	
Net Change Orders		
Net Change Orders		(20,000.00)
Contract Sum to 4/24/99		$1,717,575.00
Total Completed as of 4/23/99	738,458.00	
Balance to Finish		$ 979,117.00
Projected May Billing		295,239.00
Projected June Billing		157,000.00
Projected Billing to July 15 (start of contract)		75,000.00
Balance to finish as of July 15, 1999		$ 451,878.00
Projected Uncompleted Contract as of 7/15/99 (does not include OH & P or Retainage)		**$ 385,000.00**

Gloucester County Special Services School, Sewell, NJ

Original Contract Sum	$4,425,400.00	
Net Change Orders		0.00 Contract
Sum to 5/12/99	$4,425,400.00	
Total Completed as of 5/12/99		1,208,914.00

Balance to finish	$3,216,486.00
Projected May/June billing	1,048,876.00
Projected June/July billing	467,147.00
Balance to finish as of July 15, 1999	$1,700,463.00
Projected Uncompleted Contract as of 7/15/99 (does not include OH & P, Unused Allowances or Retainage)	**$1,553,633.00**

Summary	
Uncompleted Contracts, M. Mace	$ 385,000.00
Uncompleted Contracts Gloucester County	1,553,633.00
Total Uncompleted Contracts (projected as of July 15, 1999)	**$1,938,633.00**

The Supplementary General Conditions, 02000 clearly indicate that the building pad is to be completed by the Site Contractor, no later that July 19, 1999. Therefore were will not be able to start our work until the pad is finished. Please refer to [N.J.A.C.] 17:19-2.12(c)1. which states ". . . where a contractor provides with its bid clear and convincing evidence that its outstanding balance of contracts will be within its aggregate rating limit by the time the bid project is scheduled to begin, the duration of the bid project and the risk that the State will encounter if the bid is accepted." As previously stated we could not submit any clarification with the bid as it would serve as a basis for rejection. Furthermore, [N.J.A.C.] 17:19-2.11(b) states "Where there is a question whether a contractor's aggregate rating limit can accommodate a given award, the contractor's bid for the contract shall be opened in the normal course, and the contractor's eligibility shall thereafter be computed.

In a telephone conversation with Mr. Charles Chell of the State of New Jersey Department of Treasury, Contractor Classification, . . . he confirmed that the Total Amount of Uncompleted Contracts form is to include only the actual cost to finish the project without overhead, profit or other indirect costs. I also discussed our most recent classification and the new evaluation procedures. Effective May 25, 1999 he raised our aggregate amount to $9,000,000.00 and he agreed to review our classification further if we submit additional documentation. Although the increased aggregate amount of our classification was not in effect as of the bid date, you can see that we did comply with the State requirements and the intent of the law at the time of the bid. Furthermore, we are bonded to $15,000,000.00 and Fred M. Schiavone is both qualified and capable of performing the General Construction work on your project. We look forward to working with you.

[P-E, emphasis added.]

During the argument of this motion, the BOE represented that, before the BOE's June 1, 1999 meeting - during which it would determine what bid would be accepted, Terrence Crowley, the BOE's superintendent of schools, advised Mr. Schiavone that, because of petitioner's uncompleted contract work, including that for North Wildwood and Gloucester County, petitioner was "in trouble." However, Mr. Schiavone denies that this occurred.

During the BOE's June 1, 1999 meeting, the BOE determined that petitioner was not the lowest responsible bidder and the BOE awarded the contract to Ogren. P-1. (The minutes of the BOE's meeting are not yet available.)

In petitioner's motion papers, petitioner's attorney represents that, on June 2, 1999, he contacted Mr. Eubanks and requested an explanation as to why petitioner had been disqualified and that Mr. Eubanks advised him that the BOE determined that petitioner's total of uncompleted contracts as of the bid date exceeded its aggregate amount available, i.e., $7,000,000. (Petitioner's Brief, ¶11.)

During the argument of this motion, petitioner represented that, on or about June 7, 1999, it had forwarded to the BOE a demand for a "responsibility hearing" to fairly determine whether it was capable of performing the BOE's contract work in addition to its uncompleted contract work.

During the argument of this motion, Ogren represented that, to perform the BOE's work in a timely manner, it has already entered into contracts to purchase materials, retain consultants, etc.

CONCLUSIONS OF LAW

Public contracts laws are intended to encourage competition, guard against favoritism, improvidence, extravagance or corruption and obtain the best economic result for taxpayers. See Pucillo v. Mayor of New Milford, 73 N.J. 349, 356 (1977); Terminal Constr. Corp. v. Atlantic County Sewerage Auth., 67 N.J. 403, 409-10 (1975); In re On-Line Games Contract, 279 N.J. Super. 566, 589 (App. Div. 1995); A & S Transp. Co. v. Bergen County Sewer Auth., 133 N.J. Super. 266, 276 (Law Div.), aff'd, 135 N.J. Super. 117 (App. Div. 1975); Pied Piper Ice Cream v. Essex Cty. Park Comm., 132 N.J.Super. 480 (App. Div. 1975); In re DBC Project No. A0716-00, 303 N.J. Super. 384 (App. Div. 1997).

Consistent with the above principles, the Public School Contracts Law provides that a contract for work on a board of education project "shall be awarded to the lowest responsible bidder." N.J.S.A. 18A:18A-1 et seq. See particularly N.J.S.A. 18A:18A-37.

Consistent with the statutory requirement of award to the "lowest responsible bidder," the BOE required that bidders complete the "Total of Uncompleted Contracts" form, i.e. to demonstrate that they are capable of performing the BOE's contractual work. N.J.S.A. 18A:18A-27. See also, Bodies by Lembo, supra, 286 N.J. Super. at 305, citing D. Stamato & Co. v. Township of Vernon, 131 N.J. Super. 151, 157 (App. Div. 1974).

Statutory bid specifications have been described as mandatory and jurisdictional and a public entity may not waive a material or substantial variance between the conditions under which the bids were invited and the proposals submitted. A party who has failed to materially respond to such specifications may not be classified as a bidder, a bidder for a public contract who failed to comply with bid specifications may lack standing to bring a claim to upset the award of a contract to another bidder who did comply. Standing to bring a claim should be confirmed before proceeding to a decision on a claim's merits. See Travis v. Borough of Highlands, 136 N.J.L. 199, 201 (Sup. Ct. 1947), and Watkins v. Resorts International Hotel & Casino, 124 N.J. 398, 418 (1991); Bodies by Lembo, Inc., 286 N.J. Super. 298, 305 (App. Div. 1996). See also In re On-Line Games Contract, supra, 279 N.J. Super. at 589-90; In re Award of Contract for Constr. of Bayonne Park, 168 N.J. Super. 33, 39 (App. Div. 1979).

Rules governing classification and qualification of bidders provide that, in order to be an eligible bidder for a public contract, a contractor must receive from the Division of Building and Construction a valid classification and rating. N.J.A.C. 17:19-2.11.

The rules provide further:

> (a) A contractor shall not be awarded a contract which, when added to the uncompleted portions of all other currently held contracts from whatever source (public or private) sources, would exceed the contractor's aggregate rating limit. . . .
>
> (b) Where there is a question of whether a contractor's aggregate rating limit can accommodate a given award, the contractor's bid for the contract shall be opened in the normal course, and the contractor's eligibility shall thereafter be computed.
>
> (c) A contractor shall include with each bid a statement of the current value and status of its uncompleted work, and whether the award of the given contract would exceed the aggregate rating limit. Whether a contract is eligible for a given award shall be determined based on the dollar value of the contractor's uncompleted contract work as the bid due date.
>
> 1. However, where a contractor provides with its bid clear and convincing evidence that its outstanding balance of contracts will be within its aggregate rating limit by the time the bid project is scheduled to begin, the Director [of the DBC] shall base this determination on the complexity of the bid project, the duration of the bid project and the risk that the State will encounter if the bid is accepted.
>
> . . .
>
> (e) As a contractor completes existing contracts or discrete portions thereof, the contractor's eligibility for new contracts within its existing aggregate rating shall be adjusted accordingly.
>
> N.J.A.C. 17:19-2.12, emphasis added.]

Consistent with the general presumption that public entities act lawfully and in good faith, a BOE is presumed to have acted properly in exercising its discretion in awarding a public contract, a reviewing court will not substitute its judgment for that of a governing body that has

exercised its discretion in awarding a public contract and the party that claims that a public entity acted unlawfully in determining a bidder unqualified or rejecting a bid for a public contract, a claimant must prove that public entity's action was arbitrary, capricious and unreasonable. Bodies by Lembo, Inc., 286 N.J. Super. 298, 309 (App. Div. 1996); In re On-Line Games Contract, supra, 279 N.J. Super. at 590, Colonnelli Bros., Inc. v. Ridgefield Park, 284 N.J. Super. 538, 541 (App. Div.), certif. denied, 143 N.J. 327 (1995). See also Van Itallie v. Franklin Lakes, 28 N.J. 258, 269 (1958); Fitzpatrick v. Civil Serv. Comm'n, 91 N.J. Super. 535, 539 (App. Div. 1966).

To succeed in a motion for a temporary restraint and interlocutory injunction, the movant must show, among other thiings, that, if the relief is not granted, it will suffer immediate and irreparable harm, i.e., that money damages would not be adequate compensation, and that, when the case is fully heard, it will probably succeed in its claim. See, e.g., N.J.A.C. 1:1-12.6; R. 4:52-1; Crowe v. DeGoia, 90 N.J. 126, 132-134 (1982).

In petitioner's representations (June 1, 1999 letter) relative to the total of its uncompleted contracts, contrary to the rules governing classification and qualification of bidders, instead of listing contract value as of the bid date (May 18, 1999), petitioner credited itself for "projected billing[s]", etc., up to and including July 1999. See N.J.A.C. 17:19-2.12. Even petitioner's figures: $1,938,633, as "Total Uncompleted Contracts," plus its $5,091,476, total bid on the BOE's project, give a sum ($7,030,109) which exceeds petitioner's $7,000,000 classification limit submitted with its bid. See P-B, P-E, RO-1. Also, the BOE had reports that petitioner had $1,000,274 in uncompleted contract work for North Wildwood and $3,240,264 in uncompleted work for Gloucester County and those amounts added to petitioner's $5,091,476, total bid on the BOE's project, give a sum ($9,332,014) which exceed petitioner's classification limit submitted after the submission of the bid and that alleged in the June 1, 1999 letter. RBOE-2, RBOE-3.

Given these circumstances, the BOE was reasonably concerned about petitioner's total of uncompleted contracts and its ability to perform and it cannot be said now that when the case is fully heard petitioner will probably succeed in its charge that the BOE acted in an arbitrary capricious and unreasonable way. To the contrary, it appears that petitioner failed to fairly meet the BOE's requirement of submitting a bid, properly listing the total amount of uncompleted contracts. That is to say, petitioner fails to meet its burden of proof for issuance of restraints.

ORDER

Consistent with the above, **I DENY** the motion for emergent relief.

The parties may serve discovery requests and a telephone conference to discuss the progress of the case and hearing dates will be set.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

June 25, 1999
DATE

JOHN R. TASSINI, ALJ

EXHIBITS

Petitioner's Exhibits:

P-1 Petition and Verification by Schiavone, June 11, 1999

P-A Form of Proposal, submitted by petitioner, undated;
Total Amount of Uncompleted Contracts, partially completed, undated; etc.

P-B Notice of Classification (of petitioner), March 19, 1999

P-C Total Amount of Uncompleted Contracts, submitted by petitioner, May 18, 1999

P-D List of bids and alternates

P-E Letter from petitioner, June 1, 1999

Respondent Board of Education's Exhibits:

RBOE-1 Form of Proposal, submitted by petitioner, dated May 17, 1999

RBOE-2 Letter from North Wildwood Board of Education, May 24, 1999

RBOE-3 FAXed message from Gloucester County Special Services School District, May 25, 1999

Respondent Ogren's Exhibits:

RO-1 List and total of petitioner's total of base bid plus alternates plus uncompleted contracts.

OAL DKT. NO. EDU 4490-99
AGENCY DKT. NO. 157-6/99

FRED M. SCHIAVONE CONSTRUCTION, INC.	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE KINGSWAY REGIONAL SCHOOL DISTRICT, GLOUCESTER COUNTY AND OGREN CONSTRUCTION,	:	
RESPONDENTS.	:	

The record of this emergent matter and an audio cassette tape of the hearing conducted at the Office of Administrative Law (OAL) have been reviewed. Upon such review, the Commissioner concurs, for the reasons set forth in the initial order, that petitioner has failed to satisfy the standard set forth in *Crowe v. DeGoia*, *supra,* for obtaining emergent relief.

Accordingly, the Motion for Emergent Relief is denied. This matter shall continue at the OAL for further proceedings on the merits of petitioner's claim, as deemed necessary.*

IT IS SO ORDERED.

ACTING COMMISSIONER

* This decision, as the Commissioner's final determination in this interim matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

July 9, 1999
Mailed July 9, 1999

224-99

K.P., on behalf of minor child, J.P., Jr.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

July 16, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4483-98

AGENCY DKT. NO. 148-5/98

K.P., on Behalf of Minor Child,

J.P., Jr.,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,

Respondent.

Kevin H. Main, Esq., for petitioenr

Dennis M. DeSantis, Esq., for respondent (Destribats, Campbell, DeSantis, Magee & O'Donnell

Record Closed: June 1, 1999 Decided: June 2, 1999

BEFORE **ROBERT S. MILLER,** ALJ:

This matter was transmitted to the Office of Administrative Law on May 28, 1998, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

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

June 7, 1999
DATE

Robert S. Miller
ROBERT S. MILLER, ALJ

Receipt Acknowledged:

6/4/99
DATE

D. N. Centanaitis/gs
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 7 1999
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

tmp

**Destribats, Campbell, DeSantis,
Magee & O'Donnell
247 White Horse Avenue
Trenton, NJ 08610
Tel: (609) 585-2443
Attorneys for Respondent**

KLARA PALL, as guardian ad litem on behalf of her minor child, Julius Pall, Jr. Petitioner **VS.** BOARD OF EDUCATION OF HAMILTON TOWNSHIP Respondent	**BEFORE THE COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF EDUCATION** **AGENCY DOCKET NO:** 148-5/98 OAL DKT # EDU 4483-98 CONSENT ORDER

This matter being open to the Court on ~~October 5, 1998,~~ JUNE 1 1999 by Clara Pall as guardian ad litem on behalf of her minor child, Julius Pall, Jr., ~~David A. Gies~~ KEVIN H. MAIN, Esquire appearing attorney for Petitioner and the Respondent Board of Education of Hamilton Township, being represented by Dennis M. DeSantis of the law firm of Destribats, Campbell, DeSantis, Magee & O'Donnell, and the parties entered into a Agreement thereto;

It is on this 1st day of JUNE, ~~1998,~~ 1999

1. Ordered that Julius Pall, Jr., will not return to the Hamilton Township School system as a student; and it is further

2. Ordered that all records of the Respondent regarding the expulsion of Julius Pall, Jr., will be expunged and destroyed by the Respondent; and it is further

3. Ordered that if Julius Pall, Jr., at any time in the future returns as a student in the Hamilton Township School System, he will be required to execute the attached contract

Note: The Respondent will verify the 4th marking period grade for Spanish for school year 1997-1998, TH J.I. and make any changes required.

DESTRIBATS, CAMPBELL, DESANTIS, MAGEE & O'DONNELL
COUNSELLORS AT LAW
247 WHITE HORSE AVENUE
TRENTON, NEW JERSEY 08610

with the exception of paragraph 3, 4 & 5, which has been deleted from the contract; and it is further

4. Ordered that if there is any violation of the contract by Julius Pall, Jr., after his return to the Hamilton Township School System as a student, Julius Pall, Jr., will be scheduled to appear before the Board of Education of the Hamilton Township School District for a disciplinary hearing; and it is further

5. Ordered that Petitioner shall withdrawal the Tort Claim Notice filed with the Hamilton Township Board of Education and dated April 28, 1998, and shall not file any further pleadings pursuant to that Tort Claim Notice. In addition, the Petitioner further releases and gives up any and all claims and rights which Petitioner may have against the Respondent including but not limited to those claims and rights set forth in the Tort Claim Notice of April 28,1998. The release of the Petitioner applies to claims resulting from anything which has happened up to the date of the within Order.

Robert S. Miller, A.L.J.

Consent is hereby given to the form and entry of the foregoing Order.

Clara Pall as guardian ad litem on behalf of her minor child, Julius Pall, Jr., Petitioner

By: ~~David A. Gies~~, Esquire
Attorney for the Petitioner
KEVIN H. MAIN

Board of Education of Hamilton Township, Respondent

By: Dennis M. DeSantis, Esquire
Attorney for the Respondent

DESTRIBATS, CAMPBELL, DESANTIS, MAGEE & O'DONNELL
COUNSELLORS AT LAW
247 WHITE HORSE AVENUE
TRENTON, NEW JERSEY 08610

* If the drug test at the school tests positive for a controlled dangerous substance as defined by Statute, then the school shall send the sample to a physician of Petitioner's choice for drug testing at the Petitioner's expense.

HAMILTON TOWNSHIP SCHOOLS
OFFICE OF THE ASSISTANT SUPERINTENDENT

JULIUS PALL - EXPULSION HEARING
Wednesday, April 15, 1998 - 8:30PM - 9:40PM

THE BOARD OF EDUCATION HAS LISTED THE FOLLOWING IN LIEU OF EXPULSION AND THE FAMILY HAS AGREED TO ALL COMPONENTS:
THIS CONTRACT IS FOR THE 1998-99 SCHOOL YEAR

1. Random drug screening at the discretion of the Principal with the results shared by both the parents and school officials.* If any of the results are positive Julius will be scheduled to appear before the Board for violation of this contract.

2. Documented involvement with a drug rehabilitation program (see attached list). **

~~3. Weekly consultation with Hamilton High West Substance Abuse Counselor.~~ Weekly

4. Formal review of academic progress at the end of each marking period, with parents and guidance counselors, to review grades, attendance and discipline record.

~~5. Ten hours per month of community service to begin no later than September 28, 1998. The subject of community service to be developed by the Principal and Julius with the approval of the Assistant Superintendent.~~ DELETE

** If Petitioner chooses a drug rehabilitation program not on the attached list, then Petitioner shall pay the cost of the program. The Hamilton High West Substance Abuse Counselor shall monitor the attendance of J.P. in the program whether or not on the list.

IT IS THE PRINCIPAL'S RESPONSIBILITY TO INSURE THAT THE ITEMS STATED ABOVE ARE ADHERED TO BY THE FAMILY.

Julius Pall
Student Signature

Michael Laird
Principal, Hamilton High West

Barbara Pall
Parent Signature

Michael V. Luciano
Assistant Superintendent

MVL:bw
a:\boe\expulsion\pall2

FACILITIES

Carrier Foundation
Route 601
P.O. Box 147
Belle Mead. NJ 08502
1-800-933-3579
908-281-1591

Daytop
80 West Main Street
Mendham. NJ 07945
201-543-5656

Monmouth Ocean Educational Services Commission
P.0. Box 1264
Freehold. NJ 07728
908-431-6061

Princeton House
Princeton Medical Center
905 Herrontown Road
Princeton. NJ 08540
497-3300

UMD
University of Medicine and Dentistry of NJ
University Behavioral Health Care
671 Hoes Lane
P.O. Box 1392
Piscataway. NJ 08855-1392

OAL DKT. NO. EDU 4483-98
AGENCY DKT. NO. 148-5/98

K.P., on behalf of minor child, J.P., Jr.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record, consent order, and initial decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

July 16, 1999
Date of Mailing, July 19, 1999

225-99

ELBERT SMITH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOLS, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

July 16, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7607-97

AGENCY DKT. NO. 161-5/97

ELBERT SMITH,

Petitioner,

v.

BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOLS, HUDSON COUNTY,

Respondent.

Alexander W Booth, Esq., for petitioner
(Brownstein, Booth & Barry, attorneys)

Horatius A. Greene, II, Esq., for respondent
(Winkler, Bevacqua, Greene, attorneys)

Record Closed: May 20, 1999 Decided: June 1, 1999

BEFORE **ARNOLD SAMUELS**, ALJ:

On May 19, 1997, the petitioner, Elbert Smith, filed a Verified Petition with the Commissioner of Education contesting the action of respondent, Board of Education of Hudson County Vocational Technical Schools, seeking to suspend the petitioner without pay for a period of 120 days, effective March 1, 1997.

The 120 day suspension represented the respondent's implementation of a prior decision of the Office of Administrative Law (OAL) dated June 6, 1996, affirmed by the Commissioner of Education on July 26, 1996. That decision resulted from a contested tenure charge case that was initiated by respondent against petitioner in March 1994. The Final Decision ordered the petitioner to forfeit the 120 days pay that was withheld during his suspension, which began at the time the tenure charges were filed. However, the respondent did not seek to implement the aforementioned order for five or six months after the final decision was rendered and the petitioner returned to work.

In March 1997 the petitioner filed a verified complaint in lieu of prerogative writ in the Superior Court of New Jersey, Law Division, seeking to enjoin the respondent from suspending him for the 120 days referred to above. In addition, the complaint alleged that, after his return to employment following the tenure charge decision, petitioner was reassigned to an undesirable and unsafe position at the Hudson County Youth Correctional Facility.

On March 26, 1997 an Order was filed in the Superior Court of New Jersey transferring the matter to the OAL (through the State Department of Education) on jurisdictional grounds. The petition subsequently filed with the Commissioner of Education on June 27, 1997 solely appealed the respondent's action relating to the 120 day suspension. The petitioner asserted that he was not given proper notice of the Board of Education's hearing that implemented the suspension, and further stating that the Board's action was untimely. The issue relating to petitioner's placement in the Hudson County Juvenile Detention Center was omitted. On August 7, 1997 the Commissioner of Education transmitted the matter to the OAL for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to 13.

A hearing was scheduled for May 19, 1998. The hearing was converted to a prehearing conference, and the plenary hearing was rescheduled to October 30, 1998. On that day the parties and their attorneys conferred for purposes of settlement; and an agreement was reached.

However, in subsequent correspondence, the petitioner expressed reservations and rejected the settlement. Another settlement conference was scheduled for December 29, 1998. Further discussions held on that date resulted in the petitioner's unqualified acceptance of the settlement. Mr. Smith agreed, on the record and under oath, that he voluntarily and knowingly accepted each term of the agreement. The terms of the settlement were incorporated into a written settlement agreement dated May 12, 1999 and signed by the petitioner. A copy of the settlement agreement is attached hereto and made a part hereof.

Having reviewed and considered the issues involved in this dispute, it is **CONCLUDED** that the parties have voluntarily and knowingly agreed to the settlement, as evidenced by the attached agreement. It is further **CONCLUDED** that the settlement is fair and fully dispositive of all issues in controversy.

It is therefore **ORDERED** that the settlement be approved and that this matter be **DISMISSED**.

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

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

June 1, 1999
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

6/4/99
DATE

D. N. Centanaitis Jr.
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 7 1999
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

sej

SETTLEMENT AGREEMENT

This Agreement is made this 12 day of May, 1999 between the Hudson County Schools of Technology and Elbert Smith memorializes the Agreement of the parties put on the record before Judge Arnold Samuels on December 29, 1998. In consideration of the mutual promises and undertaking contained in this Agreement the parties state:

WHEREAS, Smith is no longer employed by the Board, and

WHEREAS, Smith has asserted a claim against the Board and in addition believes he has additional unasserted claims against the Board, and

WHEREAS, the parties are desirous of ending all present and future litigation associated with Smith's employment with Hudson County Schools of Technology.

IT IS HEREBY AGREED THAT:

1. Smith hereby generally releases the Board and its employees and agents thereby waiving any and all claims whether asserted in litigation or not that Smith may have against the Board and its employees and agents.

2. The Board and its employees and agents hereby generally releases Smith thereby waiving any and all claims whether asserted in litigation or not that the Board may have against Smith.

3. The Board will pay Smith the sum of Six Thousand ($6,000.00) Dollars.

IN WITNESS WHEREOF, the parties have set their hands below.

THOMAS CALVANICO, President
Board of Education
Hudson County School of Technology

5/12/99

ELBERT SMITH

07/07/99 WED 10:27 [TX/RX NO 9263]

OAL DKT. NO. EDU 7607-97
AGENCY DKT. NO. 161-5/97

ELBERT SMITH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOLS, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record, settlement agreement, and initial decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. [1]

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.[2]

ACTING COMMISSIONER

[1] The Commissioner clarifies that although the initial decision identifies Alexander W. Booth, Jr., Esq., as counsel for petitioner and Horatius A. Greene, II, Esq., as counsel for the respondent Board, the within record confirms that Mr. Greene represented the petitioner and Mr. Booth the Board.

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties

July 16, 1999
Date of Mailing, July 19, 1999

226-99

BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JULIA HANKERSON,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

The petitioning Board sought an order withholding the September 10, 1998-November 8, 1998 salary of respondent for neglect of or failure to perform duties and an order suspending respondent's teaching certificates for one year pursuant to *N.J.S.A.* 18A: 26-10.

The ALJ concluded that respondent effectively abandoned or refused to perform her assigned work duties, thereby constructively abandoning her employment without the sixty days' notice required by her employment contract, and that, pursuant to *N.J.S.A.*18A: 26-10, respondent's teaching certificates should be suspended for one year for her unprofessional conduct.

The Commissioner affirmed the recommended decision of the ALJ for the reasons stated therein, suspending respondent's teaching certificates for one year from the date of this decision and authorizing the Board to withhold from respondent any unpaid compensation for service on and after September 10, 1998.

July 16, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10338-98

AGENCY DKT. NO. 449-10/98

BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE,

Petitioner,

v.

JULIA HANKERSON,

Respondent.

Harvey C. Johnson, Esq., for petitioner

Julia Hankerson, respondent, *pro se*

Record Closed: May 14, 1999 Decided: June 1, 1999

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

The Lawnside Borough Board of Education (Board) sought an order withholding the September 10 - November 8, 1998 salary of Julia Hankerson, respondent, for neglect of or failure to perform duties and an order suspending the respondent's teaching certificates for one year pursuant to *N.J.S.A.* 18A:26-10. Julia Hankerson, respondent, resisted and denied all allegations on which the Board rested its case and asked that the petition of appeal be dismissed.

The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 through -13. Upon receipt of the file, I wrote to the Board's counsel and the respondent on January 5, 1999:

> This matter has been set down for hearing on Friday, May 14, 1999, at 9 a.m. at the Office of Administrative Law, 9 Quakerbridge Plaza, Mercerville.
>
> Enclosed are two standing prehearing orders. Please note their provisions as all parties are required to abide by them as well as all discovery requirements. *See,* Notice of Filing previously mailed to you and *N.J.A.C.* 1:1-10.1 through -10.6.

The Office of the Clerk prepared and sent hearing notices to the parties consistent with the judge's January 5, 1999 letter.

On May 12, 1999, the respondent called the Office of the Clerk stating she would not appear on May 14 and had no interest in the outcome of the case. The respondent called the judge the following day and made essentially the same statements.

I **FIND** and **CONCLUDE** that Julia Hankerson has abandoned defense of this matter. I further **FIND** that the respondent was employed by the Lawnside Board of Education as a social worker for the 1998-99 school year; on September 9, 1998, the Board approved the recommendation of its superintendent to terminate the respondent's employment upon sixty days' notice pursuant to *N.J.S.A.* 18A:27-5; the Board required that Hankerson perform her duties during the sixty-day period in order to receive her salary; the respondent refused to perform her duties and sat at her desk calling friends, doing personal business, handling outside social evaluations that she was performing for other employees and the like; the respondent disrupted the work of other members of the child study team by singing in a loud voice while sitting at her desk; the respondent further disrupted work of the child study team by shredding without authorization parts of student files that are needed for evaluations and the respondent has constructively abandoned her employment with the Board without providing sixty days' notice in violation of *N.J.S.A.* 18A:26-10.

Accordingly, I **CONCLUDE** that Julia Hankerson has effectively abandoned or refused to perform duties and has thereby constructively abandoned her employment without provision of sixty days' notice as required by her employment contract.

I further **FIND** and **CONCLUDE** that *N.J.S.A.* 18A:26-10 provides

> Any teaching staff member employed by a board of education, who shall, without the consent of the board, cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year.

Accordingly, I **ORDER** the teaching certificates of Julia Hankerson suspended for one year from the date of final decision in this matter pursuant to the provisions of *N.J.S.A.* 18A:26-10.

I further **ORDER** that, if the respondent received no compensation for service on and after September 10, 1998, that the Lawnside Board of Education not remit to her any monies therefor.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 1, 1999
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

June 3, 1999
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

JUN 4 1999
DATE

Mailed to Parties:
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 10338-98
AGENCY DKT. NO. 449-10/98

BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JULIA HANKERSON,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed.[1] No exceptions were filed by the parties.

Upon his independent review of the record, the Commissioner agrees with the Administrative Law Judge (ALJ) that respondent has effectively abandoned or refused to perform her assigned work duties, thereby constructively abandoning her employment without the sixty days' notice required by her employment contract. He further concurs with the ALJ that, pursuant to *N.J.S.A.*. 18A:26-10, respondent's teaching certificates should be suspended for one year for her unprofessional conduct.

Accordingly, the recommended decision of the OAL is affirmed for the reasons stated therein. The teaching certificates of Julia Hankerson are hereby suspended for one year from the date of this decision. Further, the Board is authorized to withhold from respondent any unpaid compensation for service on and after September 10, 1998.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1]It is noted that the initial decision erroneously captions this matter as a settlement.
[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

July 16, 1999
Date of Mailing, July 19, 1999

229-99

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN REID, JR.,	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF NORTH BERGEN, HUDSON COUNTY.	:	DECISION
	:	

July 22, 1999

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7623-98N

AGENCY DKT. NO. 373-8/98

IN THE MATTER OF THE TENURE HEARING OF JOHN REID, JR. and THE SCHOOL DISTRICT OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY.

Keith J. Roberts, Esq., for petitioner (Giblin and Giblin, attorneys)

Mary J. Hammer, Esq., for respondent (Bucceri & Pincus, attorneys)

Record Closed: May 12, 1999 Decided: June 3, 1999

BEFORE **BARBARA A. HARNED**, CHIEF ALJ:

This matter was transmitted to the Office of Administrative Law on August 21, 1998, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

On December 10, 1998, the parties reached a settlement agreement which was placed on the record on that day. Subsequently the parties prepared and signed a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

3. The settlement is in the public interest in light of the Board's wish to provide a reasonable accommodation to Mr. Reid's handicap and to avoid the expenses of litigation. *In the Matter of the Tenure Hearing of Kenneth Smith, School District of the City of Orange, Essex County,* decided by the Commissioner, April 7, 1982, affirmed State Board of Education, April 6, 1983, 1990 *S.L.D.* 842, 846.

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

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

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

6/3/99
DATE

Barbara A. Harned
BARBARA A. HARNED, CHIEF ALJ

Receipt Acknowledged:

6-8-99
DATE

Debbie Antanaitis/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 11 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

BUCCERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2440
(973) 773-5665
Counsel for Respondent

IN THE MATTER OF THE TENURE HEARING OF JOHN REID JR., AND THE BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY.	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO. 373-8/98 O.A.L. DOCKET NO EDU 7623-98N **STIPULATION OF SETTLEMENT**

This Stipulation of Settlement is made by and between John Reid, Jr. (hereinafter "Mr. Reid") who resides at 339 74th Street, North Bergen, New Jersey, and the Board of Education of the Township of North Bergen (hereinafter "the Board"). In consideration of the mutual promises and undertakings contained in this Agreement, and for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned state:

WHEREAS, Mr. Reid has been employed as a custodian/boilerman by the Board since 1984; and

WHEREAS, the Board certified tenure charges against Mr. Reid to the Commissioner of Education by resolution of June 30, 1998; and

WHEREAS, the tenure charges against Mr. Reid allege unbecoming conduct by virtue of excessive absenteeism, conviction of a Class A Misdemeanor in the State of New York and dereliction of duties; and

WHEREAS, the parties agree that Mr. Reid's excessive and unbcoming conduct were caused, in part, by Mr. Reid's substance abuse; and

WHEREAS, Mr. Reid has expressed his willingness to enter a substance abuse rehabilitation program; and

WHEREAS, the Board is desirous of making a reasonable accommodation to Mr. Reid's handicap, i.e., substance addiction; and,

WHEREAS, Mr. Reid pled guilty to a Class A Misdemeanor and the parties agree that the offense does not constitute an offense which would require forfeiture pursuant to N.J.S.A. 2C:51-2;

IT IS on this 28th day of April, 1999, agreed that:

1. Upon the approval of this Agreement by the Commissioner of Education, the Board shall impose a four-week unpaid suspension upon Mr. Reid. During said suspension, Mr. Reid shall not use any vacation, personal or sick leave in order to receive compensation from the Board. The time will not count toward any charge of excessive absenteeism which may be brought against Mr. Reid in the future. The unpaid suspension shall be imposed when the Commissioner approves the parties' settlement.

2. Mr. Reid shall attend a substance abuse treatment program on an in-patient or out-patient basis. The determination

as to whether Mr. Reid attends on an in-patient or out-patient basis shall be made by the substance abuse treatment center. A copy of the written determination of the center shall be sent to the Board.

3. Mr. Reid shall participate in an on-going drug rehabilitation program, such as Narcotics Anonymous, on a continuing basis.

4. This Agreement is a last chance for Mr. Reid. The parties agree that no further opportunities for assistance with a disability shall be granted by the Board as Mr. Reid consents and agrees to a last chance document. The parties agree that the Board has on a previous occasion granted to Mr. Reid the requested and necessary accommodation to assist Mr. Reid with his disability and to improve his employment performance. Any future chronic absenteeism shall result in tenure charges being filed by the Board. In the case of Mr. Reid, chronic absenteeism shall be defined as follows:

(a) For six (6) months subsequent to Mr. Reid's return from the four (4) week unpaid suspension referred to in paragraph 1 above, other than employer-approved vacation days or employer-approved personal days, Mr. Reid shall not be absent without a doctor's note (medical evidence of illness). An absence without such a doctor's note shall be considered an unexcused absence and shall be cause for termination.

(b) After the expiration of the six (6) months referred to in 4(a) above, Mr. Reid shall have no more than three (3) unexcused absences per year.

(c) The failure to report for work without calling in shall be considered an unexcused absence.

5. The Board agrees to withdraw, without prejudice, the tenure charges which it certified to the Commissioner of Education and which form the basis of In the Matter of the Tenure Hearing of John Reid, Jr. and The School District of the Township of North Bergen, Agency Ref. No. 373-8/98, O.A.L. Docket No. EDU 7623-98N, subject to the terms of this Agreement.

6. Mr. Reid agrees to waive and abandon any claims, counterclaims or actions which he may have against the Board and/or its officers, agents or representatives relating to or arising out of the proceeding entitled, In the Matter of the Tenure Hearing of John Reid, Jr. and The School District of the Township of North Bergen, Agency Ref. No. 373-8/98, O.A.L. Docket No. EDU 7623-98N, and/or the facts underlying said proceeding.

7. The parties agree that the pursuit of this litigation through plenary hearing is not in the best interests of the students, parents or the community of the petitioner school district because litigation would entail the expense of public funds with the possible result being a 120-day suspension or an increment withholding because of Mr. Reid's handicap (drug addition) and the Board's desire to afford Mr. Reid a reasonable accommodation. Rather, this settlement is in the best interest

of all concerned, and, in particular, is in the public interest. The parties have assiduously attempted to meet standards set forth In the Matter of the Tenure Hearing of Frank Cardonick, 1982 S.L.D. ___ (Commissioner of Education, April 7, 1982), aff'd. 1983 S.L.D. ___ (State Board, April 6, 1983).

8. Both parties have each had independent legal representation. They both fully understand the terms and conditions set forth in this Agreement as well as their respective rights to litigate the issues in this case with a final decision to be made by the Commissioner of Education as an alternative to settlement. The decision to enter into this Agreement rather than to avail themselves of the right to litigate has been made of their own free will without duress or coercion.

9. The parties acknowledge that this settlement must be recommended by the Honorable Barbara Harned, A.L.J. and approved by the Commissioner of Education. In the event such approvals are not forthcoming, the parties will be returned to the status quo pending at the time when this settlement was adopted, and this Agreement shall be null and void.

10. The stipulations and agreements set forth in this documents are made as part of this settlement. In the event this settlement is not approved by the appropriate authorities, it is agreed that nothing set forth herein may be used as evidence in any subsequent proceedings.

11. All terms of this Agreement are material and shall be subject to the laws of the State of New Jersey.

12. The parties signing below hereby acknowledge that they have been duly authorized to enter into this Agreement. A copy of the Board's resolution is attached hereto.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

FOR PETITIONER:

_____, President

FOR RESPONDENT, JOHN REID JR.

John Reid Jr.
John Reid Jr.

WITNESS:

_____, Secretary

WITNESS:

Mary J. Hammer

Dated:

Whereas tenure charges have been certified by the Board and are the subject matter of litigation before the Commissioner of Education, bearing Agency Ref. No. 373 - 8 / 98 and O.A.L. Docket No. Edu 7623 - 98N and,

Whereas, on the advice of the Board Attorney and Special Counsel, it has been determined that a settlement of these charges and litigation would be in the best interests of the district, its' students and employees,

Be it resolved that the settlement of the above entitled matter is hereby authorized in accordance with the attached Stipulation of Settlement and special counsel is directed to prepare and file any documentation necessary to effectuate this settlement, and

Be it further resolved that the Board's officers and employees are authorized to take all actions necessary to effectuate this resolution.

I HEREBY certify the foregoing to be a true and correct copy of resolution passed and adopted by the Board of Education of the Township of North Bergen, Hudson County, N.J. at a meeting held on date of 4-28-99

Secretary

April 28, 1999

SUBJECT Settlement DATE APR 28 1999
Docket# Edu 7623-98N RESOLUTION # 64

TRUSTEE	MOTION	SECOND	YES	NO	ABSENT	ABSTAIN
Calabria						
Diaz						
Di Gennaro						
Feldman						
Gomez						
La Bode						
La Tour						
Luzzi						
Buckman						
Nicoliello						

64

Whereas tenure charges have been certified by the Board and are the subject matter of litigation before the Commissioner of Education, bearing Agency Ref. No. 373 - 8 / 98 and O.A.L. Docket No. Edu 7623 - 98N and,

Whereas, on the advice of the Board Attorney and Special Counsel, it has been determined that a settlement of these charges and litigation would be in the best interests of the district, its' students and employees,

Be it resolved that the settlement of the above entitled matter is hereby authorized in accordance with the attached Stipulation of Settlement and special counsel is directed to prepare and file any documentation necessary to effectuate this settlement, and

Be it further resolved that the Board's officers and employees are authorized to take all actions necessary to effectuate this resolution.

OAL DKT. NO EDU 7623-98N
AGENCY DKT. NO. 373-8/98

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN REID, JR.,	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF NORTH BERGEN, HUDSON COUNTY.	:	DECISION
	:	

The record, stipulation of settlement, and initial decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

July 22, 1999
Date of Mailing, July 22, 1999

230-99

IN THE MATTER OF THE TENURE :

HEARING OF TIMOTHY KASONY, : COMMISSIONER OF EDUCATION

SCHOOL DISTRICT OF THE TOWNSHIP : DECISION ON REMAND

OF LAWRENCE, MERCER COUNTY. :

:

SYNOPSIS

Board certified tenure charges of incapacity and excessive absenteeism against respondent custodian.

Parties initially agreed to a settlement, which was rejected by the Commissioner. Matter was remanded for either revision of settlement agreement, mutual consent to hold matter in abeyance pending respondent's application to the Public Employees Retirement System for disability retirement, or for hearing on merits.

After a hearing on remand, the ALJ found that the stipulated absence of respondent has adversely affected the Board's ability to provide sanitary, clean and secure facilities and created a morale problem for other custodial staff who are subject to reassignment or demands for overtime or both. ALJ further found that respondent was incapacitated from performing his duties.

The Commissioner affirmed the initial decision of the ALJ. Respondent was dismissed from his position as a tenured custodian.

July 22, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2680-99
(ON REMAND EDU 10490-98)
AGENCY DKT. NO. 462-11/98

IN THE MATTER OF THE TENURE HEARING OF TIMOTHY KASONY, BOARD OF EDUCATION OF THE LAWRENCE TOWNSHIP SCHOOL DISTRICT

James F. Schwerin, Esq., for petitioner (Carroll, Weiss & Josephson, attorneys)

Michael T. Barrett, Esq., for respondent (Bergman & Barrett, attorneys)

Record Closed: May 12, 1999 Decided: JUN 0 8 1999

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

STATEMENT OF THE CASE

The Lawrence Township Board of Education certified tenure charges of excessive absenteeism and incapacity against Timothy Kasony, a custodian, to the Commissioner of Education. The matter was transmitted to the Office of Administrative Law on December 1, 1998, for a hearing pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13.

After notice, a prehearing conference was held and prehearing and hearing schedules were established in accordance with the Tenure Employees Hearing Law, as amended, *N.J.S.A.* 18A:6-10 through -18.1.

Opening arguments were heard on February 4, 1999. The time for discovery was lawfully enlarged and a second day of hearing was set down for March 4, 1999. Upon reopening of the record, counsel presented a stipulation of dismissal without prejudice premised on Kasony's successful application for disability retirement to the Public Employees' Retirement System. I processed the matter as an Initial Decision Settlement and it was transmitted to the Commissioner of Education under date of March 5, 1999.

On April 22, 1999, the Commissioner rejected the proposed settlement in its then present form. The Commissioner held that "he cannot accept a term of a settlement which explicitly provides for the parties to waive the statutory requirements of *N.J.S.A.* 18A:6-10 *et seq.* Further, to the extent the parties can agree to adjourn proceedings in this matter pending a review of respondent's application for disability retirement to the Public Employees' Retirement System (PERS), they may mutually consent to such an abeyance of proceedings before the OAL."

The Commissioner remanded for revision of the documents consistent with the concerns set forth or, if the parties concur, for an abeyance of proceedings pending a determination by PERS on respondent's disability retirement application. Of course, another alternative was to proceed to a hearing on the merits. This the parties choose to do.

On May 12, 1999, the matter proceeded to hearing. Counsel presented their closing arguments on that day and the record closed.

The Board asserts that the case is similar to two recent tenure matters involving custodians in Lawrence. The only issue is whether the stipulated extended absence has had a negative effect on the Board's ability to provide sanitary and secure facilities. The Board presented its Business Administrator-Board Secretary. Among other things, his responsibilities include buildings and grounds. The witness knows the respondent Kasony as a custodian on the

day shift at the high school. He has been out of work because of injury for three years. It has been necessary to move other custodians into his slot from the night shift. Kasony's duties have been filled by many different substitutes.

As to safe and sanitary problems, the witness stated it is difficult to sustain quality over an extended period while using substitute workers. Substitutes tend to have no pride invested in the particular building or area within a building. A substitute tends to need more supervision and may have lesser skills. The witness stated that Kasony still is a tenured employee.

The Board's insurance carrier agrees that Kasony's injury is work-related. There are three day shift custodians assigned to the high school. The person filling in for Kasony is a contractual employee from the night shift. Therefore, the impact is felt on the night shift, when the bulk of classroom cleaning is accomplished.

The Board's Director of Facilities and Property also testified. He knows the respondent. The witness supervises all custodians and agrees with the Business Administrator-Board Secretary's testimony. A night custodian has been moved to fill Kasony's place on the day shift at the high school. Substitutes are used at night to fill in for the person moved to the day shift. If a substitute cannot be secured, it is necessary to require a day worker to work overtime.

Substitutes do not perform as well as "invested full timers." The night position is difficult to fill. There is a ripple effect in that the high school night shift is the most heavily manned. If it were necessary to cover another school, it was the witness' practice formerly to take a custodian from the high school and move that person to the school that needed coverage. He cannot do that now, because he is always one person short on the night shift.

The witness produced exhibit P-1, facility and property daily manning logs. He testified concerning moving a night person to the day shift to cover for Kasony. He testified about absences and costs attributable to Kasony's absence. His typical experience is to try to secure a substitute to fill in the night slot that was vacated in order for that person to move to the day shift. If a substitute cannot be secured, the witness must ask regular custodians to work overtime. Their work quality tends to diminish into the night and more so as subsequent days are involved.

His last resort is to ask regular employees to cover more area. This, too, produces poorer quality work.

Kasony's long absence has had an effect on cleanliness. The witness believes that if Kasony were no longer an employee, his spot could be filled by a full-time regularly contracted person. It is necessary virtually every day to secure substitutes for the night shift at the high school. This is something of a patchwork operation as the witness previously testified. Some substitutes are looking for permanent employment. They may try to perform well. The substitutes are evaluated monthly by principals and head custodians.

The Board asserts that it has shown more than a minimum impact on its facilities because of Kasony's long absence. Inasmuch as many cases approve the dismissal of a tenured employee for chronic or persistent absenteeism or both, there is no legal impediment to removing Kasony.

Kasony argues that this is an unusual situation. He is a tenured employee who has been out on compensation leave for an extended time. It would be poor policy to have situations in which a person is detenured while on compensation leave. A person can remain on compensation leave status only while improving physically.

This is an extreme case, but if decided in favor of the Board, could lead to shorter and shorter periods of inability to work leading to removal. Furthermore, treatment is controlled by the Board's carrier's medical personnel. So long as Kasony is improving, he should remain undisturbed.

The Board counters that policy arguments are for the Legislature to make. The Commissioner has said that tenure charges can be brought where a person is incapacitated. An absence of greater than one year establishes a *prima facie* case of incapacity. No one can say how long treatment can take. How long is too long?

DETERMINATION

Kasony's injury and subsequent absence are stipulated. In *Passaic Board of Education v. James Vianni*, 91 *S.L.D.* 2386, the administrative law judge (ALJ) held and the Commissioner affirmed

> It is well-settled that excessive absenteeism may constitute grounds for the removal or suspension of tenured employees. *In the Matter of the Tenure Hearing of Marcus Miller, School District of the City of Trenton*, OAL DKT. EDU 8409-86 (Mar. 6, 1987), adopted Comm'r of Ed. (Mar. 31, 1987). In *Miller*, a tenured assistant custodian was dismissed for excessive absenteeism and abandoning his position. The assistant custodian was absent from work during the period of July 4 to July 18 due to medical reasons. A doctor's note supplied by Mr. Miller indicated that he could return to work on July 21. However, Mr. Miller never returned to his position. The ALJ dismissed the assistant custodian on the grounds that his absences from July 4 to July 18 constituted excessive absenteeism and that he had abandoned his position.

The Commissioner has stated that he would not hesitate to dismiss a tenured employee for chronic, persistent absenteeism even when there is no charge of illegitimate use of sick leave. *In the Matter of the Tenure Hearing of Patricia Marsden, School District of Toms River,* OAL DKT. EDU 1188-84 (Aug. 26, 1985), adopted Comm'r of Ed. (Oct. 10, 1985).

In the Commissioner's adoption of *Vianni*, above, the Commissioner noted that a board's burden in a case seeking dismissal of a tenured janitor because of alleged excessive absenteeism is to demonstrate the extent of harm such performance of a custodial employee has on the provision of a thorough and efficient education in an adequately equipped, sanitary and secure physical facility. 97 *S.L.D.* at 2397. In the present case, the Board focused its testimony on this concept. The Business Administrator-Board Secretary and the Director of Facilities and Property tended to show that Kasony's absence made it difficult to schedule adequate custodial coverage not only in the high school to which Kasony is assigned, but also in other buildings in the district because of the so-called ripple effect. They also credibly testified to the effect that the morale of the rest of the custodial staff from frequent transfers of assignment to cover the continuing gaps left by Kasony's absence was negatively affected.

The Commissioner has recognized the position of school custodian as an important one.

> A school janitor occupies a position of trust and responsibility necessitating high standards of dependability and morality. His functions far exceed opening and closing the school house and keeping it clean and tidy. The safety and welfare of the children may depend on the property discharge of his duties. *In the Matter of the Tenure Hearing of Joseph McDougall*, 1974 *S.L.D.* 170, 178.

Under these circumstances, notwithstanding that Kasony is not receiving pay, he is having an effect on the assignment of custodians. Until the respondent returns or is removed from position, those responsible for assignment of custodians and the condition of buildings cannot know either that the work will be done to the necessary degree or that it cannot be done. However, in the case of removal, a new custodial person may be hired toward the end that the work will be accomplished.

The tenure laws are designed to protect employees from unwarranted political interference and from arbitrary and capricious treatment. They are not, however, infinite protection. There appears to be no statutory definition or classification of excessive absenteeism. However, there have been Commissioner of Education decisions that indicate excessive absenteeism may support a charge of unbecoming conduct. In *In the Matter of the Tenure Hearing of Edith Trautwein*, OAL DKT. EDU 9692-82 (Nov. 15, 1983), the Board certified five charges to the Commissioner against a tenured teacher. The first charge was that the respondent's continuous excessive absenteeism constituted conduct unbecoming a teacher or other good cause to terminate her employment or to reduce her salary. The respondent contended that the numbers of absences were an invalid ground upon which to seek her removal and moved for dismissal. The ALJ denied the respondent's motion to dismiss the first count. The judge found that the local board had the right to impose some discipline upon respondent because of her absences and the Board must be given the opportunity to present at hearing, through admissible evidence, the truth of the charge that respondent had adopted and maintained a pattern of excessive absences that constituted unbecoming conduct. The Commissioner affirmed the retention of that count. The administrative hearing of the matter did not reach the merits of the issue of unbecoming conduct,

but held that the charge brought against the respondent by the Board was in retaliation for the respondent's exercise of free speech and thus the complaint was dismissed. The decision was on a basis other than excessive absenteeism. The Commissioner decided that excessive absenteeism can constitute a tenure charge. On the basis of *Trautwein*, the Commissioner's policy is not to let cases of excessive absenteeism go unpunished. His affirmation of the retention of a charge of unbecoming conduct based on excessive absenteeism in that case lends strong support to the subsequent use of that charge for similar conduct.

Having reviewed all the evidence, I **FIND** that:

1. A tenure charge of unbecoming conduct based on excessive absenteeism, substantiated by adequate proofs, is cause for removal;

2. The ability of the Lawrence Township Board of Education to maintain its schools has been hampered and adversely affected by the long absence stipulated here;

3. In addition to a negative effect on the ability to provide sanitary, clean and secure facilities as required, the long absence present here has created a morale problem for other custodial staff who are subject to reassignment or demands for overtime or both;

4. The long absence present here creates an administrative problem in that staff have to be reassigned virtually daily in order to cover all authorized custodial positions.

In consideration of these findings, I **CONCLUDE** that Kasony's stipulated absence has had negative effects on the operation of the Lawrence Public Schools above and beyond the criteria discussed in *Vianni*, above. The absences require frequent modification of other custodians' schedules which, in addition to having a negative effect on morale, requires the Head Custodian and his immediate superiors to devote time to the reassignments that might better be used otherwise. This decision does not say that the mere fact of Kasony's absence has led to cleanliness citations from local authorities. This decision does note that Kasony's absence can only exacerbate the circumstances leading to cleanliness citations.

Accordingly, I **CONCLUDE** that the Lawrence Township Board of Education has shown by a preponderance of the credible evidence in the record that the extended absence of Timothy Kasony rises to the level of unbecoming conduct and I further **CONCLUDE** that the appropriate penalty for that unbecoming conduct is removal.

Finally, the Board argues alternatively that the respondent's in capacity has been established as a matter of law by his absence and he should be dismissed on those grounds unless he comes forward with evidence of his ability to return to work in the immediate future. In *In the Matter of the Tenure Hearing of Phyllis Stanley, Board of Education of the Freehold Regional High School District*, 95 *N.J.A.R.*2d (EDU) 495, the Commissioner adopted the ALJ's initial decision that incapacity was related to the inability to perform a duty despite the cause of the inability. In *Stanley*, the ALJ concluded that the Board had met its burden and established by a preponderance of the credible evidence that Stanley was incapacitated from performing her duties. The ALJ found that dismissal was the appropriate penalty and the Commissioner concurred. *Id.* at 499.

In this case, I **FIND** and **CONCLUDE** that, unless Timothy Kasony can demonstrate to the contrary in the immediate future, he is incapacitated as the Commissioner contemplated that term in *Stanley*.

For the reasons stated, the removal of Timothy Kasony from his custodial position in the employ of the Lawrence Township Board of Education is **ORDERED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is

otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

JUN 0 8 1999
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

6-9-99
DATE

Debbie Antanaitis/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 10 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

ml

WITNESSES

For petitioner:

Nicholas Puleio

Bouldin Hitchcock

For respondent:

None

EXHIBITS

For petitioner:

P-1 Facility and Property Daily Manning Logs, November 1998 through May 8, 1999

For respondent:

None

IN THE MATTER OF THE TENURE	:	
HEARING OF TIMOTHY KASONY,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION ON REMAND
OF LAWRENCE, MERCER COUNTY.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Respondent's exceptions and the Board's reply thereto were considered by the Commissioner in his determination of this matter.

Upon review of the record in this matter, the Commissioner determines to affirm the initial decision of the Administrative Law Judge (ALJ). Initially, the Commissioner notes it is undisputed that respondent has been out of work for three years (Initial Decision at p. 3). The Board's tenure charges assert, and respondent does not refute, that

> [o]n or about March 14, 1995 and again on March 20, 1997 [respondent] suffered injuries to his back and right leg, the first injury occurring during the course of his performing his duties. Respondent has not worked for the District since suffering that first injury. (Statement of Evidence, September 2, 1998 at p. 2)

The Board has demonstrated a negative effect from respondent's prolonged absence. Further, there is no indication in the record when, or even whether, respondent will be able to resume his duties. Thus, the Commissioner concurs with the ALJ that the appropriate penalty under such circumstances is dismissal, notwithstanding that respondent's absenteeism constituted a legitimate use of sick leave and the possibility remains that he might ultimately, at

some point not presently foreseeable, once again become physically capable of performing his duties.[1]

Further, to the extent respondent argues in exceptions that he has, as of May 1999, applied to the New Jersey Department of Treasury, Division of Pensions and Benefits, for a disability retirement, and the within decision should, therefore, accommodate the time period required to review his application (Respondent's Exceptions at p. 2), the Commissioner notes that not only is the record devoid of any evidence of respondent's application,[2] but the parties specifically *chose* to move forward to a plenary hearing in this matter, notwithstanding that they had an opportunity to consent mutually to an abeyance of proceedings before the OAL pending a review of any application respondent might submit to the Public Employees Retirement System. (Initial Decision at p. 2)

Accordingly, the initial decision of the ALJ is affirmed for the reasons expressed therein. Respondent is dismissed from his position as a tenured custodian as of the date of this decision.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

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[1] Although the ALJ appears to equate excessive absenteeism with unbecoming conduct (Initial Decision at p. 8), the Commissioner specifically observes that the Board did *not* charge respondent with unbecoming conduct.

[2] The Board expressly notes that, as of June 28, 1999, it has received no papers from the Division of Pensions and Benefits confirming that respondent has applied for disability retirement. (Board's Reply at p. 2)

[3] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.* within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

July 22, 1999
Date of Mailing, July 22, 1999

231-99

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

July 22,1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 08698-97S

AGENCY DKT. NO. 328-9/97

TELFORD BERKEBILE,

Petitioner,

v.

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

Respondent.

Michael C. Damm, Esq., for petitioner (Selikoff and Cohen, attorneys)

Robert A. Blanda, Esq., for respondent

Record Closed: May 19, 1999 Decided: June 8, 1999

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from the filing of a Verified Petition by Telford Berkebile, ("petitioner") with the Commissioner of Education on September 8, 1997, involving a dispute over counsel fees regarding attorneys who successfully defended employees of the Board of Education of the Borough of South River ("respondent" or "board") in a Municipal Court prosecution brought by the board. The matter was transmitted to the Office of Administrative Law on October 27, 1997, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The board has now settled its dispute with each attorney, and the parties have prepared the attached Stipulation of Dismissal with Prejudice indicating the terms of settlement.

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

1. The parties have voluntarily agreed to the settlement on the record.

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

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

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

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

6/8/99
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

6-10-99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 11 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm
Attachment

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OFFICE OF ADMIN LAW

SELIKOFF & COHEN, P.A.
Suite 314
307 Fellowship Road
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(609) 778-6055
FAX (609) 778-6056
Attorneys for Petitioner,
Telford Berkebile

TELFORD BERKEBILE,

Petitioner,

v

BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER,

Respondent.

STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 8698-97

AGENCY DKT. NO. 328-9/97

STIPULATION OF DISMISSAL WITH PREJUDICE

THE MATTER in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and is hereby dismissed with prejudice and without costs against any of the parties.

SELIKOFF & COHEN, P.A.
Attorneys for Petitioner

By: _____
MICHAEL C. DAMM, ESQUIRE

Dated:

BLANDA & BLANDA
Attorneys for Respondent

By: _____
ROBERT A. BLANDA, ESQUIRE

Dated:

F:\WPDOCS\PUBLIC\MIKE\NEA-C\BERKEBIL\SETTLE.AGT

OAL DKT. NO. EDU 8698-97
AGENCY DKT. NO. 328-9/97

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

The record and notice of withdrawal based on a joint stipulation of dismissal with prejudice of the parties transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed.[1] The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before him and is dismissed with prejudice.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] It is noted that this matter was characterized as a settlement, pursuant to *N.J.A.C.* 1:1-19.1, by the Administrative Law Judge in his initial decision. The Commissioner determines that because no settlement terms were brought to the record and the document signed by the parties was entitled a joint stipulation of dismissal this matter is more appropriately categorized as a withdrawal under *N.J.A.C.* 1:1-19.2.

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

July 22, 1999
Date of Mailing, July 22, 1999

230-99

EDU #10490-98
C # 121-99
EDU # 2680-99
C # 230-99
SB # 37-99

IN THE MATTER OF THE TENURE :
HEARING OF TIMOTHY KASONY, :
SCHOOL DISTRICT OF THE TOWNSHIP :
OF LAWRENCE, MERCER COUNTY. :

STATE BOARD OF EDUCATION

DECISION

Remanded by the Commissioner of Education, April 22, 1999

Decided by the Commissioner of Education, July 22, 1999

For the Petitioner-Respondent, Carroll, Weiss & Josephson (James F. Schwerin, Esq., of Counsel)

For the Respondent-Appellant, Bergman & Barrett (Michael T. Barrett, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. We stress in that regard that the respondent has provided no evidence regarding his current medical condition or his ability to return to work. Nor has he provided any information regarding the status of his application to the Division of Pensions and Benefits for a disability retirement. We note further, as pointed out by the Commissioner, that the respondent chose to proceed to a hearing on the merits of this matter rather than requesting that it be placed in abeyance–an option offered by the Commissioner in his decision of April 22, 1999–pending a determination of the respondent's application for a disability retirement.

January 5, 2000

Date of mailing JAN - 7 2000

232-99

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

July 23,1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 08697-97S

AGENCY DKT. NO. 329-9/97

FREDERICK SCHAUM,

Petitioner,

v.

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

Respondent.

Robert J. MacNiven, Esq., for petitioner (Iaria and MacNiven, attorneys)

Robert A. Blanda, Esq., for respondent

Record Closed: May 13, 1999 Decided: June 8, 1999

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from the filing of a Verified Petition by Frederick Schaum, ("petitioner") with the Commissioner of Education on September 8, 1997, involving a dispute over counsel fees regarding attorneys who successfully defended employees of the Board of Education of the Borough of South River ("respondent" or "board") in a Municipal Court prosecution brought by the board. The matter was transmitted to the Office of Administrative Law on October 27, 1997, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The board has now settled its dispute with each attorney, and the parties have prepared the attached Stipulation of Dismissal with Prejudice indicating the terms of settlement.

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

1. The parties have voluntarily agreed to the settlement on the record.

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

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

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

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

6/8/99
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

6-10-99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 11 1999
DATE

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OFFICE OF ADMIN LAW

IARIA & MacNIVEN
577 Cranbury Road
East Brunswick, NJ 08816
(732)254-0050
Attorneys for Petitioner, Frederick Schaum

STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION
OFFICE OF ADMINISTRATIVE LAW

FREDERICK SCHAUM,

Petitioner,

vs.

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

Respondent.

AGENCY DKT. NO. 535-11/96
OAL DKT. NO. EDU-10776-96

STIPULATION OF DISMISSAL WITH PREJUDICE

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and is hereby dismissed with prejudice and without costs against any of the parties.

IARIA & MacNIVEN, ESQS.
Attorneys for Petitioner, Frederick Schaum

By: _____
ROBERT J. MacNIVEN

Dated: February 3, 1999

BLANDA & BLANDA, ESQS.
Attorneys for Respondent

By: _____
ROBERT A. BLANDA

Dated: February 3, 1999

OAL DKT. NO. EDU 8697-97
AGENCY DKT. NO. 329-9/97

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

The record and notice of withdrawal based on a joint stipulation of dismissal with prejudice of the parties transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed.[1] The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before him and is dismissed with prejudice.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] It is noted that this matter was characterized as a settlement, pursuant to *N.J.A.C.* 1:1-19.1, by the Administrative Law Judge in his initial decision. The Commissioner determines that because no settlement terms were brought to the record and the document signed by the parties was entitled a joint stipulation of dismissal this matter is more appropriately categorized as a withdrawal under *N.J.A.C.* 1:1-19.2.

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

July 23, 1999
Date of Mailing, July 23, 1999

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

July 23,1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 08701-97S

AGENCY DKT. NO. 325-9/97

NICHOLAS BYCZKOWSKI,

Petitioner,

v.

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

Respondent.

Charles J. Uliano, Esq., for petitioner (Chamlin, Rosen, Uliano and Witherington, attorneys)

Robert A. Blanda, Esq., for respondent

Record Closed: May 25, 1999 Decided: June 8, 1999

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from the filing of a Verified Petition by Nicholas Byczkowski, ("petitioner") with the Commissioner of Education on September 8, 1997, involving a dispute over counsel fees regarding attorneys who successfully defended employees of the Board of Education of the Borough of South River ("respondent" or "board") in a Municipal Court prosecution brought by the board. The matter was transmitted to the Office of Administrative Law on October 27, 1997, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The board has now settled its dispute with each attorney, and the parties have prepared the attached Stipulation of Dismissal with Prejudice indicating the terms of settlement.

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

1. The parties have voluntarily agreed to the settlement on the record.

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

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

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

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

6/8/99
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

6-10-99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 11 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm
Attachment

CHAMLIN, ROSEN, ULIANO AND WITHERINGTON
268 Norwood Avenue, P. O. Box 38
West Long Branch, New Jersey 07764
(732) 229-3200
Attorneys for Petitioner

NICHOLAS BYCZKOWSKI,	:	STATE OF NEW JERSEY
	:	COMMISSIONER OF EDUCATION
Petitioner,	:	OFFICE OF ADMINISTRATIVE LAW
	:	
v.	:	OAL DKT. NO. EDU 8701-97
	:	
SOUTH RIVER BOARD OF EDUCATION, et al	:	AGENCY DKT. NO. 325-9/98
	:	
	:	STIPULATION OF DISMISSAL,
Respondents	:	WITH PREJUDICE
	:	

The matter in difference in the above action, having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and it is hereby dismissed with prejudice and without costs against either party.

CHAMLIN, ROSEN, ULIANO & WITHERINGTON

By: JULIA S. DASARO, ESQ.
Attorneys for Petitioner

BLANDA & BLANDA

By: ROBERT A. BLANDA
Attorneys for Respondents

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

May _____, 1999

OAL DKT. NO. EDU 8701-97
AGENCY DKT. NO. 325-9/97

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

The record and notice of withdrawal based on a joint stipulation of dismissal with prejudice of the parties transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed.[1] The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before him and is dismissed with prejudice.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] It is noted that this matter was characterized as a settlement, pursuant to *N.J.A.C.* 1:1-19.1, by the Administrative Law Judge in his initial decision. The Commissioner determines that because no settlement terms were brought to the record and the document signed by the parties was entitled a joint stipulation of dismissal this matter is more appropriately categorized as a withdrawal under *N.J.A.C.* 1:1-19.2.

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

July 23, 1999
Date of Mailing, July 23, 1999

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

July 23, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 08702-97S

AGENCY DKT. NO. 324-9/97

PETER KRZYZKOWSKI,

Petitioner,

v.

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

Respondent.

Mary J. Hammer, Esq., for petitioner (Bucceri and Pincus, attorneys)

Robert A. Blanda, Esq., for respondent

Record Closed: May 13, 1999 Decided: June 8, 1999

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from the filing of a Verified Petition by Peter Krzyzkowski, ("petitioner") with the Commissioner of Education on September 8, 1997, involving a dispute over counsel fees regarding attorneys who successfully defended employees of the Board of Education of the Borough of South River ("respondent" or "board") in a Municipal Court prosecution brought by the board. The matter was transmitted to the Office of Administrative Law on October 27, 1997, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The board has now settled its dispute with each attorney, and the parties have prepared the attached Stipulation of Dismissal with Prejudice indicating the terms of settlement.

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

1. The parties have voluntarily agreed to the settlement on the record.

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

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

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

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

6/8/99
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

6-10-99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 11 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm
Attachment

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OFFICE OF ADMIN LAW

BUCCERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2440
(973) 773-5665
Counsel for Petitioner

PETER KRZYZKOWSKI,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	
v.	:	O.A.L. DKT. NO. EDU 8702-97 AGENCY REF. NO. 324-9/97
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER,	:	
Respondent.	:	**STIPULATION OF DISMISSAL WITH PREJUDICE**

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and is hereby dismissed with prejudice and without costs against any of the parties.

BUCCERI & PINCUS, ESQS.
Attorneys for Petitioner

By: Mary J. Hammer
Mary J. Hammer, Esq.

Dated: 1-29-99

BLANDA & BLANDA, ESQS.
Attorneys for Respondent

By: _____
Robert A. Blanda, Esq.

Dated:

OAL DKT. NO. EDU 8702-97
AGENCY DKT. NO. 324-9/97

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

The record and notice of withdrawal based on a joint stipulation of dismissal with prejudice of the parties transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed.[1] The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before him and is dismissed with prejudice.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] It is noted that this matter was characterized as a settlement, pursuant to *N.J.A.C.* 1:1-19.1, by the Administrative Law Judge in his initial decision. The Commissioner determines that because no settlement terms were brought to the record and the document signed by the parties was entitled a joint stipulation of dismissal this matter is more appropriately categorized as a withdrawal under *N.J.A.C.* 1:1-19.2.

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

July 23, 1999
Date of Mailing, July 23, 1999

235-99

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

July 23, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10800-97S

AGENCY DKT. NO. 401-10/97

ROBERT PETCHEL,

Petitioner,

v.

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

Respondent.

G. Robert Wills, Esq., for petitioner (Wills, O'Neill and Mellk, attorneys)

Robert A. Blanda, Esq., for respondent

Record Closed: May 25, 1999 Decided: June 8, 1999

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from the filing of a Verified Petition by Robert Petchel, ("petitioner") with the Commissioner of Education on October 21, 1997, involving a dispute over counsel fees regarding attorneys who successfully defended employees of the Board of Education of the Borough of South River ("respondent" or "board") in a Municipal Court prosecution brought by the board. The matter was transmitted to the Office of Administrative Law on December 18, 1997, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The board has now settled its dispute with each attorney, and the parties have prepared the attached Stipulation of Dismissal with Prejudice indicating the terms of settlement.

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

1. The parties have voluntarily agreed to the settlement on the record.

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

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

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

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

6/8/99
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

6-10-99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 11 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

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Attachment

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OFFICE OF ADMIN LAW

G. Robert Wills, Esq.
WILLS, O'NEILL & MELLK
10 Nassau Street
Princeton, New Jersey 08542
(609) 924-0700
Attorneys for Petitioner Robert Petchel

ROBERT PETCHEL, Petitioner, vs. BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION / OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. EDU-8697-97 AGENCY DKT. NO. 329-9/97 **STIPULATION OF DISMISSAL WITH PREJUDICE**

THE MATTER in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and is hereby dismissed with prejudice and without costs against any of the parties.

WILLS, O'NEILL & MELLK
Attorneys for Petitioner, Robert Petchel

By: _____
G. ROBERT WILLS

BLANDA & BLANDA
Attorneys for Respondent

By: _____
ROBERT A. BLANDA, ESQ.

Dated: May 13, 1999
GRW:jw\Pleadings7\Southriv\aol\dismissal.stp

WILLS, O'NEILL
& MELLK
ATTORNEYS AT LAW
10 NASSAU STREET
P.O. BOX 614
PRINCETON, NJ 08542

OAL DKT. NO. EDU 10800-97
AGENCY DKT. NO. 401-10/97

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

The record and notice of withdrawal based on a joint stipulation of dismissal with prejudice of the parties transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed.[1] The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before him and is dismissed with prejudice.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] It is noted that this matter was characterized as a settlement, pursuant to *N.J.A.C.* 1:1-19.1, by the Administrative Law Judge in his initial decision. The Commissioner determines that because no settlement terms were brought to the record and the document signed by the parties was entitled a joint stipulation of dismissal this matter is more appropriately categorized as a withdrawal under *N.J.A.C.* 1:1-19.2.

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

July 23, 1999
Date of Mailing, July 23, 1999

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

July 23, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 08700-97S

AGENCY DKT. NO. 326-9/97

ARLENE NOVAK,

Petitioner,

v.

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

Respondent.

Paul L. Kleinbaum, Esq., for petitioner (Zazzali, Zazzali, Fagella and Nowak, attorneys)

Robert A. Blanda, Esq., for respondent

Record Closed: May 25, 1999 Decided: June 8, 1999

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from the filing of a Verified Petition by Arlene Novak, ("petitioner") with the Commissioner of Education on September 8, 1997, involving a dispute over counsel fees regarding attorneys who successfully defended employees of the Board of Education of the Borough of South River ("respondent" or "board") in a Municipal Court prosecution brought by the board. The matter was transmitted to the Office of Administrative Law on October 27, 1997, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The board has now settled its dispute with each attorney, and the parties have prepared the attached Stipulation of Dismissal with Prejudice indicating the terms of settlement.

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

1. The parties have voluntarily agreed to the settlement on the record.

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

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

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

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

6/8/99
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

6-10-99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 11 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

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Attachment

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
One Riverfront Plaza
Newark, New Jersey 07102
(973) 623-1822
Attorneys for Petitioner, Arlene Novak

ARLENE NOVAK, Petitioner,	:	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW ADMINISTRATIVE LAW
v.	:	AGENCY DKT. NO. 324-9/97 OAL DKT. NO. EDU-8700-97
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, Respondent.	:	**STIPULATION OF DISMISSAL WITH PREJUDICE**

The matter in difference in the above-entitled action having been amicably adjusted by and between the parties, it si hereby stipulated and agreed that the same be and is hereby dismissed with prejudice and without costs against any of the parties.

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
Attorneys for Petitioner

By: _____
PAUL L. KLEINBAUM

Dated: 5/14/99

BLANDA & BLANDA
Attorneys for Respondent

By: _____
ROBERT A. BLANDA

Dated:

ZAZZALI, ZAZZALI, FAGELLA & NOWACK
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

OAL DKT. NO. EDU 8700-97
AGENCY DKT. NO. 326-9/97

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

The record and notice of withdrawal based on a joint stipulation of dismissal with prejudice of the parties transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed.[1] The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before him and is dismissed with prejudice.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] It is noted that this matter was characterized as a settlement, pursuant to *N.J.A.C.* 1:1-19.1, by the Administrative Law Judge in his initial decision. The Commissioner determines that because no settlement terms were brought to the record and the document signed by the parties was entitled a joint stipulation of dismissal this matter is more appropriately categorized as a withdrawal under *N.J.A.C.* 1:1-19.2.

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

July 23, 1999
Date of Mailing, July 23, 1999

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 08699-97S

AGENCY DKT. NO. 327-9/97

MELVIN ROSSI,

Petitioner,

v.

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

Respondent.

David L. Rosenberg, Esq., for petitioner (Klausner, Hunter and Rosenberg, attorneys)

Robert A. Blanda, Esq., for respondent

Record Closed: May 13, 1999 Decided: June 8, 1999

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from the filing of a Verified Petition by Melvin Rossi, ("petitioner") with the Commissioner of Education on September 8, 1997, involving a dispute over counsel fees regarding attorneys who successfully defended employees of the Board of Education of the Borough of South River ("respondent" or "board") in a Municipal Court prosecution brought by the board. The matter was transmitted to the Office of Administrative Law on October 27, 1997, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The board has now settled its dispute with each attorney, and the parties have prepared the attached Stipulation of Dismissal with Prejudice indicating the terms of settlement.

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

1. The parties have voluntarily agreed to the settlement on the record.

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

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

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

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

6/8/99
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

6-10-99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 11 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

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Attachment

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

KLAUSNER, HUNTER & ROSENBERG, ESQS.
63 E. HIGH STREET
P.O. BOX 1012
SOMERVILLE, NJ 0876
(908) 685-1552
ATTORNEYS FOR PETITIONER, MELVIN ROSSI

MELVIN ROSSI, Petitioner, - vs - BOARD OF EDUCATION OF BOROUGH OF SOUTH RIVER, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDU 8699-97 AGENCY DOCKET NO. 327-9/97 STIPULATION OF DISMISSAL WITH PREJUDICE

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and is hereby dismissed with prejudice and without costs against any of the parties.

KLAUSNER, HUNTER & ROSENBERG, ESQS.
Attorneys for Petitioner

By: _____
DAVID L. ROSENBERG, ESQ.

BLANDA & BLANDA
Attorneys for Respondent

By: _____
ROBERT A. BLANDA, ESQ.

Dated: Jan 28 1999

OAL DKT. NO. EDU 8699-97
AGENCY DKT. NO. 327-9/97

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

The record and notice of withdrawal based on a joint stipulation of dismissal with prejudice of the parties transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed.[1] The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before him and is dismissed with prejudice.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] It is noted that this matter was characterized as a settlement, pursuant to *N.J.A.C.* 1:1-19.1, by the Administrative Law Judge in his initial decision. The Commissioner determines that because no settlement terms were brought to the record and the document signed by the parties was entitled a joint stipulation of dismissal this matter is more appropriately categorized as a withdrawal under *N.J.A.C.* 1:1-19.2.

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

July 23, 1999
Date of Mailing, July 23, 1999

239-99

C #239-99LM
SB # 36-99

IN THE MATTER OF THE TENURE :
HEARING OF MORRIS KIMBLE, SCHOOL:
DISTRICT OF THE CITY OF TRENTON, :
MERCER COUNTY. :

STATE BOARD OF EDUCATION

DECISION

Decision on motion by the Commissioner of Education, July 27, 1999

For the Petitioner-Respondent, Sumners, George & Dortch (Thomas W. Sumners, Jr., Esq., of Counsel)

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

The decision of the Commissioner of Education denying the respondent's motion to summarily dismiss tenure charges of unbecoming conduct is affirmed for the reasons expressed therein. Like the Commissioner, we note that our decision does not preclude the respondent from arguing during the proceedings in the Office of Administrative Law that the charges against him constitute inefficiency rather than unbecoming conduct.

November 3, 1999

Date of mailing NOV 05 1999

240-99SEC

IN THE MATTER OF MARGARET	:	
CAHILL, TETERBORO BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, BERGEN COUNTY.	:	DECISION
	:	

July 28, 1999

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
MARGARET CAHILL,	:	
Teterboro Board of Education	:	**SEC Docket No.: T04-99**
Bergen County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Margaret Cahill was elected to serve a three-year term on the Teterboro Board of Education in April 1998; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on December 17, 1998; and

WHEREAS, the NJSBA conducted seven training sessions between April 1998 and April 1999 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held in March 1999; and

WHEREAS, the Commission issued an Order on April 26, 1999, directing Ms. Cahill to Show Cause why she had not attended training up until that time; and

WHEREAS, the Teterboro Board Secretary informed the Commission that Ms. Cahill is resigning from the Board at the end of June, but Ms. Cahill wrote a letter stating that she planned to attend a one-day session at the end of the year; and

WHEREAS, the Commission notified her that the Commission would discuss this matter at its May 26, 1999 meeting, that she had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission has considered the reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 1998 to April 1999 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that Ms. Cahill could have attended one of the many sessions offered; and

WHEREAS, the Commission believes if Ms. Cahill fails to resign, it would be appropriate to have her removed from the board if she fails to attend a session by the end of October;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Ms. Cahill violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education remove her from the board if she fails to resign or attend training by the end of October.

Dated: May 26, 1999

Paul C. Garbarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on May 26, 1999.

Lisa James-Beavers, Executive Director

Ljb/T0499.doc

AGENCY DKT. NO. 149-6/99

IN THE MATTER OF MARGARET	:	
CAHILL, TETERBORO BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, BERGEN COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6:3-9.4; and

Whereas, the Commission sent ample notice to the above-named Board member of her failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on April 26, 1999, the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, the above-named Board member informed the Commission that she would attend a training session at the end of the year; and

Whereas, the Commission voted on May 26, 1999 that the above-named Board member's failure to attend Board member training from April 1998 to April 1999 constitutes a violation of *N.J.S.A.* 18A:12-33; and

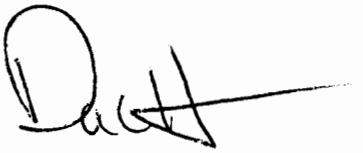
Whereas, the Commission further voted to recommend removal of the above-named Board member if she fails to attend a training session by the end of October 1999 and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on June 7, 1999, the above-named Board member was afforded an opportunity to submit to the Commissioner of Education a response to said resolution; and

Whereas, no response was forthcoming; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is permitted to remain on the Board pending her attendance at the October 1999 training session, in that she is one of only two such members serving a small, nonoperating school district and her suspension would preclude the district from functioning as required by law, and should she fail to do so by the end of October 1999, she shall be removed from office effective November 1, 1999.*



COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

July 28, 1999
Date of Mailing, July 28, 1999

241-99SEC

AGENCY DKT. NO. 148-6/99

IN THE MATTER OF JAMES E. HALL,	:	
TETERBORO BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, BERGEN COUNTY.	:	DECISION
_____:		

July 28,1999

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
JAMES HALL,	:	
Teterboro Board of Education	:	**SEC Docket No.: T03-99**
Bergen County	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, James Hall was elected to serve a three-year term on the Teterboro Board of Education in April 1998; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on December 17, 1998; and

WHEREAS, the NJSBA conducted seven training sessions between April 1998 and April 1999 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held in March 1999; and

WHEREAS, the Commission issued an Order on April 26, 1999, directing Mr. Hall to Show Cause why he had not attended training up until that time; and

WHEREAS, Mr. Hall replied that he could not previously attend due to health problems, but that he planned to attend the January 2000 session because it was the first available one-day session near his home; and

WHEREAS, the Commission notified him that the Commission would discuss this matter at its May 26, 1999 meeting, that he had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission has considered the reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 1998 to April 1999 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that Mr. Hall has presented adequate reasons for not attending a weekend session but has set forth that the only reason he has for not attending the October session is that it is far from his home; and

WHEREAS, the Commission believes if Mr. Hall fails to attend the October session, it would be appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Hall violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education remove him from the board if he fails to attend a training session by the end of October.

Dated: May 26, 1999

Paul C. Garbarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on May 26, 1999.

Lisa James-Beavers, Executive Director

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AGENCY DKT. NO. 148-6/99

IN THE MATTER OF JAMES E. HALL,	:	
TETERBORO BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, BERGEN COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6:3-9.4; and

Whereas, the Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on April 26, 1999, the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, the above-named Board member submitted a response to the Commission indicating that he planned to attend the January 2000 session; and

Whereas, the Commission voted on May 26, 1999 that the above-named Board member's failure to attend Board member training from April 1998 to April 1999 constitutes a violation of *N.J.S.A.* 18A:12-33; and

Whereas, the Commission further voted on May 26, 1999 to recommend removal of the above-named Board member if he fails to attend a training session by the end of October 1999 and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on June 7, 1999, the above-named Board member was afforded an opportunity to submit to the Commissioner of Education a response; and

Whereas, no response was forthcoming; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is permitted to remain on the Board pending his attendance at the October 1999 training session, in that he is one of only two such members serving a small, nonoperating school district and his suspension would preclude the district from functioning as required by law, and should he fail to do so by the end of October 1999, he shall be removed from office effective November 1, 1999.*

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

July 28,1999
Date of Mailing, July 28, 1999

242-99SEC

IN THE MATTER OF WILLIAM REED,	:	
HADDONFIELD BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
CAMDEN COUNTY.	:	DECISION
	:	

July 28, 1999

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
WILLIAM REED,	:	
Haddonfield Board of Education	:	**SEC Docket No.: T05-99**
Camden County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, William Reed was elected to serve a three-year term on the Haddonfield Board of Education in April 1998; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on December 17, 1998; and

WHEREAS, the NJSBA conducted seven training sessions between April 1998 and April 1999 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held in March 1999; and

WHEREAS, the Commission issued an Order on April 26, 1999, directing Mr. Reed to Show Cause why he had not attended training up until that time; and

WHEREAS, Mr. Reed replied that his eight children prevent him from attending weekend sessions and his obligations with his business frequently take him out of the country preventing him from attending the other sessions, but he is currently scheduled for a September session; and

WHEREAS, the Commission notified him that the Commission would discuss this matter at its May 26, 1999 meeting, that he had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission has considered the reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 1998 to April 1999 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that Mr. Reed could have attended one of the many sessions offered; and

WHEREAS, the Commission believes if Mr. Reed does not attend a session by October, it would be appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Reed violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education allow him to attend a June session if he can, suspend him until he attends, if he does not attend until the September or October session, but remove him from the board if he fails to attend by the end of October.

Dated: May 26, 1999

Paul C. Garbarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on May 26, 1999.

Lisa James-Beavers, Executive Director

Ljb/T0599.doc

AGENCY DKT. NO. 152-6/99

IN THE MATTER OF WILLIAM REED, :

HADDONFIELD BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION

CAMDEN COUNTY. : DECISION

:

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6:3-9.4; and

Whereas, the Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on April 26, 1999, the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, the above-named Board member replied that raising his eight children prevented him from attending weekend sessions and his business obligations frequently take him out of the country, preventing him from attending previous training sessions in 1998 and 1999, but that he was scheduled to attend a September 1999 training session; and

Whereas, the Commission voted on May 26, 1999, to recommend that the above-named Board member be allowed to attend a June 1999 training session, if he can, and, if he fails to do so, that he be suspended until he does attend a required training; and

Whereas, the Commission further voted on May 26, 1999 that the above-named Board member be removed from office if he fails to so attend a required training program by the end of October 1999 and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on June 7, 1999, the above-named Board member was afforded an opportunity to submit to the Commissioner of Education a response to said resolution; and

Whereas, no response was forthcoming; and

Whereas, the Commissioner of Education has confirmed the above-named Board member did not attend a June training session; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member, having failed to attend a June 1999 training session, is on this date suspended from office until he attends the required training program and, should he fail to do so by the end of October 1999, he shall be removed from office effective November 1, 1999.*

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

July 28, 1999
Date of Mailing, July 28, 1999

243-99SEC

IN THE MATTER OF DALE A. HANNA,	:	
DELAWARE VALLEY REGIONAL	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION, HUNTERDON	:	DECISION
COUNTY.	:	
	:	

July 28, 1999

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
DALE HANNA,	:	
Delaware Valley Reg. Board of Education	:	**SEC Docket No.: T09-99**
Hunterdon County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Dale Hanna was appointed in January 1997 to fill a vacated seat and was elected to serve a one-year term on the Delaware Valley Regional Board of Education in April 1998 and was elected to a three-year term in April 1999; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on December 17, 1998; and

WHEREAS, the NJSBA conducted seven training sessions between April 1998 and April 1999 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held in March 1999; and

WHEREAS, the Commission issued an Order on April 26, 1999, directing Mr. Hanna to Show Cause why he had not attended training up until that time; and

WHEREAS, Mr. Hanna replied that he attended a session on March 14, 1998 in Morristown, but the NJSBA had no record of it and he had no paperwork to show for it; and

WHEREAS, he further replied that he could not attend the last session in March due to a planned vacation, but is willing to attend any session, although he has not yet registered; and

WHEREAS, the Commission notified him that the Commission would discuss this matter at its May 26, 1999 meeting, that he had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission has considered the reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 1998 to April 1999 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that Mr. Hanna could have attended one of the many sessions offered; and

WHEREAS, the Commission believes if Mr. Hanna does not attend a session by October, it would be appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Hanna violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend him until he attends if he does not attend a June session, but remove him from the board if he fails to attend by the end of October.

Dated: May 26, 1999

Paul C. Garbarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on May 26, 1999.

Lisa James-Beavers, Executive Director

Ljb/T0999.doc

AGENCY DKT. NO. 144-6/99

IN THE MATTER OF DALE A. HANNA,	:	
DELAWARE VALLEY REGIONAL	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION, HUNTERDON	:	DECISION
COUNTY.	:	
	:	

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6:3-9.4; and

Whereas the Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(1), on April 26, 1999, the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, the above-named Board member informed the Commission by letter dated May 17, 1999, that he had attended a training session on March 14, 1998 in Morristown, but the NJSBA had no record of it and he had no paperwork to show for it; and

Whereas, the above-named Board member further advised that he is willing to attend any upcoming session, although he has not yet registered; and

Whereas, the Commission voted on May 26, 1999 to recommend that the above-named Board member be allowed to attend a June 1999 training session, if he can, and, if he fails to do so, that he be suspended until he does attend a required training; and

Whereas, the Commission further voted on May 26, 1999 that the above-named Board member be removed from office if he fails to so attend a required training program by the end of October 1999 and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on June 7, 1999, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, no response was forthcoming; and

Whereas, the Commissioner of Education has confirmed that the above-named Board member did not attend a June training session; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member, having failed to attend a June 1999 training session, is on this date suspended from office until he attends the required training program and, should he fail to do so by the end of October 1999, he shall be removed from office effective November 1, 1999.*

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

July 28, 1999
Date of Mailing, July 28, 1999

244-99SEC

IN THE MATTER OF DOUGLAS ADAMS, :
BUENA REGIONAL BOARD OF :
EDUCATION, ATLANTIC COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

July 28, 1999

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
DOUGLAS ADAMS,	:	
Buena Regional Board of Education	:	**SEC Docket No.: T01-99**
Atlantic County	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Douglas Adams filled an unexpired term for 10 months and then was elected to serve a three-year term on the Buena Regional Board of Education in April 1998; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on December 17, 1998; and

WHEREAS, the NJSBA conducted seven training sessions between April 1998 and April 1999 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held in March 1999; and

WHEREAS, the Commission issued an Order on April 26, 1999, directing Mr. Adams to Show Cause why he had not attended training up until that time; and

WHEREAS, Mr. Adams replied that he could not attend due to his family obligations and schedule, but that he planned to attend the October 26, 1999 session; and

WHEREAS, the Commission notified him that the Commission would discuss this matter at its May 26, 1999 meeting, that he had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission has considered the reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 1998 to April 1999 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, he could have attended one of the many other sessions offered; and

WHEREAS, the Commission finds that if Mr. Adams fails to attend by October, the Commission finds that it would be appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Adams violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend him until he attends if he does not attend a June session, but remove him from the board if he fails to attend the October training session.

Dated: May 26, 1999

Paul C. Garbarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on May 26, 1999.

Lisa James-Beavers, Executive Director

Ljb/T0199.doc

AGENCY DKT. NO. 141-6/99

IN THE MATTER OF DOUGLAS ADAMS, BUENA REGIONAL BOARD OF EDUCATION, ATLANTIC COUNTY.	COMMISSIONER OF EDUCATION DECISION

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6:3-9.4; and

Whereas, the Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on April 26, 1999, the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, the above-named Board member submitted a response to the Commission indicating that his family obligations and demanding work schedule precluded his prior attendance, but that he planned to attend the October 26, 1999 session; and

Whereas, the Commission voted on May 26, 1999 to recommend that the above-named Board member be allowed to attend a June 1999 training session, if he can, and, if he fails to do so, that he be suspended until he does attend a required training; and

Whereas, the Commission further voted on May 26, 1999 that the above-named Board member be removed from office if he fails to so attend a required training program by the

end of October 1999 and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

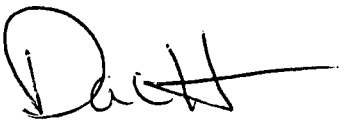
Whereas, on June 7, 1999, the above-named Board member was afforded an opportunity to submit to the Commissioner of Education a response to said resolution; and

Whereas, no response was forthcoming; and

Whereas, the Commissioner of Education has confirmed the above-named Board member did not attend a June training session; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member, having failed to attend a June training session, is on this date suspended from office until he attends the required training program and, should he fail to do so by the end of October 1999, he shall be removed from office effective November 1, 1999.*



COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

July 28, 1999
Date of Mailing, July 28, 1999

244+-99SEC

AMENDED DECISION

IN THE MATTER OF DOUGLAS ADAMS, :
BUENA REGIONAL BOARD OF :
EDUCATION, ATLANTIC COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

September 27, 1999

AGENCY DKT. NO. 141-6/99

AMENDED DECISION

IN THE MATTER OF DOUGLAS ADAMS, :
BUENA REGIONAL BOARD OF :
EDUCATION, ATLANTIC COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6:3-9.4; and

Whereas, the Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on April 26, 1999, the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, the above-named Board member submitted a response to the Commission indicating that his family obligations and demanding work schedule precluded his prior attendance, but that he planned to attend the October 26, 1999 session; and

Whereas, the Commission voted on May 26, 1999 to recommend that the above-named Board member be allowed to attend a June 1999 training session, if he can, and, if he fails to do so, that he be suspended until he does attend a required training; and

Whereas, the Commission further voted on May 26, 1999 that the above-named Board member be removed from office if he fails to so attend a required training program by the

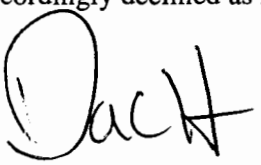
end of October 1999 and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on June 7, 1999, the above-named Board member was afforded an opportunity to submit to the Commissioner of Education a response to said resolution; and

Whereas, no response was forthcoming; and

Whereas, the Commissioner of Education has subsequently been informed by the Commission that the above-named Board member did in fact attend a June training session as directed[1]; now therefore

IT IS ORDERED that the Commission's recommendation to suspend and/or remove the above-named Board member is accordingly declined as moot.[2]



COMMISSIONER OF EDUCATION

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[1] Contrary to the information previously provided to the Commission by the New Jersey School Boards Association, NJSBA has advised the Commission, and the Commission has confirmed, that the above-named Board member attended training from June 18-20, 1999.

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

IN THE MATTER OF THE TENURE :

HEARING OF ARLENE HARDER, : COMMISSIONER OF EDUCATION

SCHOOL DISTRICT OF WASHINGTON : DECISION

TOWNSHIP, GLOUCESTER COUNTY. :

:

SYNOPSIS

Board certified tenure charges of unbecoming conduct, specifically abandonment of employment, incapacity and other just cause against respondent secretary.

Respondent chose not to contest the tenure charges. The ALJ sustained the charge of unbecoming conduct, specifically abandonment of employment, and dismissed without prejudice the incapacity and other just cause charges, finding that incapacity cannot be determined without expert medical testimony.

The Commissioner adopted as his own the recommendation of the ALJ which sustained the charges of unbecoming conduct relating to abandonment of position but reversed that portion of the ALJ's decision which dismissed without prejudice the charges of unbecoming conduct relating to incapacity and other just cause, finding that those charges were deemed admitted by respondent as a result of her withdrawal of opposition to the charges set forth by the Board. Respondent was removed from her tenured position as secretary.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10789-98

AGENCY DKT. NO. 541-12/98

BOARD OF EDUCATION OF
WASHINGTON TOWNSHIP,
GLOUCESTER COUNTY,

Petitioner,

v.

ARLENE HARDER,

Respondent.

Joseph F. Betley, Esq., for petitioner (Capehart & Scatchard, attorneys)

Carl C. Bowman, Esq., for respondent

Record Closed: June 14, 1999 Decided: June 15, 1999

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter commenced on December 2, 1998, when the Board of Education of Washington Township, Gloucester County (hereinafter petitioner) filed tenure charges with the Commissioner of Education against Arlene Harder (hereinafter respondent), a tenured secretary in the district, charging respondent with unbecoming conduct, specifically abandonment of her employment, and incapacity. An answer on behalf of respondent was filed on December 17,

1998, and on December 22, 1998, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 to -13.

A prehearing conference was conducted on January 14, 1999, at which time the hearing was scheduled for May 3, 4 & 5, 1999 at the Trenton office of the Office of Administrative Law. By letter dated March 31, 1999, counsel for respondent wrote to the undersigned with a copy to petitioner's counsel, as follows:

> With regard to the above matter, my client has indicated to me that she no longer feels capable to resume her position with the Washington Township Board of Education. She therefore has indicated that she will no longer contest the termination of her employment. For that reason she has directed me to request the dismissal of the above matter.

On May 4, 1999, the undersigned received a document entitled "Withdraw of Opposition Certification of Arlene Harder," signed by respondent on April 30, 1999. That document is attached hereto and made a part hereof as if set forth herein at length. By letter dated May 27, 1999, the undersigned wrote to both counsel as follows:

> I have received and reviewed the "Withdraw of Opposition Certification of Arlene Harder," dated April 30, 1999 and Mr. Bowman's letter to me dated March 31, 1999, wherein he states that Ms. Harder "will no longer contest the termination of her employment." Although I might be able to write some sort of initial decision based upon these two documents for the Commissioner to approve to close out this case, the usual way for resolving tenure cases without a hearing is a Stipulation of Settlement prepared by counsel setting forth all the reasons why the public interest does not require the case to go forward. See Cardonick v. Board of Education of the Borough of Brooklawn, EDU 7093-81, 7094-81 and 100-82, decided April 6, 1983 by the State Board of Education. In addition, if I do issue an initial decision removing respondent from her tenured position and the Commissioner approves it, Ms. Harder's pension rights may be adversely affected in accordance with N.J.S.A. 43:15A-38. See Uricoli v. Board of Trustees, 91 N.J. 62 (1982). Please advise in writing whether you will be submitting a signed Stipulation of Settlement discussing the considerations required by Cardonick or whether you wish me to proceed with an initial

decision based upon the two documents submitted by Mr. Bowman.

Counsel for petitioner replied by letter dated June 1, 1999, requesting that an initial decision be entered in favor of petitioner substantiating the tenure charges as filed. To date, nothing further has been received from counsel for respondent.

Based upon the foregoing, I **CONCLUDE** that respondent has abandoned her tenured position and those charges are therefore hereby **SUSTAINED.** Whether or not respondent is incapacitated from performing her duties is a matter which cannot be determined without expert medical testimony and accordingly, those charges are **DISMISSED WITHOUT PREJUDICE.** Although the tenure charges also list "other just cause" for dismissing respondent from her tenured position, in fact the statement of evidence in support of the charges sets forth facts relating only to abandonment of employment or incapacity. Accordingly, the charges of unbecoming conduct, specifically abandonment of employment are **SUSTAINED**; the charges of incapacity and other just cause are **DISMISSED WITHOUT PREJUDICE.** It is hereby **ORDERED** that respondent is removed from her tenured position and the within proceedings are concluded.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 15, 1999
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

June 16, 1999
DATE

Receipt Acknowledged:

D.N. Contarino Jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 17 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cc

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
1999 MAY -4 P 12: 26

CARL C. BOWMAN, Esquire
SMA Building, Suite 105
1170 Delsea Drive
Westville NJ 08093
(609) 853-6300

WASHINGTON TOWNSHIP BOARD OF EDUCATION	**BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY**
Petitioner,	
vs.	**AGENCY DKT. NO. 541-12/98**
ARLENE HARDER	
Respondent.	**WITHDRAW OF OPPOSITION CERTIFICATION OF ARLENE HARDER**

1. I am a tenured secretary employed by the Washington Township Board of Education.

2. On or about October 14, 1998 tenure charges were brought by the Superintendent of Schools, Dr. Robert Kern, against me pursuant to N.J.S.A. 18A:6-11 alleging Conduct Unbecoming a Public Employee, specifically abandonment of employment and incapacity, arising from my alleged failure of my to resume her duties as the Administrative Secretary to the Board Secretary.

3. On October 30, 1998 I submitted a written statement of position through my attorney, CarL C. Bowman, challenging said tenure charges.

4. On November 16, 1998 the Board adopted a resolution certifying tenure charges against me to the Commissioner of Education.

5. On March 31, 1999 my counsel submitted correspondence to Administrative Law Judge M. Kathleen Duncan stating that I will not contest the tenure charges.

6. I will not contest the change against me since I cannot currently return to my position at the Washington Township Board of Education because I am suffering from major depression. This depression was initiated by the harassment I was subjected to by the Secretary to the Board of Education, Margaret Meehan.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false that I am subject to punishment.

April 30, 1999.

Arlene Harder

ARLENE HARDER

CARL C. BOWMAN, ESQUIRE

SMA Building, Suite 105
1170 Delsea Drive
Westville, New Jersey 08093
TEL.: (609) 853-6300
FAX: (609) 853-2993

March 31, 1999

Honorable M. Kathleen Duncan, ALJ
Office of Administrative Law
9 Quakerbridge Plaza
P.O. Box 049
Trenton NJ 08625-0049

RE: Washington Township Board of Education v. Arlene Harder
OAL Docket No. EDU 10789-98
My File No. 5160.98

Dear Judge Duncan:

With regard to the above matter, my client has indicated to me that she no longer feels capable to resume her position with the Washington Township Board of Education. She therefore has indicated that she will no longer contest the termination of her employment. For that reason she has directed me to request the dismissal of the above matter.

Respectfully,

Carl C. Bowman
Attorney for Arlene Harder

CCB/nls
cc: Ms. Arlene Harder
Joseph E. Betley, Esquire (via fax & regular mail)

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
1999 APR -5 A 11: 30

OAL DKT. NO. EDU 10789-89
AGENCY DOCKET NO. 541-12/98

IN THE MATTER OF THE TENURE	:	
HEARING OF ARLENE HARDER,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF WASHINGTON	:	DECISION
TOWNSHIP, GLOUCESTER COUNTY.	:	
	:	

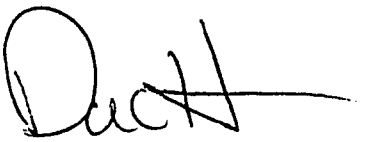
The record and initial decision issued by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon examination of the record in this matter, the Commissioner notes that the document entitled "Withdraw of Opposition Certification of Arlene Harder" submitted by respondent expressly states that she "will not contest the tenure charges" notwithstanding her prior position to the contrary, and that, by reference to her attorney's letter of March 31, 1999, she "will no longer contest the termination of her employment." Given that this document was filed prior to the commencement of hearings and resulted, at respondent's behest, in the conclusion of proceedings at the Office of Administrative Law, respondent has by her certification, in effect, withdrawn her answer filed on December 17, 1998, wherein she contested the charges of unbecoming conduct, specifically abandonment of employment, incapacity and other just cause, certified by the Board. Accordingly, pursuant to *N.J.A.C.* 6:24-1.4(e), the Commissioner finds and determines that each count of the tenure charges set forth by the Board shall be deemed admitted by respondent, and the Commissioner shall issue his final determination by way of summary decision.

Thus, upon careful consideration of the record and initial decision, the Commissioner adopts as his own the recommendation of the Administrative Law Judge (ALJ) which sustains the charges of unbecoming conduct relating to abandonment of position. However, the Commissioner reverses that portion of the ALJ's recommended decision which dismisses without prejudice the charges of unbecoming conduct relating to incapacity and other just cause, finding instead that those charges are deemed admitted by respondent as a result of her withdrawal of opposition to the charges set forth by the Board. The Commissioner having determined that the instant charges were, if true, sufficient to warrant respondent's dismissal, and the charges having been deemed admitted, the Commissioner concurs with the recommended order of the ALJ dismissing respondent from her tenured employment.[1]

Accordingly, respondent is hereby removed from her tenured position as secretary in the Washington Township School District.[2]

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

[1] The Commissioner emphasizes that the final decision in this matter does not in any way signify that the Commissioner concurs with or accepts respondent's assertion, in the above-referenced certification withdrawing opposition to the tenure charges, that she is suffering from major depression which was initiated by the harassment of the Board Secretary.

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 et seq., within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

July 30,1999
Date of Mailing, July 30, 1999

IN THE MATTER OF THE TENURE HEARING OF ROBERT G. MORTON, SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY.	:	
AND	:	COMMISSIONER OF EDUCATION
ROBERT MORTON,	:	DECISION
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Board certified tenure charges of unbecoming conduct against Respondent Morton, an Industrial Arts Teacher, based on drug-related criminal charges. In consolidated matter, respondent challenged the Board's action suspending him without pay. He asserted that his suspension should have been with pay from November 1, 1996 until December 16, 1996, when the Board voted to certify tenure charges against him, and that he was entitled to continuation of his full salary effective April 16, 1997, pursuant to *N.J.S.A.* 18A:6-8.3 and 6-14.

Having found respondent's testimony incredible, the Board determined that his possession of a controlled dangerous substance and possession of drug paraphernalia constituted conduct unbecoming a teacher even though the possession occurred off school premises. In 1988, the Board had reasonably accommodated respondent's drug addiction by supporting his inpatient drug program and by permitting him to return to work after completion of that program. Now, since respondent did not prove any mitigating circumstances, the ALJ concluded that the appropriate penalty for respondent's conduct unbecoming on the two charges brought by the Board was removal from his tenured position. Board argued that by virtue of respondent's conviction of possession of drug paraphernalia, he forfeited his position. However, the ALJ noted that neither the OAL nor the Commissioner has the jurisdiction to enter orders for forfeiture of public employment pursuant to *N.J.S.A.* 2C:51-2, as amended by *P.L.* 1995, *c.* 250. ALJ ordered respondent dismissed from his position and ordered that the Board pay respondent his salary for the period between November 1, 1996 and December 16, 1996.

Having reviewed the record, including transcripts of the hearing, the Commissioner found no reason to challenge the ALJ's credibility determinations and adopted the findings and determination in initial decision as his own. Commissioner also affirmed the ALJ's Interlocutory Order of May 14, 1997 regarding the permissible scope of discovery and the procedures for disclosure of documents in the Board's possession. Commissioner ordered respondent dismissed as of the date of this decision and directed Board to pay respondent's salary for the period in question. Commissioner ordered a copy of this decision transmitted to the State Board of Examiners for action as it deems appropriate.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

IN THE MATTER OF THE TENURE HEARING OF ROBERT G. MORTON, BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	OAL DKT. NO. EDU 253-97 AGENCY DKT. NO. 596-12/96
and,	
ROBERT MORTON petitioner, v. **BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,** Respondent.	OAL DKT. NO. EDU 956-97 AGENCY DKT. NO. 37-1/97 (CONSOLIDATED)

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

Karen Murray, Esq., for respondent (Murray, Murray, Corrigan & Garcia, attoneys)

Record Closed: May 15, 1998 Decided: June 11, 1999

BEFORE **BARBARA A. HARNED,** CHIEF ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

These matters were transmitted to the Office of Administrative Law (OAL) by the Commissioner of Education on January 15, 1997 and February 25, 1997 respectively for hearing as contested cases. In OAL Docket No. EDU 253-97S petitioner Board of Education of the City of Camden, Camden County (Board) filed tenure charges against respondent Robert G. Morton, a tenured teacher in the school district. In its petition, the Board charges that Mr. Morton engaged in conduct unbecoming a teacher and conduct that constitutes a forfeiture of his position by virtue of the following: (1) on May 11, 1995, Mr. Morton was charged with possession of cocaine and drug related paraphernalia and driving with a suspended license and (2) on July 11, 1996, Mr. Morton was arrested for possession of cocaine and drug related paraphernalia. Mr. Morton received a conditional discharge from the May 11, 1995 charge of possession of cocaine and drug related paraphernalia conditioned on one year of probation with random drug testing and a fine of $625.00. The July 11, 1996 charge of possession of cocaine and drug related paraphernalia was downgraded to a charge of use or possession with intent to use drug paraphernalia, to which Mr. Morton pled guilty and received probation for three years and a fine of $1,310.00. Mr. Morton's driving privileges were also revoked for one year. By letter dated November 4, 1996, the Superintendent of Schools notified Mr. Morton that he was suspended without pay effective November 1, 1996 as a result of his guilty plea, and pending the filing of tenure charges against him.

In OAL Docket EDU 956-97S, Mr. Morton is the petitioner and the Board is respondent. In this matter, Mr. Morton is challenging the Board's action in suspending him without pay. In his petition, Mr. Morton asserts that his suspension should have been with pay from November 1, 1996 until December 16, 1996, when the Board voted to certify tenure charges against him. Mr. Morton further asserts that he is entitled to continuation of his full salary effective April 16, 1997, pursuant to *N..J.S.A.* 18A:6-8.3 and *N.J.S.A.* 18A:6-14.

On March 12, 1997, an order was entered consolidating EDU 253-97S and EDU 956-97S. On that same day, a prehearing order was entered which established a schedule for the completion of discovery and scheduled the hearing for September 22, 23 and 24, 1997. The hearing was held on

September 22, 23 and 24, 1997 and December 10, 1997. Post-hearing submissions were filed on February 9, 1998, April 16 and May 15, 1998, on which later date the record closed.

FACTUAL DISCUSSION AND FINDINGS

The parties stipulated to the following facts. Mr. Morton commenced work with the Board of Education of the City of Camden on September 1, 1975. He worked as an industrial arts teacher at East Camden Middle School during the 1994-1995 school year and at Woodrow Wilson High School during the 1995-1996[1] school year and was certificated to teach industrial arts. On August 13, 1996, the Board of Education suspended Mr. Morton with pay. Mr. Morton's suspension with pay was converted to a suspension without pay, effective November 1, 1996. On November 16, 1996, tenure charges were filed with the Board. On December 19, 1996, tenure charges were certified by the Board. Mr. Morton's suspension without pay was converted to a suspension with pay as of April 18, 1997, within 120 days of the certification of charges by the Board (J-1). This ends the stipulation of facts.

Officer Richard D. Kinkler testified on behalf of the Board. He has been a patrolman for the Hadden Heights Police Department for four years. On May 11, 1995, he observed Mr. Morton sitting in a car by himself on High Street in a non-residential area. Officer Kinkler testified that Mr. Morton looked at him "funny" and so he ran a "tag" or check on the car. In his written offense report Officer Kinkler stated that after Mr. Morton looked at him in a "suspicious manner" and due to recent criminal activity in the area, he ran a "tag" on Morton's car which was reported to be registered to an older female (P-4). While the officer was running the check, Mr. Morton moved his car to another area near the railroad tracks and parked again (P-4). Officer Kinkler followed; parked his car near Mr. Morton's and observed Morton's car for about five minutes during which Mr. Morton did not leave the vehicle (P-4). The officer then left his vehicle and walked over to Mr. Morton's vehicle. Mr. Morton got out of his car, approached the officer and, when asked what he was doing, told the officer he had just gone to get ice cream (P-4). Kinkler would have seen Morton if he had gone to the ice cream store because Kinkler was parked between Morton's car and the store. He never saw

[1] While the Stipulation signed by the parties states that Mr. Morton taught at Woodrow Wilson during both school years, the testimony of the witnesses made it clear that he taught there only during the 1995-1996 school years. See Transcript of September 24, 1997, page 46, lines 7 through 22.

Morton with ice cream that evening. Officer Kinkler asked Mr. Morton for his driver's license and was told that he did not have one. Mr. Morton offered his school identification with his picture. Officer Kinkler was then advised by the dispatcher that Morton's driving license was suspended and that a warrant was out for his arrest. The warrant was issued by the Pennsauken Municipal Court for a traffic violation (P-6). While Officer Kinkler did not have the actual warrant, the dispatcher from Haddon Heights Police Department confirmed with Kinkler that he had received it by fax. The officer searched Mr. Morton's vehicle but did not find anything. At that point, he arrested Morton and drove him to police headquarters.

At police headquarters, Mr. Morton was searched. Morton had a sweater on and when it was removed, Officer Kinkler observed two glassine bags in Morton's top front left hand pocket. The officer removed the two bags from Mr. Morton's pocket and saw that they contained a white substance. Officer Kinkler placed the glassine bags into evidence and entered a notation of the glassine bags as "containing what is believed to be cocaine" in the evidence log (P-8). He visually identified the substance as crack cocaine. The substance was also field tested for cocaine (P-4). During this test, a portion of the substance is placed on a clip and the clip is dipped in a chemical. If the chemical turns blue, the substance is cocaine. The substance taken from the bags in Mr. Morton's possession field tested positive for cocaine. Officer Kinkler completed a uniform arrest report in which he listed the charges against Mr. Morton as "Possession of CDS, Driving While Suspended, Warrant" (P-3). He also completed a Request for Examination of Evidence to be sent to the State Police for testing of the two bags (P-12). The request was received by the State Police on October 11, 1995. Officer Kinkler described the bags as small, heat-sealed bags, about one inch by one-half inch in size and of a dark green color. He has seen green glassine bags like that hundreds of time, although sometimes different colors are used.

On that same day, May 11, 1995, Officer Kinkler filled out a summons and complaint which was filed with the Municipal Court of Haddon Heights on the charge of driving while suspended (P-7). Officer Kinkler also filled out a complaint on the charge of possession of a controlled dangerous substance, stated to be a crime of the third degree in violation of *N.J.S.A.* 2C:35-10a (P-5). Officer Kinkler's supervisor was Sergeant Giambrone, who reviewed the complaint and also signed it (P-5).

On this complaint, P/C or "probable cause" was described as "m/v stop, warrant and search incident to arrest producing contraband" (P-5).

On cross examination, Officer Kinkler testified that he had been on the Haddon Heights police force for four years and nine months and that he lived locally. He is well acquainted with Haddon Heights, having attended school in the town. The officer described the recent criminal activity referred to in his offense report as having occurred in the area of Eighth Street and Hyde Park and consisted of kids drinking in the area and performing acts of criminal mischief.

Officer Kinkler agreed that Mr. Morton did not speed nor drive erratically while he observed him. When questioned about the "suspicious" look of Morton's, the officer stated that it is not his general experience that people look at police officers with anxiety or suspicion and that Mr. Morton looked at him out of the corner of his eye as though Morton did not want Kinkler to see him looking at the officer. Officer Kinkler also agreed that Mr. Morton did not try to flee and that they had a cordial conversation.

The "tag" or check on the car revealed that it was not stolen but registered to an older woman whom Mr. Morton later identified as his mother-in-law. After Officer Kinkler ran the check, Mr. Morton moved the car about five blocks. Morton stopped his car and parked even after he saw Officer Kinkler. When the officer also pulled over, there were cars parked between the two vehicles and approximately sixty feet separated the two cars. An ice cream store was across the street. At the time it was dusk, almost nighttime and it was getting dark. Mr. Morton got out of his car and walked towards the officer. Kinkler asked Morton for his driver's license because of the suspicious look Morton had given him and because he lied about going for ice cream, since Kinkler had observed Morton during the time he was parked in the area and Morton had not left his car to go to the ice cream store. Officer Kinkler could not cite to any specific code, statute or regulation supporting his request for Mr. Morton's driver's license in these circumstances. However, the officer thought there might be some criminal activity occurring. Before arresting Mr. Morton, Officer Kinkler did not check at the ice cream store to determine if he had been there. To do so would require that he either leave Mr. Morton alone or take him to the store. Before the arrest, Kinkler did not detain Morton. Although the officer did not tell Morton he could go, if Mr. Morton had left, the officer would not

have stopped him. Officer Kinkler arrested Morton only after he was told that the arrest warrant had been faxed to the police department.

Officer Kinkler found no drugs, drug paraphernalia or weapons in the car Mr. Morton was driving and did not see Morton throw anything out of the car. In searching the car, the officer looked only in the immediate area in which Mr. Morton sat in the car. When he took Morton to the police station, the car was left where it was parked because Mr. Morton told the officer that it belonged to his mother-in-law. The search of Mr. Morton at the police station revealed no drug paraphernalia.

When questioned as to the contents of P-5, the complaint for possession of a controlled dangerous substance, Officer Kinkler acknowledged that the description of probable cause he swore to in that document is not accurate in that he had written "m/v stop, warrant, and search incident to arrest producing contraband." (P-5). In fact there was no motor vehicle stop. He also agreed that the field test he performed on the substances found on Mr. Morton is not 100% accurate. Officer Kinkler could not testify as to whether Mr. Morton was under the influence or not at the time of the arrest because he did not take any blood or urine samples. Kinkle is aware that Mr. Morton was given a conditional discharge on the charge of possessing a controlled dangerous substance.

Mr. Morton gave a written statement at the police station (R-1). In his statement, Mr. Morton wrote that he "saw to small bag of what I thought was drug by four students. I pick it up and ask them what it was. They said they did not know. I replyed I'll find out. I put it in my pocket and got sidetrack and forgot about it" (R-1). Mr. Morton did not tell Officer Kinkler the names of the students, although he may have told the officer that he found the bags during the school day when he was supervising students. Officer Kinkler did not ask Morton for the names of the students as he generally does not ask follow-up questions to an arrestee's statements. Mr. Morton could have written in as much detail as he wanted in writing his statement.

Detective Sergeant Robert Griffith testified on behalf of the Board. He has been an officer with the Haddon Heights Police Department since 1974. He has held the positions of special officer, patrolman and, for the past nine years, detective sergeant. In his position as detective sergeant he is responsible for investigations of criminal acts and completion of uniform crime reports. He is also in

charge of all evidence that is turned into the police department. The standard procedure for the collection of evidence calls for officers to place evidence in bags with identifying information. The evidence bags are then stored in an evidence locker which has a padlock. The key to the padlock is locked in Sergeant Griffith's desk. In addition, the Chief of Police has a key to the evidence locker. Within a day of evidence coming into the department, Sergeant Griffith will bring the evidence bag to his office, log the bag in, assign it a number which number is prefaced by NAR, put the number on the evidence bag and place the evidence bag into a vault. Three people have the combination to the vault: Detective Sergeant Griffith; the Captain and the Chief. When the evidence is narcotics it is placed in a locked cabinet in the vault to which only Sergeant Griffith and the Chief have a key.

Sergeant Griffith identified the Evidence Log Sheet for the glassine bags found in Mr. Morton's pocket (P-8). The number assigned to these bags by Griffith was NAR454 (P-8). The log sheet is kept with the case records. Sergeant Griffith also identified a Request for Examination of Evidence which was sent to the state police, asking for a quantitative and qualitative analysis for drugs in the two glassine bags (P-12). The Request for Examination of Evidence is a three-part form, with an original and two copies. The Request in this case had a Laboratory Number assigned to it of 148489H and went to the state police laboratory on October 11, 1995 at 11:16 a.m. when it was delivered with the glassine bags in a sealed package by Sergeant Griffith (P-12).

A Municipal Court Order was entered on November 14, 1995 on the charge of possession of a controlled dangerous substance (P-10). Pursuant to this Order, Mr. Morton was given a conditional discharge on the charge (P-10). Conditions for the discharge included payment of certain fines, probation for one year, compliance with random drug testing and payment of $5.00 per month to Probation (P-10).

Sergeant Griffith received a Certified Laboratory Report on Laboratory Number 148489H from the Forensic Science Bureau of the State Police (P-13). The Report is dated November 27, 1995 and was certified on November 29, 1995 (P-13). Sergeant Griffith did not know whether the charge against Mr. Morton had been determined before he sent the evidence for testing and received the Report, since he usually is not told about a conditional discharge. He testified that there is no specific schedule for when evidence is sent to the state lab for testing, although if a "not guilty" plea is

entered, he would try to get testing for that case done first. A copy of Certified Laboratory Reports is provided to the court by Sergeant Griffith. It was stipulated by the parties that the Certified Laboratory Report in this matter shows that specimens 1 and 2 of Laboratory Number 148489H tested positive for cocaine at .22 G. On January 19, 1996, Sergeant Griffith received the glassine bags back from the state police laboratory in a sealed package with another copy of the Request for Examination of Evidence. He then placed the glassine bags back into the vault.

On cross examination, Sergeant Griffith agreed that he was not involved in the field testing of the glassine bags and did not know whether the bags had been opened before he retrieved them from the evidence locker.

On July 16, 1996, a second complaint was filed against Mr. Morton by Patrolman R. Long of the Haddon Heights Police Department (P-15). The complaint charged that on July 11, 1996, Mr. Morton "knowingly or purposely obtain[ed] or possess[ed] a controlled dangerous substance . . . specifically by possessing cocaine" in violation of *N.J.S.A.* 2C:35-10(a)1 (P-15). On the first court appearance on this charge, Mr. Morton received a continuance until October 22, 1996 in order to obtain counsel (P-16). On October 22, 1996, Mr. Morton waived his right to counsel and pled guilty to a reduced charge of "use or possess with intent to use drug paraphernalia to inhale and process a controlled dangerous substance or controlled substance analog, specifically by possessing 'crack' pipes and a test tube" in violation of *N.J.S.A.* 2C:36-2 (P-16). As a result of his guilty plea, Mr. Morton was placed on probation for three years and ordered to pay fines totaling $1310 (P-17). In addition, his driving privileges were revoked for one year (P-17) and he was ordered to attend an in-house treatment program at "My Brothers" (P-19).

On March 10, 1997, the May 11, 1995, charge against Mr. Morton for possession of a controlled dangerous substance was dismissed as the "conditional discharge is completed" (P-11).

Patricia E. Cook testified on behalf of the Board. She has been employed by the Camden Board of Education since 1964 in various capacities including Assistant Librarian, Administrative Assistant, Assistant Principal and Principal. Principal Cook holds certificates in Teacher/English; Teacher/Librarian and Principal/Supervisor. She obtained the Principal/Supervisor certificate in the

mid 1970's. While currently Principal at the Veterans Middle School, Principal Cook was Principal of the Woodrow Wilson High School when Mr. Morton taught industrial arts at that school during the 1995/96 school year. The Camden school district has three high schools: Camden, Woodrow Wilson and Medical Arts.

When Principal Cook was principal at Woodrow Wilson High School between July 1994 and June 1997, her administrative team consisted of two assistant principals; a Dean of Students; two Administrative Assistants and a Scheduling Administrative Assistant. During the 1995/1996 school year, there were approximately 1400 students and 148 teachers at Woodrow Wilson.

Principal Cook testified that the Camden Board of Education has a two-volume policy manual, called a Governance Manual, which is kept in every principal's office. The policy manual is not distributed to every teacher but they are told of its existence and that they can come to the office to review the manual. Sections of this manual are distributed to teachers periodically. In addition, while Principal at Woodrow Wilson, Ms. Cook developed a Teachers Handbook which was distributed to the teachers. It included, *inter alia*, policies on attendance, lateness, dress code and a drug-free work place policy.

A section of the Board's Governance Manual is captioned "Smoking, Drinking and Use of Drugs on School Premises" (P-1). It bans the use of alcoholic beverages and the manufacture, distribution, dispensing, possession of, use of or sale of any controlled dangerous substance on or in school work sites and provides that violation of this ban may lead to disciplinary action, including termination (P-1). The manual further provides that "[t]he Board of Education, as a result of criminal convictions of any criminal drug statute violation by an employee occurring outside of the worksite, may discipline said employee. Disciplinary action may include, but is not limited to nonrenewal, suspension, or termination at the discretion of the board" (P-1). According to Principal Cook, this provision applies to all Board employees. Principal Cook included this manual section in the Teachers Handbook which she distributed to every teacher in September 1994, 1995 and 1996. The Handbook was distributed at the beginning of each school year during in-service training during which the morning is spent going over policies and new programs.

The Governance Manual also contains a provision concerning use of drugs or alcohol by students (P-2). This provision is part of the Student Handbook and provides, *inter alia,* that "[b]y joining with community agencies; hospitals; law enforcement; and providing a drug-free workplace, the Camden City Board of Education hopes to provide an atmosphere in which drug alcohol abuse will not have a negative impact on the students in the Camden City School District" (P-2).

Principal Cook testified as to the Board policy on drugs which is to instill abstinence in students. To accomplish this goal, several programs have been established. For example, the "Network 3" program is a year-long program with seminars, rallies and a trip to Washington, D.C., all designed to motivate students to stay away from drugs. The Tigers Lair is a health-based clinic in the school which is open to students, staff and the community and which makes presentations to staff on drug usage. There is also a Living Well program which brings professional athletes into the school to motivate students to stay away from drugs and stay in school. Each school has a Save our Students (SOS) team which, *inter alia,* is established to provide support and assistance to students in need of help (P-2). During the 1995/1996 school year, the Woodrow Wilson SOS team and the school nurse who attended a special program at Rutgers University on drug usage made presentations to the teachers. In Principal Cook's words, "abstinence" is the message given to the staff.

Principal Cook described a flyer from the Personnel Department which she posted on the bulletin board in the main office where all flyers are posted. It described the Employee Assistance Program(EAP) and gave a phone number to call for help if an employee had a drug problem. In addition to posting the flyer, Principal Cook advised staff of the program. If a staff member told Principal Cook he or she had a drug problem, Cook would refer him or her to the EAP. Mr. Morton never told Principal Cook that he had a drug problem or that he had been arrested even though she had an "open door" and he could have come to speak with her. Nor did the Superintendent of the district, Dr. Dawson, tell Principal Cook of a criminal problem involving Mr. Morton during the 1995/1996 school year.

On cross-examination, Principal Cook testified that she received on-going training from the district in the area of substance abuse and how to help staff with drug problems. She also had been a member of the SOS team. If an employee came to Principal Cook with a drug problem, she was

instructed to refer him or her to the EAP or the school nurse and was not instructed to terminate such an employee. Principal Cook agreed that there was no requirement in the Board policies that an employee come to her with a drug problem.

Principal Cook acknowledged that the two volumes of Board policies kept in a bookshelf in her office were very thick but they had a Table of Contents and staff were told at the beginning of the school year that they were free to use them.

Robert Morton testified on his own behalf. He received an associate degree in Mechanical Engineering/Technology from Camden County College in 1971 and a bachelor of arts degree in Industrial Arts Education from Trenton State College in 1974. Mr. Morton holds a kindergarten through twelfth grade teaching certificate in Industrial Arts. He commenced employment with the Board in January 1975 as a permanent substitute teacher and in September 1975 he became a full-time teacher of Industrial Arts. Between September 1975 and September 1995, Mr. Morton taught at various middle schools in the district. Between September 1995 and June 1996, he taught at the Woodrow Wilson High School. Mr. Morton had ten month contracts of employment with the Board, from September 1 through June 30 of each year.

For most of his life, Mr. Morton has lived in Camden. In August, 1991, however, he moved to Haddon Heights and lived at 802 Station Avenue, one block from the Haddon Heights police station. While living in Haddon Heights, Mr. Morton walked frequently past the police station and knew Officer Kinkler by sight, having seen him many times. On May 11, 1995, Mr. Morton was teaching at the East Camden Middle School. He testified he found two bags laying on the floor in the Technology wing which he assumed was contraband. He saw four students in the area and, pointing down to the bags, he asked the students "whose is this?" The students looked at him as though he were "crazy." Mr. Morton identified one of the students as D.A., an eighth grader. Mr. Morton then picked up the bags, intending to turn them in at the main office. He had found contraband once before and brought it to the main office. Another teacher, Deborah Harris, had also found and turned in contraband at East Camden.

As Mr. Morton walked toward the main office, he saw a security guard who was having trouble with two students fighting. This was at the end of sixth period and there was a large crowd of students yelling "fight, fight, fight." Mr. Morton stopped to help the guard separate the students, putting the two bags in his front pocket. He had to wade through the crowd to get to the fighting students. Mr. Morton, the guard and another teacher pulled the students apart and brought them into Morton's classroom. There was another student also there for fighting in a separate incident and the principal came to the scene. It took forty-five minutes to resolve the matter and, therefore, Mr. Morton did not teach his seventh period class. He did teach his eighth period class followed by homeroom and a conference until 3:30 p.m. He then went home exhausted and fell asleep, forgetting about the bags in his pocket.

When Officer Kinkler asked him if he wanted to write a statement, Mr. Morton agreed to do so. The officer did not ask him any follow-up questions and did not seek any further information from him. Morton initially pled not guilty to the May 11, 1995 charge of possessing a controlled dangerous substance. He was never indicted on the charge because he was offered a conditional discharge.

Since 1974, Mr. Morton has been employed over the summer months by the City of Camden as a pool coordinator, including the summer of 1996. In that capacity, he supervises the lifeguards at one of the City's pools. He trains the lifeguards in CPR, First Aid and lifeguarding procedures. Mr. Morton has a lifeguard certification and certifications for Instructor of Lifeguard Training, First Aid and CPR Instructor. These certifications are issued by the Red Cross.

During the summer of 1996, Mr. Morton was living in the room in Haddon Heights. His fourteen-year old son, Austin, was living with him. Mr. Morton testified that he was not using drugs on July 11, 1996, but had done so four or five days earlier. He got very upset about taking the drugs and started throwing out everything he had connected with drugs. He looked through all the storage containers and threw out every drug-related item he found. His son helped him with this project.

On July 11, 1996, there was money missing from Mr. Morton's wallet. He "hemmed" Austin in the bathroom and asked him about the missing money, telling Austin that he would beat him.

Austin got around Morton and left. Mr. Morton returned to his room and started assembling a flying model rocket. He uses the models in teaching and assembling them is also a hobby of his, like therapy. While Mr. Morton was alone in the room working on the rocket, the door was ajar. He heard a knock and called out "come in." Officers Kinkler and Long and Austin came in. The officers did not draw their guns and did not have a search warrant. They told Morton that Austin had come to the police station and told them that Morton was getting "high." His son went to a milk container that was in the trash and pulled drug paraphernalia out of it. Mr. Morton was not told of his Miranda rights at this point. He told the officers that he did own some of the paraphernalia, that he had had a relapse and was throwing the "stuff" out. Mr. Morton was arrested and charged with possession of a controlled dangerous substance and possession of drug paraphernalia. On October 22, 1996, Mr. Morton pled guilty to a downgraded charges of possession of drug paraphernalia.

Between July 1996 and October 1996, Mr. Morton was supervised by Probation Officer J. Petty on the conditional discharge resulting from the May 11, 1995 charge. He testified that she never asked him to submit to a drug test during this period and that he discussed his rehabilitation with her. He asked her to find a place for him to go because he could not do it on his own. She recommended My Brother's Keeper and he entered into a twenty-eight day in-patient rehabilitation program on October 2, 1996. While at My Brother's Keeper, he could not leave the facility without supervision. His entire day was planned with meetings, counseling and group sessions with an outside counselor. Mr. Morton described this program as a spiritual rehabilitation in which the goal was to learn how to live right. During the sessions, the group discussed subjects such as their "triggers," i.e. things that lead them to use drugs. Three evenings a week Mr. Morton attended an outpatient rehabilitation program at John F. Kennedy Hospital, accompanied by a senior member or counselor.

After completing the in-patient program at My Brother's Keeper, Mr. Morton went to ninety meetings of Narcotics Anonymous (NA) or Alcoholics Anonymous (AA) in ninety days. While he is not an alcoholic, he went to AA meetings sometimes because whether cocaine or alcohol "it's all a drug" and he had to learn to be abstinent from all drugs. Mr. Morton celebrated one year of sobriety on October 2, 1997. He continues to go to at least three and sometimes four NA or AA meetings a

week. He described himself as a "recovering addict" rather than an "active addict" and that it is something he has to work on every day, one day at a time.

Mr. Morton testified that he never used drugs at school nor did he ever bring drugs to school. He was never accused of being under the influence at school. He had never seen the Board policies on drugs described by Principal Cook and marked as exhibits P-1 and P-2. The Board policies were never discussed in depth by the Principal or Vice Principal. Rather, they would distribute the teacher handbook and run through the index with the teachers and instruct them to read the handbook at their leisure.

After he was suspended by the Board, Mr. Morton started working for Clifford Industries, telemarketing for a home improvement business. He worked there in October and November, 1996; was laid off in December 1996; returned to work on January 6, 1997 and continued until June 1997 when he left for his Pool Coordinator job with the City of Camden. He found out about Clifford from his sister-in-law who told him it would be a good place to work because a number of recovering addicts worked there. Mr. Morton agreed that it was a good place to work but it only paid $7.00 per hour and he needed to earn more than that because he has seven children.

On cross examination, Mr. Morton testified he first used drugs while attending Trenton State College when he smoked marijuana. In approximately 1987, he started using crack cocaine. He has not used any other drugs. Between 1987 and 1996, he used crack cocaine occasionally. In 1988, he voluntarily entered a forty-five day residential program at Seabrook House for detoxification and rehabilitation because he realized his drug usage was uncontrollable. At the time, he was using crack cocaine every other weekend or so. Mr. Morton told the then superintendent Dr. Arnold Webster about his drug problem and that he needed some time off. Dr. Webster responded "take all the time you need." After he left Seabrook in November 1988, he attended a weekly NA meeting and abstained from crack cocaine until 1991 when he used again. He began using approximately once a month but eventually it was every other weekend. He did not use crack cocaine during the week.

Mr. Morton continued using crack cocaine on and off until he entered My Brother's Keeper in October 1996. While he was using, he would realize he was doing something he should not and would try to stop. After he left My Brother's Keeper, Mr. Morton went to live with his mother.

Upon questioning concerning the May 11, 1995 incident, Mr. Morton indicated that his classroom is on the main floor and only a minute or two away from the main office. Marilyn Allen was principal of East Camden Middle School on May 11, 1995. Mr. Morton found the bags at approximately 1:30 p.m., right at the end of the sixth period. Sixth period is the last lunch period and students were milling in an area near the cafeteria. Mr. Morton had seen similar bags which contained contraband and suspected that these bags contained contraband. He did not ask the students' names because they denied the bags were theirs and he did not see the bags fall out of any student's pocket. He therefore could not say to whom the bags belonged. Mr. Morton found drugs in school two times during his twenty years of teaching: on May 11, 1995 and one other occasion a few months earlier than May 11, 1995.

On May 11, 1995, Mr. Morton was wearing a white shirt and a sweater and he put the bags he found in his shirt pocket when he went to assist the security guard who was attempting to separate two students who were fighting in the central hallway. The guard pulled one student away while Morton pulled the other away. Mr. Morton took one of the fighters to his classroom to separate him from the other student whom the guard was taking to the principal's office. Mr. Morton put the student in his office to "chill out." By this time, students in Mr. Morton's seventh period class started entering the classroom when another incident occurred in the hallway. Mr. Morton had two of the larger students "stand guard" over the student who had fought earlier and went out to the hallway to help with the second disturbance. The intercom in his classroom was not working at the time and he did not have time to call the principal's office. According to Mr. Morton, there were fights almost every day in the school.

The second incident which occurred in the school on May 11, 1995 was described by Mr. Morton as a much larger altercation. There were four or five classrooms of students in the hallway. Some of the students were fighting; others were watching the fights. Security arrived and they got the fighters separated. Mr. Morton had two of the fighters in his classroom and he waited for them to be

picked up. The principal arrived toward the end of the seventh period and the fighters were then removed from his classroom. Mr. Morton then taught his eighth period class and had by that time forgotten about the bags in his pocket. He finished the school day with home room and a conference. After signing out in the main office he took two buses home to Haddon Heights and fell asleep in his clothes, exhausted.

Mr. Morton left his room around 7:30 p.m., wearing the same clothes he had worn to school. "On paper" Mr. Morton did not own a car in 1995 but he shared the costs of a car with another individual. On May 11, 1995 he was driving his mother-in-law's car. He knew his license had been suspended but did not think it was for the incident set forth in the bench warrant (P-6). The bench warrant lists his address as on Thurman Street in Camden and Morton agreed that he used to live on Thurman Street. However, he was not aware of a bench warrant against him until Officer Kinkler told him of the warrant. Mr. Morton acknowledged driving between 1991 and 1995 even though he knew his license had been suspended.

When Officer Kinkler found the bags in his pocket, Mr. Morton uttered a swear word and then told the officer where he had found the bags. In giving his written statement on May 11, 1995, Morton did not refer to the fights at the school but rather stated he had gotten "sidetracked" (R-1). He testified, however, that he did tell Officer Kinkler about the fights. Mr. Morton had an attorney who advised him on the May 11, 1995 charge and the subsequent discharge.

In May of 1995, Mr. Morton was not in rehabilitation but testified that he was not using cocaine at the time. He could not recall when he had last used cocaine before May 11, 1995. Between November 1995 and July 1996, he also was not in any inpatient rehabilitation program. He acknowledged using crack cocaine during this period but denied doing so on a continuing basis. Mr. Morton did not tell anyone in the school district that his license had been suspended or about the arrest and the subsequent conditional discharge. Nor did he speak with any administrator in the district at this time to advise that he had a drug problem and needed rehabilitation or help in any way and did not participate in the EAP program. He was only vaguely aware of the EAP program.

Mr. Morton was aware of the Board's Drug Awareness Program and agreed that drugs are a major problem in urban schools. He did not personally teach students not to use drugs because that was not his job. As regards the Teacher's Handbook, Mr. Morton kept it throughout the school year but did not read it thoroughly because he did not have a lot of leisure time. He did not recall anything in the handbook on a drug policy.

As regards the July 11, 1996, incident Mr. Morton recalled that the argument with his son occurred while it was still daylight and it might have been early evening. He worked at the pool from Friday to Tuesday and had Wednesday and Thursday off and he thought July 11 may have been a Thursday. While denying that he used crack cocaine on July 11, Mr. Morton acknowledged using a few days earlier but not when he was working at the pool. He testified that he did not know if he was in violation of his conditional discharge when he used cocaine because no one had read him the rules. He denied ever seeing the order granting him the conditional discharge (P-10). Mr. Morton testified that he did not start seeing a probation officer (Jacqueline Petty) on his conditional discharge until August 1996. After that date, he met with Ms. Petty once a week with the meetings lasting up to thirty minutes.

When the officers came to Morton's room on July 11, his son gave them a milk container from the garbage. In the container was drug paraphernalia, including pipes, a clear glass tube and a black leather pouch. The officers also found a tube with a residue of crack cocaine. When the officers told Mr. Morton that he was arrested, they read him his Miranda rights.

Mr. Morton did not tell anyone at the pool or in the school district that he had been arrested on July 11, 1996. In August, 1996, he received a letter from the district suspending him with pay because of the pending drug charges. He did not enter rehabilitation until October 1996 because he was trying to do it on his own and testified that he has not used cocaine since he entered My Brother's Keeper in October 1996. Mr. Morton testified that he gave the court order in which he pled guilty to a reduced charge and was placed on suspension (P-17) to D. Parthema Cogdell, the district's Director of Personnel Services in October 1996 while he was in the My Brother's Keeper program.

On redirect, Mr. Morton explained that he now has a supportive network that he did not have before My Brother's Keeper. He calls a friend or goes to a meeting whenever a "trigger" urges him to use cocaine. The My Brother's Keeper program had a religious component that included bible study and Mr. Morton now goes to church every Sunday and to Bible Study every Tuesday evening. In his words, he is trying to live the way Christ wants him to live. In addition, his hobby of building rockets also helps his sobriety.

Mr. Morton usually has no contact with school administrators over the summer months. About a week before he went to court on the July 11, 1996 charges, he called Ms. Cogdell about coming back to work. She told Morton to get the paperwork from the court, bring it to her and she would get him back to work. He gave Ms. Cogdell the court order placing him on probation (P-17) because he thought he was going back to work.

As regards the bench warrant which led to his arrest on May 11, 1995, Mr. Morton testified that he had received a ticket and gave money to his wife to pay the fine and she failed to do so. He and his wife separated in 1991.

On re-cross, Mr. Morton clarified that he met in person with Ms. Cogdell and that Brother George from My Brother's Keeper accompanied him and that he had contacted her on the advice of Richard Lee, his supervisor in the Technology Department. He reiterated that Ms. Cogdell told him "to go to court, to take care of court, bring back the paperwork and she would see about getting him back to work." In addition to P-17, Mr. Morton also gave Ms. Cogdell a letter regarding his rehabilitation. Mr. Morton acknowledged that he received nothing in writing from Ms. Cogdell or any one else in the district regarding his coming back to work. He did receive an August 1996 letter suspending him with pay and a subsequent November 1996 letter from Dr. Dawson suspending him without pay pending the filing of tenure charges.

Mr. Morton further testified as to July 11, 1996, incident during re-cross. He stated that when the officers asked him if he had a drug problem, he replied yes. However, when they asked him if he had a pipe, he said no because his son had thrown it in the garbage. He also testified that he has been building rockets since 1974.

Wendy Bradin testified on behalf of Mr. Morton. She is the Assistant Manager of Telemarketing for the night shift of Clifford Industries, a home improvement company. The night shift starts at 3 p.m. and ends at 9 p.m. Mr. Morton worked at Clifford under her supervision during the spring of 1996 and the fall of 1997. At the time of her testimony, she had known Morton for at least one year. She described Mr. Morton as having a great work ethic. He was always there when he was supposed to be and had an "energy" about him. He was always happy and had a smile all the time. She summed him up as an "excellent employee." Although Mr. Morton took the summer of 1996 off from Clifford to do his job at the pool, he was eligible for re-employment.

Ms. Bradin testified that she has had experience with people who have been addicted to drugs and some of them have been open about it with her. She could tell by their behavior that they were abusing drugs. They were unreliable, with frequent absences and inconsistent performances. It looked as though they were high and strung out. Ms. Bradin never observed this behavior in Mr. Morton nor observed him under the influence of drugs.

On cross examination, Ms. Bradin testified that she had been employed as a telemarketer for Clifford's predecessor corporation, Eastern Home Improvement Company, for about four years, some of that on a part-time basis. In May 1996, she started working full-time as Assistant Supervisor of the night shift and worked Monday through Saturday. Mr. Morton started with Clifford in November 1996, when it was incorporated, after previously working for Eastern Home, starting in the early fall of 1996. Ms. Bradin supervised Morton while he worked for Eastern Home, but only as a back-up. Mr. Morton first started working the day shift and then went to the evening shift that Ms. Bradin supervised. He worked Monday, Tuesday, Wednesday and Thursday from 3 p.m. to 9 p.m. and on Saturday from 9 a.m. to 1 p.m.

As the evening Manager, Ms. Bradin is responsible for all employees on the shift, eight to ten telemarketers. All the telemarketers work in one room, while Ms. Bradin has a desk with a computer in a corner of the room. There are no children in the room and the company does not market to children. The telemarketers are paid $7.00 to $7.50 per hour but also get bonuses, although she did not know if

Mr. Morton had gotten any bonuses. There were no formal evaluations done of the employees in the last year and Ms. Bradin has not seen a written drug policy for Clifford.

Clifford does not have a drug counselor and keeps no records of employees with addiction problems, although employees would talk about such problems. Ms. Bradin never documented anyone's addiction nor dealt with any medical or rehabilitation issues. In the past year, she did not go to her supervisor with any drug problems involving employees, although in the past about five employees have spoken to her, telling her that they had a drug problem in the past. She has no education in drug counseling or rehabilitation. Ms. Bradin could not recall if Morton told her that he was addicted or that he was in a rehabilitation program. She did recall, however, that when she interviewed him for the position, he was very open and told her about prior charges and that he was in NA. Ms. Bradin was not aware of any written policy of the company regarding drug convictions. Mr. Morton did show her a summons or court complaint in the fall of 1996 regarding drug charges and showed her subsequent paperwork indicating the charges had been dismissed. Ms. Bradin did not know that Morton's driver's license had been suspended.

Ms. Bradin did not keep written records on employees' attendance. Rather, employees punch in at a time clock and payroll relies on the time cards in calculating their pay. Ms. Bradin testified that the telemarketing position is a high turnover job generally although some employees have been there two to four years and there is less turnover now than a year ago. In the year prior to her testimony, Ms. Bradin had no employees specifically discuss with her as Manager that they had a drug problem. Many of the telemarketers, up to fifty percent, are recovering addicts and most have been clean for a month to several years. There are sixteen to twenty telemarketers on the day and night shift and for a period of time she worked from 1 p.m. to 9 p.m. and supervised all of them.

Cindy Haeffner testified on behalf of Mr. Morton. She is a Senior Probation Officer and has been with the Probation Department for six years. Since October 1996 she has been the Supervising Probation Officer for Mr. Morton on the charge of possession of drug paraphernalia. She was aware of the previous charge against Mr. Morton resulting from the May 11, 1995 incident and of the conditional discharge of that charge. The conditional discharge was completed while Ms. Haeffner was supervising Mr. Morton and the charge was dismissed. During her supervision of Mr. Morton, he has always appeared for their

meetings and she has had no problems with him. Ms. Haeffner has not asked him to have drug tests because of the nature of the charge against him, i.e. it was not for possession or use of drugs. In addition, based on his appearance while in her office she felt no need to have him tested.

On cross-examination, Ms. Haeffner explained that a conditional discharge is a diversionary program run by the Probation Department and is not considered probation. She has seen the court order granting Mr. Morton a conditional discharge since the court sends probation a copy of the order. Mr. Morton's conditional discharge order called for random drug testing (P-10). Ms. Haeffner did not know if random testing was done on Mr. Morton because his conditional discharge was supervised by another Probation Officer, Jacqueline Petty. For a while, both Ms. Petty and Ms. Haeffner supervised Mr. Morton. Ms. Haeffner did not ask Ms. Petty if Mr. Morton had been tested under her supervision. While P-10 has a box checked that Mr. Morton would be placed on probation, Ms. Haeffner thought the wrong box had been checked. P-10 also indicates that Mr. Morton was to pay $5.00 per month for Probation. Ms. Haeffner explained that is a standard monthly supervisory fee. Ms. Haeffner was also asked about P-11, a Municipal Court Order dated March 10, 1997 which dismissed the May 11, 1995 charge against Mr. Morton. In the Whereas clause of that Order, it is stated that Mr. Morton was charged with violation of conditional discharge (P-11). Ms. Haeffner believes that clause refers to the new charge relating to the incident on July 11, 1996 being filed against Mr. Morton while his conditional discharge was still open. Despite the indication of a conditional discharge violation charge in P-11, Mr. Morton's conditional discharge was deemed complete and the May 11, 1995 charge was dismissed (P-11).

While Mr. Morton's probation commenced in October 1996, Ms. Haeffner did not have her first meeting with him until January 8, 1997. He had an earlier meeting with an Intake Officer on November 19, 1996 at which time the rules of probation were explained to him. Mr. Morton was not in a rehabilitation program at the time Ms. Haeffner started supervising him but in his conditional discharge file, there is a completion form for drug rehabilitation at My Brother's Keeper. The file indicates that Mr. Morton entered My Brother's Keeper on October 2, 1996 and was discharged on October 30, 1996 but does not indicate whether it was in-patient or out-patient treatment. The conditional discharge file does not contain copies of any urine screens, indicating that no drug tests had been taken of Mr. Morton.

Mr. Morton reports monthly to Ms. Haeffner and their meetings last five to ten minutes. At the time of her testimony, they had met ten times plus an additional meeting with her supervisor. Ms. Haeffner also tried to go to Mr. Morton's residence in December 1996 but he was not living at the address she had in his file. She did not attempt any further home visits and did not go to his place of employment or meet with any of his family members. She did know that Mr. Morton was working as a lifeguard with the City of Camden as of June 1997.

On redirect, Ms. Haeffner indicated that her notes do not reflect any treatment of Mr. Morton at JFK or any participation by him in groups.

D. Parthema Cogdell was called as a rebuttal witness by the Board. Ms. Cogdell is the Director of Personnel Services for the Board and has held that position since October 1992. Prior to 1992, she was the Bureau Director of Regional Day Schools and worked ten years with the Department of Education. In her position as Director of Personnel Services, Ms. Cogdell facilitates implementation of Board policy and due process for employees. Her staff maintains personnel files for all Board employees.

Sometime in 1996, Mr. Morton called her regarding the notice he received that he was being suspended. Ms. Cogdell did not recall any specifics from that conversation. On October 23, 1996, Ms. Cogdell spoke with Mr. Morton in person. He asked her about his suspension and whether he was being paid. Mr. Morton told her that the original charge had been downgraded and was no longer a drug charge and gave her the Municipal Court Order in which he pled guilty to the downgraded charge (P-17). There is a "sticky" note on Ms. Cogdell's copy of the Court Order which reflects what Mr. Morton told her during this conversation (P-19). Since part of the information did not show on P-17, Ms. Cogdell asked Mr. Morton for a more complete order. On October 24, 1996, Mr. Morton came to her office and gave Ms. Codgell's secretary P-20. Mr. Morton also gave her secretary a copy of instructions dated October 10, 1996 that he was to follow for the treatment program at Kennedy Memorial Hospital (P-21). Employees sign in when they come to Ms. Cogdell's office. Mr. Morton signed in on October 23, 1996 but did not sign in on October 24, 1996 (P-22).

Ms. Cogdell spoke with Mr. Morton either on October 24, 1996 or the next day. Morton asked her if he had his job back. Ms. Cogdell replied that she could not make that decision but that she would

take the paperwork and review it. Ms. Cogdell testified that she has no authority to hire, fire or bring an employee back from suspension. She does not make recommendations to the Board on such issues and did not do so in Morton's case.

Ms. Cogdell had no involvement with Mr. Morton's rehabilitation. If an employee came to her and told her that he or she had a drug problem, Ms. Cogdell would give the employee the EAP phone number.

On cross examination, Ms. Cogdell testified that she was not expecting Mr. Morton to come to her office on October 23, 1996. Rather, he came on his own initiative. During their conversation, they did not discuss Mr. Morton's treatment program other than he told her he was in treatment with My Brother's Keeper. Ms. Cogdell did not recall Mr. Morton mentioning an evening treatment program at Kennedy Memorial Hospital. She did not contact My Brother's Keeper or Kennedy about the treatment Mr. Morton was receiving. To her knowledge, nobody in the administration followed up on his rehabilitation.

Although Ms. Cogdell does not make recommendations to the Board, she does make recommendations to the Superintendent on personnel matters. She did not make a recommendation in regard to Mr. Morton, however. Ms. Cogdell could not recall if she told the Superintendent that Mr. Morton was in treatment. She did recall, however, that she sent the Superintendent a packet which included the documents Mr. Morton gave her.

On redirect, Ms. Cogdell explained that it is against Board policy for her to contact a treatment program. Rather, the program notifies her when an employee completes the program. One of the requirements of the EAP program is that the program must notify Personnel when an employee completes the program. Ms. Cogdell did not receive anything from either My Brother's Keeper or Kennedy indicating that he had completed the treatment program. She acknowledged that there are no written documents indicating she asked Mr. Morton to supply completion data on his treatment program.

Ms. Cogdell had a telephone conversation with Mr. Morton after their October 23, 1996 meeting in which he asked if he could come back to work and she told him she could not respond.

When the facts of a case are contested, as herein, the trier of fact must weigh the credibility of the witnesses in order to make factual findings concerning the disputed facts. Credibility is the value that a fact finder gives to a witness's testimony, requiring an overall assessment of the witness's story in light of its rationality, internal consistency and manner in which it "hangs" together with other evidence. *Carbo v. United States,* 314 *F. 2d* 718 (9th Cir. 1963). Credible testimony must proceed from the mouth of a credible witness and must be such as common experience, knowledge and common observation can accept as probable under the circumstances. *State v. Taylor,* 38 *N.J. Super.* 6, 24 (App. Div. 1955). A fact finder is expected to base credibility decisions on common sense, which is also referred to as intuition or experience. *Barnes v. United States,* 412 *U.S.* 837, 93 *S.Ct.* 2357, 37 *L. Ed. 2d* 380 (1973).

Considering the testimony of the various witnesses under the above standards I found the testimony of Officer Kinkler and Sergeant Griffith to be entirely credible. Their demeanor while testifying was matter of fact and rational and their testimony was consistent, both internally and with each other. For similar reasons, I found the testimony of Principal Cook, Wendy Bradin and Cindy Haeffner entirely credible. However, while some of his testimony was credible, I found portions of Mr. Morton's testimony to be lacking credibility. I do not find it credible that he found the two glassine bags in school on May 11, 1995 and simply forgot about them because of altercations during school that day. On the one hand, he testified that there were fights almost every day in school but on the other hand he had only found "contraband" in the school on two occasions. While there very well may have been fights in the school on May 11, 1995, it strains credulity to believe that he would forget such an extraordinary find because of an everyday occurrence. I also note that Mr. Morton made no mention of a fight or fights in school in his written statement to Officer Hinkler (R-1). In addition, Mr. Morton's demeanor when he testified as to the May 11, 1995 and July 11, 1996 incidents was glib and sounded self-serving. Moreover, Mr. Morton's explanation for what he was doing in the area where Officer Hinkler observed him on May 11, 1995, i.e. buying ice cream, is contradicted by the credible testimony of the officer that Mr. Morton never went to the ice cream store. Similarly, I find Mr. Morton's explanation of why the officers found drug paraphernalia in his room on July 11, 1996 lacking credibility. His explanation that he had thrown all the drug related items out several days before is simply too "pat" and lacks common sense. If he had intended .o throw the paraphernalia out days earlier, why was it still in the garbage basket in his room on July 11, 1996? Finally, I found Mr. Morton's testimony concerning his drug usage inconsistent. On the one hand,

he testified that at most he used crack cocaine every other weekend. On the other hand, he testified that his drug usage was so out of control that he had to enter an inpatient rehabilitation program twice because he could not stop using cocaine on his own.

Based on the foregoing, I make the following **FINDINGS OF FACT:**

(1) Robert Morton received an associate degree in Mechanical Engineering/Technology from Camden County College in 1971 and a bachelor of arts degree in Industrial Arts Education from Trenton State College in 1974. He holds a kindergarten through twelfth grade teaching certificate in Industrial Arts. Mr. Morton commenced employment with the Board of Education of the City of Camden in January 1975 as a permanent substitute teacher and in September 1975 he became a full-time teacher of Industrial Arts. From 1988 to June 1995, Morton was assigned to teach at East Camden Middle School. Morton was transferred to Woodrow Wilson High School for the 1995-1996 school year. He had ten month contracts of employment with the Board, from September 1 through June 30 of each year.

(2) On August 13, 1996, the Board of Education suspended Mr. Morton with pay. Mr. Morton's suspension with pay was converted to a suspension without pay, effective November 1, 1996 (J-1).

(3) On November 16, 1996, tenure charges were filed with the Board. On December 19, 1996, tenure charges were certified by the Board. Mr. Morton's suspension without pay was converted to a suspension with pay as of April 18, 1997, within 120 days of the certification of charges by the Board (J-1).

(4) Mr. Morton has lived most of his life in Camden. In August, 1991, however, he moved to Haddon Heights and lived at 802 Station Avenue, one block from the Haddon Heights police station.

(5) On May 11, 1995, Officer Richard D. Kinkler of the Haddon Heights Police Department observed Mr. Morton sitting in a car by himself in a non-residential area of Hadden Heights. Mr. Morton knew Officer Kinkler by sight, having frequently walked past the police station. After Mr. Morton looked at Officer Kinkler in a suspicious manner and because of recent criminal activity in the area, the officer ran a check on the automobile Mr. Morton was driving. The check showed the car was not stolen and was registered to an older female, whom Mr. Morton later identified as his mother-in-law. The recent criminal activity in the area consisted of kids drinking and performing acts of criminal mischief.

(6) While the check was being run on the automobile, Mr. Morton drove it to another location about five blocks away, near the railroad tracks, and parked the car. Morton stopped the car and parked after he had seen the officer. Officer Kinkler followed and parked his car about sixty feet from Mr. Morton's, with some other cars parked between the two vehicles. At this time it was dusk, almost nighttime and getting dark. During the period he observed Morton, Officer Kinkler could see Mr. Morton at all times and Mr. Morton did not leave his car to go to a near-by ice cream store. Mr. Morton did not speed nor drive erratically while the officer was observing him. Nor did Mr. Morton meet with anybody or throw anything out of the car while the officer was observing him.

(7) After about five minutes of observing Mr. Morton, Officer Kinkler left his vehicle and walked over to Morton's vehicle. At that point Mr. Morton got out of his car, approached the officer and told him he had just gone to buy ice cream.

(8) Officer Kinkler asked Mr. Morton for his driver's license because of the suspicious look Morton had given him and because Morton lied about going for ice cream. Morton told the officer that he did not have a license and showed him his school picture identification instead. Officer Kinkler was then advised by the police dispatcher that Mr. Morton's driver's license was suspended and there was a warrant for his arrest issued by the Pennsauken Municipal Court for a traffic violation, which warrant the dispatcher had just received by fax. Mr. Morton did not try to flee and he and Officer Kinkler had a cordial conversation. Officer Kinkler did not check at the ice cream store to ask whether Mr. Morton had gone there before he arrested Morton.

(9) Officer Kinkler searched the car Mr. Morton was driving in the immediate area in which Mr. Morton had sat, but did not find any drugs, drug paraphernalia or weapons. He then arrested Mr. Morton and drove him to police headquarters.

(10) Mr. Morton was searched at police headquarters. When his sweater was removed, Officer Kinkler saw two, sealed, glassine bags in Morton's top front left hand pocket which the officer removed from Morton's pocket, observing that they contained a white substance. Officer Kinkler visually identified the substance as crack cocaine and field tested the substance with a positive result for cocaine. The field test for cocaine is not 100% accurate. The officer then placed the glassine bags into evidence bags and entered a notation of the bags as "containing what is believed to be cocaine" in the evidence log. The search of Mr. Morton at police headquarters revealed no drug paraphernalia in his possession. There were no blood or urine samples taken from Mr. Morton at the time and therefore Officer Kinkler could not say whether Morton was under the influence at the time.

(11) Officer Kinkler completed a uniform arrest report in which he listed the charges against Mr. Morton as "[p]ossession of CDS, Driving While Suspended, Warrant" (P-3). He also filled out a summons and complaint to be filed with the Haddon Heights Municipal Court on the charge of driving while suspended and a complaint on the charge of possession of a controlled dangerous substance, stated to be a crime of the third degree in violation of *N.J.S.A.* 2C:35-10a (P-7, P-5). In addition, the officer completed a Request for Examination of Evidence to be sent to the State Police for testing of the two bags (P-12). Probable cause on the possession of a CDS complaint was described by Officer Kinkler as "m/v stop, warrant and search incident to arrest producing contraband" (P-5). Officer Kinkler acknowledged that the description of probable cause in the complaint is not accurate since there was no motor vehicle stop.

(12) Mr. Morton gave a written statement at the police station in which he wrote that he "saw to small bag of what I thought was drug by four students. I pick it up and ask them what it was. They said they did not know. I replyed 'i'll find out.' I put it in my pocket and got sidetrack and forgot about it" (R-1). Mr. Morton did not tell Officer Kinkler the names of the students, although he may have orally told the officer that he found the bags during the school day when he was supervising students. Officer Kinkler did not ask Morton for the names of the students as he generally does not ask follow-up questions to an arrestee's statements. Mr. Morton could have written as much detail as he wanted in his statement.

(13) The glassine bags found in Mr. Morton's pocket on May 11, 1995, which Officer Kinkler placed in labeled evidence bags on that date, were placed in a padlocked evidence locker. Within one day, Sergeant Robert Griffith brought the evidence bags to his office, logged them in, and assigned them a number of NAR454 (P-8), which he placed on the bags before storing them in a locked cabinet within a locked vault. On October 11, 1995, Sergeant Griffith delivered a Request for Examination of Evidence, with a Laboratory Number of 148489H, and the sealed evidence bag numbered NAR454 to the state police laboratory. A Certified Laboratory Report on Laboratory Number 148489H from the Forensic Science Bureau of the State Police, dated November 29, 1995, found that specimens 1 and ~~2~~ of Laboratory Number 148489H tested positive for cocaine (P-13) and the parties so stipulated to that finding.

(14) Mr. Morton initially pled not guilty to the May 11, 1995 charge of possessing a controlled dangerous substance and was never indicted on this charge. Rather, on November 14, 1995, a Municipal Court Order was entered on the charge of possession of a controlled dangerous substance.

Pursuant to this Order, Mr. Morton received a conditional discharge of the possession charge. Conditions for the discharge included payment of certain fines, probation for one year, compliance with random drug testing and payment of $5.00 per month to Probation.

(15) On March 10, 1997, the May 11, 1995, charge against Mr. Morton for possession of a controlled dangerous substance was dismissed as the "conditional discharge is completed" (P-11).

(16) On July 11, 1996, Haddon Heights Police Officers R. Long and Kinkler knocked on Mr. Morton's door and he told them to come in. They entered along with Mr. Morton's son, Austin. Austin gave the officers a milk container that was in the garbage. In the container was drug paraphernalia, including pipes, a clear glass tube and a black leather pouch. The officers also found a tube with a residue of crack cocaine. Mr. Morton was arrested by the officers and read his Miranda rights. On July 16, 1996, a complaint was filed against Mr. Morton by Officer Long (P-15). The complaint charged that on July 11, 1996, Mr. Morton "knowingly or purposely obtain[ed] or possess[ed] a controlled dangerous substance . . . specifically by possessing cocaine" in violation of *N.J.S.A.* 2C:35-10(a)1 (P-15). On the first court appearance on this charge, Mr. Morton received a continuance until October 22, 1996 in order to obtain counsel (P-16).

(17) Mr. Morton did not tell anyone in the school district that he had been arrested on July 11. 1996. In August 1996, he received a letter from the district suspending him with pay because of the pending drug charges.

(18) On October 22, 1996, Mr. Morton waived his right to counsel and pled guilty to a reduced charge of "use or possess with intent to use drug paraphernalia to inhale and process a controlled dangerous substance or controlled substance analog, specifically by possessing 'crack' pipes and a test tube" in violation of *N.J.S.A.* 2C:36-2 (P-16). He gave a copy of the court order in which he pled guilty to D. Parthema Cogdell, the district's Director of Personnel Services.

(19) As a result of his guilty plea, Mr. Morton was placed on probation for three years and ordered to pay fines totaling $1310.00 (P-17). In addition, his driving privileges were revoked for one year (P-17) and he was ordered to attend an in-house treatment program at "My Brothers" (P-19).

(20) For reasons not clear in this record, supervision of Mr. Morton's probation on the conditional discharge resulting from the May 11, 1995 charge did not commence until July 1996. Between July 1996 and October 1996, he was supervised by Probation Officer Jacqueline Petty. She never requested that he take a drug test during this period. At some point, Mr. Morton asked Ms. Petty for assistance in seeking a rehabilitation program and she recommended My Brother's Keeper.

(21) On October 2, 1996, Mr. Morton entered a twenty-eight day in-patient rehabilitation program at My Brother's Keeper. While at My Brother's Keeper he could not leave the facility without supervision. His day was planned for him with meetings, counseling and group sessions with an outside counselor. Three evenings a week Mr. Morton attended an outpatient rehabilitation program at John F. Kennedy Hospital, accompanied by a senior member or counselor.

(22) After completing the in-patient program at My Brother's Keeper, Mr. Morton attended ninety meetings of either NA or AA within ninety days. He celebrated one year of sobriety on October 2, 1997. He continues to go to at least three and sometimes four NA or AA meetings a week and describes himself as a "recovering addict" which is something he has to work on every day, one day at a time. He has a supportive network and goes to church every Sunday and to Bible Study every Tuesday evening. His hobby since 1974 of building rockets helps with his sobriety.

(23) Mr. Morton was never charged with bringing to or using drugs at school and was never charged with being under the influence of drugs at school.

(24) Mr. Morton did not tell anyone in the school district that his license had been suspended or about the May 11, 1995 arrest and subsequent conditional discharge. He did not tell anyone in the school district about the July 11, 1996 arrest until after he entered My Brother's Keeper on October 2, 1996. Nor did he speak with any administrator in the district at the time to advise that he had a drug problem and needed rehabilitation or help in any way. Mr. Morton was aware of the Board's Drug Awareness Program and agreed that drugs are a major problem in urban schools. He acknowledged receiving a Teacher's Handbook every year, which he kept throughout the year but did not read thoroughly because of a lack of time. He did not recall anything in the Handbook on a drug policy.

(24A) Mr. Morton first used drugs while attending Trenton State College when he smoked marijuana. In approximately 1987, he started using crack cocaine.

(25) In 1988, Mr. Morton voluntarily entered a forty-five day residential program at Seabrook House for detoxification and rehabilitation because he realized his drug usage was uncontrollable. He told the then Superintendent of Schools, Dr. Arnold Webster, about his drug problem and that he needed some time off from teaching. Dr. Webster told him to "take all the time you need."

(26) After leaving Seabrook in November 1988, Mr. Morton attended a weekly NA meeting and abstained from crack cocaine until 1991 when he started using again. Mr. Morton continued using crack cocaine until he entered My Brother's Keeper in October 1996. After leaving My Brother's Keeper, Mr. Morton moved from his room in Haddon Heights into his mother's home.

(24) After he was suspended by the Board, Mr. Morton started working for Clifford Industries, doing telemarketing for a home improvement business. He found out about Clifford from his sister-in-law who told him it would be a good place to work because a number of recovering addicts worked there. Morton worked for Clifford in October and November 1996; was laid off in December, 1996; returned to work on January 6, 1997 and continued until June 1997 when he left for a Pool Coordinator job with the City of Camden. Mr. Morton has held the job of Pool Coordinator during the summer months since 1974. In his capacity as Pool Coordinator Mr. Morton supervises lifeguards at one of the City's pools, training them in CPR, First Aid and lifeguarding procedures. He holds certifications in all three fields from the Red Cross.

(25) While employed at Clifford, Mr. Morton was supervised by Wendy Bradin, the Assistant Manager of Telemarketing for the night shift. He had a great work ethic, was never absent, always had a smile and an "energy" about him. Ms. Bradin considered him an excellent employee and Clifford would rehire him if he applied again for work. There was no formal written evaluation of Mr. Morton's performance, however.

(26) Ms. Bradin could not recall if Mr. Morton told her he was addicted or that he was in a rehabilitation program. When she interviewed him for the job, he did tell her about prior charges and that he was in NA. In the fall of 1996, Mr. Morton showed her a summons or court complaint regarding drug charges and subsequent paperwork indicating the charges had been dismissed. Ms. Bradin did not know that Morton's driver's license had been suspended.

(27) Ms. Bradin has had experience with employees in the past who have had problems with drug addiction. By their behavior of unreliability, absences and inconsistent performances, she could tell that they were abusing drugs. They would sometimes appear high and strung out. Ms. Bradin never observed this behavior in Mr. Morton nor observed him under the influence of drugs.

(28) Ms. Bradin has never seen a written drug policy for Clifford and has never documented any employee's addiction nor dealt with any medical or rehabilitation issues. She was not aware of any company policy regarding drug convictions. Ms. Bradin has no education in drug counseling or rehabilitation. Clifford does not have a drug counselor and keeps no records regarding employees with addiction problems. During the past year, no employee specifically discussed with her as Manager that he or she had a drug problem and Ms. Bradin did not go to her supervisor with any drug problems involving employees during the proceeding year. Prior to the proceeding year, about five employees

have spoken to her, telling her that they had a drug problem. Up to fifty percent of the telemarketers are recovering addicts and most have been sober for a month to several years.

(29) Cindy Haeffner, a Senior Probation Officer, has been Mr. Morton's supervising Probation Officer on the charge of possession of drug paraphernalia since October 1996. On November 19, 1996, Mr. Morton met with an Intake Officer and had the rules of probation explained to him. His first meeting with Ms. Haeffner was on January 8, 1997. Mr. Morton was not in a rehabilitation program when Ms. Haeffner supervised him but there is in his conditional discharge file a completion form for drug rehabilitation at My Brother's Keeper. There was nothing in the file regarding any treatment of Mr. Morton at John F. Kennnedy Hospital or his participation in any groups. During Ms. Haeffner's supervision of Mr. Morton, he always appeared for their meetings and she had no problems with him. Ms. Haeffner has not asked him to have drug tests because of the nature of the conviction, i.e. it was not for possession or use of drugs. In addition, based on his appearance while in her office she felt no need to have him tested.

(30) Mr. Morton reports monthly to Ms. Haeffner and their meetings last five to ten minutes. At the time of her testimony, they had met ten times plus an additional meeting with her supervisor. She tried to visit Mr. Morton's residence in December 1996 but he was not living at the address she had in his file. She did not attempt any further home visits and did not go to his place of employment or meet with any of his family members. Ms. Haeffner was aware that Mr. Morton was working as a lifeguard with the City of Camden as of June 1997.

(31) A conditional discharge is a diversionary program run by the Probation Department but is not considered probation. Although Ms. Haeffner has seen Mr. Morton's conditional discharge order which called for random drug testing, she did not know whether random drug testing was done because his conditional discharge was supervised by Probation Officer Petty and Haeffner never asked Petty whether testing had been done. Mr. Morton's conditional discharge file contains no copies of urine screens, indicating that no drug tests had been taken of him.

(32) Sometime in 1996, Mr. Morton called D. Parthema Cogdell, the district's Director of Personnel Services, regarding the notice he received that he was being suspended. Ms. Cogdell did not recall any specifics from that conversation.

(33) On October 23, 1996, Ms. Cogdell spoke with Mr. Morton in person. He came to her office on his own initiative and asked about his suspension and whether he was being paid. Mr. Morton told Ms. Cogdell that the original charge had been downgraded and was no longer a drug charge and

gave her the Municipal Court order in which he pled guilty to the downgraded charge (P-17). He also told her that he was in treatment at My Brother's Keeper but she could not recall whether he mentioned Kennedy Hospital. Ms. Cogdell made notations of what Mr. Morton told her on a "sticky" note which she placed on her copy of the court order (P-19). Since some information did not show on the copy of the court order, Ms. Cogdell asked Mr. Morton to provide a more complete copy.

(34) On October 24, 1996, Mr. Morton came to Ms. Cogdell's office and gave her secretary another copy of the court order (P-20). He also gave the secretary a copy of instructions dated October 10, 1996, that he was to follow for the treatment program at Kennedy Memorial Hospital (P-21).

(35) Employees sign in when they come to Ms. Cogdell's office. Mr. Morton signed in on October 23, 1996 but did not sign in on October 24, 1996 (P-22).

(36) On either October 24 or 25, 1996, Ms. Cogdell spoke with Mr. Morton. He asked if he had his job back and she replied that she could not make that decision and could not further respond but that she would take the paperwork and review it. Ms. Cogdell has no authority to hire, fire or bring an employee back from suspension. She does make recommendations to the Superintendent on personnel issues but did not do so in Mr. Morton's case. Ms. Cogdell could not recall whether she told the Superintendent that Mr. Morton was in treatment but she did send him a packet which included the documents Mr. Morton gave her.

(37) Ms. Cogdell had no involvement with Mr. Morton's rehabilitation. It is against Board policy for her to contact a treatment program so she did not contact either My Brother's Keeper or Kennedy Hospital about his treatment. Rather, the program notifies her when an employee completes a rehabilitation program. She did not receive anything from either My Brother's Keeper or Kennedy indicating that he had completed the treatment program. There is no documentation that Ms. Cogdell asked Mr. Morton to provide completion data on his treatment program. To Ms. Cogdell's knowledge, nobody in the administration did any follow-up on Mr. Morton's rehabilitation.

(38) If an employee told Ms. Cogdell that he or she had a drug problem, she would give the employee the number for the Employee Assistance Program.

(39) Patricia E. Cook was Principal of the Woodrow Wilson High School when Mr. Morton taught Industrial Arts there during the 1995-1996 school year. During that school year, there were approximately 1400 students and 148 teachers at Woodrow Wilson.

(40) The Camden Board of Education has a two-volume policy manual, called a Governance Manual, which is kept in every principal's office. The policy manual is not distributed to every teacher but they are told of its existence and that they can come to the office to review the manual. Sections of the manual are distributed to teachers periodically. In addition, while Principal at Woodrow Wilson, Ms. Cook developed a Teachers Handbook which was distributed to the teachers. The handbook included, *inter alia,* policies on attendance, lateness, dress code and a drug-free work place policy.

(41) A section of the Board's Governance Manual is captioned "Smoking, Drinking and Use of Drugs on School Premises" (P-1). It bans the use of alcoholic beverages and the manufacture, distribution, dispensing, possession of, use of or sale of any controlled dangerous substance on or in school work sites and provides that violation of this ban may lead to disciplinary action, including termination (P-1). The manual further provides that "[t]he Board of Education, as a result of criminal convictions of any criminal drug statute violation by an employee occurring outside of the worksite, may discipline said employee. Disciplinary action may include, but is not limited to nonrenewal, suspension, or termination at the discretion of the board" (P-1). This provision applies to all employees and was included in the Teachers Handbook distributed at the beginning of each school year during in-service training in which the morning is spent going over policies and new programs.

(42) The Governance Manual also contains a provision concerning use of drugs or alcohol by students (P-2). This provision is part of the Student Handbook and provides, *inter alia,* that "[b]y joining with community agencies; hospitals, law enforcement; and providing a drug-free workplace, the Camden City Board of Education hopes to provide an atmosphere in which drug alcohol abuse will not have a negative impact on the students in the Camden City School District" (P-2).

(43) The two volumes of Board policies are kept in a bookshelf in Principal Cook's office. They are very thick but have a Table of Contents and staff are told they are free to use the volumes.

(44) The Board policy is to instill abstinence in students. To accomplish this goal, several programs have been established including seminars, rallies, and a trip to Washington D.C. A health-based clinic in the school, the Tigers Lair, makes presentations to staff on drug usage and the Living Well program brings professional athletes into the school to motivate students to stay away from drugs and stay in school. Each school has a Save Our Students (SOS) team which provides support and assistance to students in need of help (P-2). During the 1995-1996 school year, the SOS team and school nurse attended a special program at Rutgers University on drug usage and then make presentations to the Woodrow Wilson teachers. "Abstinence" is the message given to the staff.

(45) Principal Cook posted a flyer from the Personnel Department on the bulletin board in the main office which described the Employee Assistance Program (EAP) and gave a phone number to call for help if an employee had a drug problem. She also advised staff of the program's existence. If an employee told Principal Cook that he or she had a drug problem, she would refer the employee to EAP or the school nurse and would not terminate that employee. There is no requirement in the Board policies, however, that an employee must go to Principal Cook with a drug problem.

(46) Mr. Morton never told Principal Cook that he had a drug problem or that he had been arrested even though she had an "open door" and he could have come to speak with her.

(47) Principal Cook received on-going training from the district in the area of substance abuse and how to help staff with problems. In the past, she was a member of the SOS team.

LEGAL DISCUSSION

N.J.S.A. 18A:6-10 provides that no tenured teacher shall be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct or other just cause." In this case, the Board asserts that Mr. Morton forfeited his position, an argument which will be discussed *infra.* In addition, the Board asserts that Mr. Morton's conduct constitutes unbecoming conduct sufficient to justify his removal. It is well settled that the Board has the burden of proving the charges of unbecoming conduct against Mr. Morton by a fair preponderance of the credible evidence. *In re Polk License Revocation,* 90 *N.J.* 550, 560 (1982); *In re Tenure Hearing of Grossman,* 127 *N.J. Super.* 12 (App. Div. 1974); *Borough of Park Ridge v. Salimone,* 36 *N.J. Super.* 485, 488 (App. Div. 1955). In a case involving allegations of unbecoming conduct, all of the facts and circumstances surrounding the employee's actions are deemed relevant and material, including whether there are mitigating circumstances. *In re Tenure Hearing of Robert Ferenz,* 1987 *S.L.D.* 2602 (State Board of Education), aff'd App. Div. DKT. No. A-1309-87 (April 18, 1989).

Based on Findings of Fact 10, 13, and 16 *supra,* it is clear that on May 11, 1995 Mr. Morton possessed two glassine bags containing crack cocaine,[2] a controlled dangerous substance, and that on

[2] While respondent does not specifically argue that the crack cocaine was found as a result of an illegal search, I note that even if the search had been illegal, the evidence is admissible in this administrative proceeding. *Delguidice v. New Jersey Racing Commission,* 100 *N.J.* 79 (1985); *In the Matter of the Tenure Hearing of McIntyre,* 96 *N.J.A.R.* 2d (EDU) 718, aff'd, Appellate Division Docket No. A-5942-94 (July 10, 1996).

July 11, 1996 he possessed drug paraphernalia and a tube with a residue of crack cocaine. Since I found Mr. Morton's testimony that he found the bags in school on May 11, 1995 and forgot them and that he had thrown out the drug paraphernalia days before July 11, 1996 to be not credible, there are no mitigating circumstances surrounding his possession of the crack cocaine or the drug paraphernalia.

There is no doubt that possession of a controlled dangerous substance and possession of drug paraphernalia constitutes conduct unbecoming a teaching staff member and subjects the teacher to penalty under the tenure law. That possession of the controlled dangerous substance or paraphernalia occurred off school premises has no bearing on the determination that the possession, in and of itself, constitutes unbecoming conduct.. *Willingboro Board of Education v. Lott,* 93 *N.J.A.R.* 2d (EDU) 516, aff'd State Board of Education, 94 *N.J.A.R.* 2d (EDU); *In the Matter of the Tenure Hearing of McIntyre,* 96 *N.J.A.R.* 2d (EDU) 718, aff'd, Appellate Division Docket No. A-5942-94 (July 10, 1996); *In the Matter of the Tenure Hearing of Jeffrey Wolfe, School District of the Township of Randolph,* 1980 *S.L.D.* 721, aff'd Appellate Division 1981 *S.L.D.* 1537. 1539. Nor does the fact that Mr. Morton received a conditional discharge and eventual dismissal of the May 11, 1995 drug possession charge preclude a finding of unbecoming conduct as to that incident. *In the Matter of the Tenure Hearing of Jeffrey Wolfe, School District of the Township of Randolph, supra.*

While Mr. Morton's conduct clearly constitutes unbecoming conduct under the tenure laws, the nature of the penalty to be imposed requires a balancing of interests. *In the Matter of the Tenure Hearing of McIntyre, supra,* 96 *N.J.A.R.* 2d at 725. In *McIntyre,* however, the Commissioner determined that "with respect to the possession of controlled dangerous substances by an educator, analyses which consider quantity or measure shades of misconduct are inappropriate" because the Legislature and the State Board of Education have "assigned to the school districts of New Jersey a fundamental role in the prevention and intervention of substance use and abuse among students (see *N.J.S.A.* 18A:40A-1 et seq. and *N.J.A.C. 6:29-6).*" *Ibid.* That the Board herein takes this responsiblility very seriously is shown by the testimony of Principal Cook and the above findings of fact 42 through 47. Teachers serve as role models, "'a heavy duty [which] requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment.'" *Ibid.* at 726 (quoting *In the Matter of the Tenure Hearing of Jacques L. Sammons, School District of Black*

Horse Pike Regional, Camden County, 1972 *S.L.D.* 302, 321). Accordingly, "possession of a controlled dangerous substance by an educator, absent mitigating circumstances, . . . is sufficiently flagrant conduct to warrant dismissal," even if it reflects only one instance of misconduct. *Ibid. See also, Willingboro Board of Education v. Lott, supra.*

The mitigating circumstances referred to by the Commissioner in *McIntyre* could include evidence of an exemplary record as a teacher. For example, in *The Tenure Hearing of Robert P. Valenti, School District of the Township of Monroe,* OAL DKT. NO. EDU 4926-89, Commissioner's Decision 177-89 (March 6, 1990), the teacher was arrested for possession of one marijuana joint and an additional 2.5 grams of marijuana. A principal, teacher and guidance counselor, all employees of the Board, testified as to the teacher's exemplary record over twenty years as a teacher, his rapport with his students and his integral part in the school community. While the Commissioner increased the penalty recommended by the Administrative Law Judge from forfeiture of 120 days pay to forfeiture of 180 days pay, the Commissioner did not order Valenti removed from his tenured position.

In the instant matter, however, respondent has not proven any mitigating circumstances. He presented no testimony or documents to establish an exemplary record as a teacher other than he has been so employed for twenty-one years. Moreover, as found above, his testimony as to the circumstances surrounding the two incidents is not credible and thus does not constitute mitigating circumstances. "{E]ducators who flaunt the law, especially in the area of illicit involvement with drugs, must be prepared to pay a very heavy price for their lack of lawfulness." *Willingboro Board of Education v. Lott, supra,* 93 *N.J.A.R.* 2d (EDU) at 522. Accordingly, I conclude that the appropriate penalty for respondent's conduct unbecoming on the two charges brought by the Board is removal from his tenured position.

Respondent argues, however, that to remove him from his position would violate the New Jersey Law Against Discrimination (LAD) because he is a handicapped individual, i.e. a drug addict, and the Board failed to provide him a reasonable accommodation. Firstly, it is not as well settled as respondent asserts that drug addiction is a handicap under the LAD. *Compare, The Matter of Henry Jackson,* 294 *N.J. Super.* 233, 236 n.1 (App. Div. 1996) *with Matter of Cahill* 245 *N.J. Super.* 397,

400, 401 (App. Div. 1991) and *In the Matter of the Tenure Hearing of Sondra Yanniello, Board of Education of the City of Millville, Cumberland County,* 95 *N.J.A.R.*. 2d (EDU) 262, 271, aff'd State Board of Education, 97 *N.J.A.R.* 2d (EDU) 250, 251, aff'd Docket Number A-3482-96 (App. Div. 1998) (slip op. at 9) (State Board of Education and Appellate Division hold that "drug addiction is a handicap within the protections of" the LAD). Assuming, *arguendo*, that drug addiction is a handicap, it is clear that the Board has provided Mr. Morton a reasonable accommodation. It is undisputed that in November, 1988 the then Superintendent of Schools, Dr. Arnold Webster, approved Mr. Morton's absence from school so that he could attend a forty-five day residential program at Seabrook House for rehabilitation from drug abuse and that Dr. Webster told Mr. Morton to "take all the time you need." As in *Yanniello, supra,* the Board has reasonably accommodated Mr. Morton by supporting his forty-five day inpatient drug program in 1988 and permitting him to return to work after he completed that program.

In addition to charging Mr. Morton with conduct unbecoming the Board argues that by virtue of Mr. Morton's conviction of possession of drug paraphernalia he forfeited his position. A public employee convicted of a crime may forfeit his position pursuant to *N.J.S.A.* 2C:51-2. That statute provides in pertinent part that

> A person holding any public office, position, or employment, elective or appointive, under the government of this State or any agency or political subdivision thereof, who is convicted of an offense shall forfeit such office or position if:
>
> (1) He is convicted under the laws of this State of an offense involving dishonesty or of a crime of the third degree or above or under the laws of another state or of the United States of an offense or a crime which, if committed in this State, would be such an offense or crime;
>
> (2) He is convicted of an offense involving or touching such office, position or employment; or
>
> (3) The Constitution or a statute other than the code so provides.
>
> [*N.J.S.A.* 2c:51-2(a)].

Mr. Morton was not convicted of a crime of dishonesty or a third degree or higher crime and there is no Constitutional or statutory provision that applies. Accordingly, whether he forfeited his position by pleading guilty to the disorderly persons offense of possessing drug paraphernalia would be determined by the second above-quoted provision, i.e. whether that offense "involve[d] or touch[ed]" Morton's position as a teacher.

In *Arocha &. Gonzalez v. Board of Education of The Hudson County Area Vocational-Technical Schools District, Hudson County,* the State Board of Education concluded that a school janitor's guilty plea to the crime of conspiracy to possess marijuana "touched" his employment and justified forfeiture of his position under the statute. (State Board of Education Docket No. 95-84, April 8, 1985). In so concluding, the Board reasoned that an "employe[e] in the public school system who [is] charged with the care of students or ha[s] significant contact with students serve[s] as [an] adult role mode[l] and contribute[s] to the student's education . . . [and] is under a duty to conduct himself in a manner that in no way encourages or condones the use of drugs." *Ibid.*, slip op. at 6-7. The Board continued that "when such an employee is convicted of a drug related offense, he has violated that duty and, therefore, the conviction 'touches' his position within the meaning of *N.J.S.A.* 2C:51-2a(2)." *Ibid.*, slip op. at 7.

Were it not for a 1995 amendment to *N.J.S.A.* 2C:51-2, I would conclude that Mr. Morton forfeited his position under the holding of *Arocha v. Gonzalez, supra.* However, in 1995 the Legislature amended the cited statute by, *inter alia,* adding a new subsection. That subsection provides, in pertinent part, that

> In any case in which the issue of forfeiture is not raised in a court of this State at the time of a finding of guilt, entry of guilty plea or sentencing, a forfeiture of public office, position or employment required by this section may be ordered by a *court of this State* upon application of the county prosecutor or the Attorney General or upon application of the public officer or public entity having authority to remove the person convicted from his public office, position or employment. [*N.J.S.A.* 2C:51-2g] (emphasis added).

In the instant case, the issue of forfeiture was apparently not raised at Mr. Morton's sentencing. However, neither the Office of Administrative Law nor the Commissioner of Education is a "court." *See, In Re Tyler,* 236 *N.J. Super.* 478 (App. Div. 1989). Accordingly, neither the OAL nor the Commissioner has the jurisdiction to enter orders for forfeiture of public employment pursuant to *N.J.S.A.* 2C:51-2, as amended by *P.L.* 1995, c. 250. *In the Matter of Vitacco,* 97 *N.J.A.R.* 2d (EDU) 454, 455. Rather, should the Board wish to pursue forfeiture, it will have to make application to the appropriate municipal court.

In his cross appeal, Mr. Morton argues that, since there was no judicial declaration of forfeiture of his position when he was sentenced on his guilty plea, the Board had no authority to convert his suspension to one without pay effective November 1, 1996. Accordingly, he seeks judgment in his favor for his salary between November 1, 1996 and December 16, 1996 when the Board voted to certify tenure charges against him. The Board contends that since Morton forfeited his position as of the date of his conviction, he is not entitled to any back pay. As discussed above, the OAL and the Commissioner lacks jurisdiction to enter a forfeiture order. If the Board applies to the appropriate court and receives a forfeiture order, the effective date of forfeiture would be the date of conviction and Mr. Morton would not be entitled to any back pay. In the absence of such a forfeiture order, Mr. Morton's suspension should have been with pay until the Board certified tenure charges against him. *N.J.S.A.* 18A:6-8.3.

ORDER

Based on the foregoing, it is **ORDERED** that respondent Robert Morton be dismissed from his tenured employment with Board of Education of the City of Camden, Camden County. It is further **ORDERED** that the petitioner Board pay Mr. Morton his salary for the period between November 1, 1996 and December 16, 1996 unless petitioner applies for and obtains an order of forfeiture of Mr. Morton's position from the appropriate municipal court.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

6/11/99
DATE

Barbara A Harned
BARBARA A. HARNED, CHIEF ALJ

Receipt Acknowledged:

6-14-99
DATE

Delfie Antanaitis/sp
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 16 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

DOCUMENTS IN EVIDENCE

For Petitioner

P-1 Section 4119.23 of the Camden Board of Education Governance Manual

P-2 Section 5131.6 of the Camden Board of Education Governance Manual

P-3 Uniform Arrest Report dated May 11, 1995 for Case Number 10,364

P-4 Offense Report for Case Number 10,364

P-5 Complaint captioned State of New Jersey v. Robert G. Morton

P-6 Warrant for Arrest of Robert Morton issued by Pennsauken Municipal Court on July 15, 1992

P-7 Summons for Driving While Suspended issued May 11, 1995 with school identification of Robert Morton

P-8 Evidence Log Sheet for Case Number 10,364

P-9 Complaint captioned State of New Jersey v. Robert G. Morton with notations of court action taken on November 11, 1995 granting conditional discharge

P-10 Order dated November 14, 1995 granting conditional discharge

P-11 Municipal Court Order dated March 10, 1997 dismissing complaint since conditional discharge was completed

P-12 Request for Examination of Evidence for Case Number 10,364

P-13 Certified Laboratory Report dated November 27, 1995

P-15 Complaint captioned State of New Jersey v. Robert G. Morton with notations of court action dated October 22, 1996

P-16 Complaint captioned State of New Jersey v. Robert G. Morton with notations of court action dated October 22, 1996

P-17 Municipal Court Order dated October 22, 1996

P-19 Municipal Court Order dated October 22, 1996 with handwritten notations of D. Parthema Cogdell

P-20 Municipal Court Order dated October 22, 1996

P-21 Conditions of Substance Abuse Services at Kennedy Memorial Hospitals signed by Robert Morton on October 10, 1996

P-22 Sign-in sheet for office of D. Parthema Cogdell

For Respondent

R-1 Written statement of Robert Morton dated May 11, 1995

Joint

J-1 Stipulations

WITNESSES

For Petitioner

Richard D. Kinkler

Robert Griffith

Patricia E. Cook

D. Parthema Cogdell

For Respondent

Robert G. Morton

Wendy Bradin

Cindy Haeffner

IN THE MATTER OF THE TENURE HEARING OF ROBERT G. MORTON, SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY.	:	
AND	:	COMMISSIONER OF EDUCATION
ROBERT MORTON,	:	DECISION
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent Morton's exceptions and the Board's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in rendering the within decision.

Upon careful and independent review of the record in this matter, which included transcripts from the four days of hearing conducted at the OAL, the Commissioner finds no cause to disturb the findings and conclusions of the Administrative Law Judge (ALJ).[1] To the extent the ALJ's factual findings omit details which respondent argues are relevant, the Commissioner determines that such information is inconsequential to the within matter.

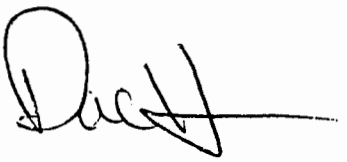
[1] In his affirmance, the Commissioner neither explicitly accepts nor rejects the ALJ's discussion on pages 37 and 38 regarding whether respondent's criminal conviction *would have been* sufficient to warrant forfeiture under the pertinent statute, prior to its 1995 amendment.

Moreover, the Commissioner observes that the record before him provides no basis to challenge the ALJ's credibility determinations.

Concurring that the Board has proven the charges of unbecoming conduct, the Commissioner affirms the initial decision of the ALJ recommending a penalty of dismissal, for the reasons clearly and effectively expressed in the initial decision. Additionally, in accordance with *N.J.A.C.* 1:1-14.10(j), the Commissioner affirms the ALJ's Interlocutory Order of May 14, 1997 regarding the permissible scope of discovery and the procedures for disclosure of documents in the Board's possession.

Accordingly, respondent is deemed dismissed from his tenured position as of the date of this decision. The Board is directed to pay respondent's salary due for the period November 1, 1996 to December 16, 1996, the date upon which the herein charges were certified to the Commissioner, as per *N.J.S.A.* 18A:6-14, unless, as the ALJ notes, the Board successfully obtains an order of forfeiture pursuant to *N.J.S.A.* 2C:51-2, as amended by *P.L.* 1995, *c.* 250. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate, pursuant to *N.J.A.C.* 6:11-3.6.[2]

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

247-99

WILLIAM BUCKLEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a teaching staff member, alleged that respondent Board violated his tenure and seniority rights when it reassigned him from a 12-month position to a 10-month position and prorated his annual salary to reflect his 10-month work schedule as opposed to the 12-month work schedule in his prior assignment.

The ALJ granted petitioner's motion for summary decision, following the rationale of her initial decision in *Rocco DiMaggio v. Board of Education of the City of Trenton, Mercer County*, issued prior to the Appellate Division's recent decision in *Edward Carpenito v. Board of Education of the Borough of Rumson, Monmouth County.*

In light of *Carpenito, supra*, the Commissioner reversed the decision of the ALJ and granted summary decision to respondent, finding that, as in *DiMaggio*, it was permissible for the Board to reduce petitioner's salary upon abolishment of his 12-month position and reassignment to a 10-month position as part of a bona fide reduction in force.

July 30, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 6586-97

AGENCY DKT. NO. 275-7/97

WILLIAM BUCKLEY,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,

Respondent.

David L. Rosenberg, Esq., for petitioner (Klausner & Hunter, attorneys)

Thomas W. Sumners, Jr., Esq. and **Giuffre M. Hollinsgworth,** Esq., for respondent (Sumners, George & Dortch, attorneys)

Record Closed: October 28, 1998 Decided: June 11, 1999*

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter commenced on July 25, 1997, when William Buckley (hereinafter petitioner) filed a petition of appeal with the Commissioner of Education seeking a determination that the Board of Education of the City of Trenton (hereinafter respondent) had violated his tenure and

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* Extensions of time for issuing the decision in this matter were requested and granted pursuant to N.J.S.A. 52:14B-10(c).

seniority rights when its reassigned him from a 12-month position to a 10-month position, effective September 1, 1997. An answer on behalf of respondent was filed on August 1, 1997 and on August 11, 1997, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 to -13.

The matter was assigned originally to administrative law judge Solomon Metzger, but was reassigned to the undersigned when counsel for petitioner advised that consolidation with a number of other matters being handled by the undersigned might be appropriate. A prehearing conference was scheduled and was conducted on November 10, 1997, together with the other matters which were being consolidated for determination. An amended answer was filed on behalf of respondent on December 15, 1997. A separate supplemental prehearing conference was scheduled in the above-captioned matter on January 14, 1998, at which time it was determined that consolidation with the other cases was not appropriate because of issues present in the within matter which were not present in the others. Thereafter numerous telephone conference calls took place to ascertain the status of this matter while the parties were engaged in settlement negotiations. On July 31, 1998, petitioner submitted a motion for summary decision together with supporting papers. A brief in opposition to petitioner's motion was submitted on behalf of respondent on August 31, 1998. Oral argument on the motion took place by telephone conference call on October 28, 1998, whereupon the record closed.

FINDINGS OF FACT

The facts relevant to a determination of this matter are not in dispute and I therefore **FIND** the following as uncontested facts.

Petitioner has been continuously employed as a teaching staff member by respondent since January 1973. Beginning in September 1974 and continuing through April 28, 1986, petitioner was employed as a full-time, 10-month teacher of industrial arts-machine shop, an assignment for which he held the appropriate endorsement on his New Jersey Instructional Certificate. Commencing April 28, 1986, and continuing until July 1, 1997, he was assigned to the position

Job Developer - OSR, a full-time 12-month position. By letter dated May 1, 1997, respondent notified petitioner as follows:

> Due to economy and a Reduction In Force, the Board of Education, on Monday, April 28, 1997, approved the Superintendent's recommendation to reassign you from the position of Teacher Specialist, assigned to Trenton High Vocational School, to Industrial Arts Teacher, location to be determined, effective September 1, 1997.

Following his reassignment to Industrial Arts Teacher on a 10-month basis, respondent maintained petitioner's rate of salary and level of monthly compensation. In effect, however, petitioner's annual salary was reduced because his compensation was prorated to reflect his 10-month work schedule as opposed to the 12-month work schedule in his prior assignment.

Although the petition of appeal and the prehearing order set forth an additional issue with respect to petitioner's allegations that respondent violated his rights by contracting with the Children's Home Society of New Jersey, an independent agency, to provide the services which petitioner previously provided as Job Developer within the district, in the within motion petitioner seeks only a summary decision that respondent was required to maintain petitioner's annual salary frozen or "red-circled" at its former level until the annual salary on the salary guide for Industrial Arts Teacher becomes equal to or greater than his last annual salary for the 12-month assignment as Job Developer.

APPLICABLE LAW AND DISCUSSION

The once classic statement of the standard for granting or denying summary judgment set forth in Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954), was recently modified in Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995). Therein the Court held that the standard to be applied is now the same as the standard for determining motions for involuntary dismissal under R. 4:37-2(b) and for determining motions for judgment under R. 4:40-1 and R. 4:40-2. Trial courts considering motions for summary judgment are now required

to engage in the same type of evaluation, analysis or sifting of evidential materials in light of the burden of persuasion that applies if the matter goes to trial. The Court explained:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.". . . Credibility determinations will continue to be made by a jury and not a judge. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2. . . . The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law, . . ., the trial court should not hesitate to grant summary judgment. (citations omitted) Id. at 540.

The Court noted that to send a case to trial knowing that a rational decision-maker could reach but one conclusion was indeed "worthless" and would "serve no useful purpose." The purpose of this new standard, the decision explained, was to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves.

In the present matter, the parties stipulate that none of the material facts are in dispute and accordingly, this matter is ripe for summary decision.

On May 24, 1999, I issued an initial decision in Rocco DiMaggio v. Board of Education of the City of Trenton, EDU 6389-97, wherein the motion for summary decision had set forth arguments and facts almost identical to those in the within matter. There are some differences, however. Although respondent in its May 1, 1997 letter to petitioner herein characterized his position as "Teacher Specialist" as it did Mr. DiMaggio's in the other case, in the within matter the documents submitted indicate that petitioner's position "Job Developer" in fact required an Educational Services Certificate with a "Valid N.J. Teacher-Coordinator, Cooperative Vocational

Technical Education Program Certificate." (sic-should say endorsement). See, N.J.A.C. 6:11-11.20 for description and prerequisites. Under the Educational Services Certificate there is also an endorsement entitled "Vocational-Technical Coordinator; Cooperative Industrial Education Programs." See, N.J.A.C. 6:11-11.3. Petitioner obtained this endorsement in December 1977. Petitioner does currently hold the endorsement entitled "Teacher Coordinator of WECEP," (work experience career exploration program), but it was not issued until May 1997. I **CONCLUDE** that the endorsement pursuant to which petitioner held his Job Developer position must have been the endorsement Coordinator, Cooperative Industrial Education on the Educational Services Certificate which petitioner obtained in December 1977. The two endorsements are similar and both entitle the holder to teach similar subjects and to act as coordinator between school and industry. Since he held the Job Developer position commencing in 1986, it could not have been held pursuant to the endorsement he did not obtain until May 1997. Accordingly, petitioner herein is in a slightly different situation from the petitioner in DiMaggio, since the tenured position which he held at the time of the RIF was not simply "teacher," the position title to which tenure attaches for any service under the Instructional Certificate, but rather was teacher-coordinator (or perhaps Job Developer*) the position title to which tenure attaches under petitioner's Educational Services Certificate.

In my DiMaggio opinion, a copy of which is attached hereto for convenient reference, after reviewing the relevant statutory and case law, I **CONCLUDED**:

> It is simply not possible to reconcile all of the foregoing inconsistent decisions. What does appear from a composite analysis, however, is that although at first blush there would seem to be no logical explanation for regarding a reduction from full-time employment to part-time employment as a RIF and refusing to consider a twelve-month position to a ten-month position in the same regard, in fact there is justification for the disparate treatment. As noted by Judge Errickson in his opinion in *East Brunswick Education Association, supra*, a ten-month position is not considered in the operations of schools to be part-time or less than a full-time position. See also *N.J.A.C.* 6:3-5.1(f) which provides in

* Whether the position title job developer was submitted to the county superintendent for approval pursuant to N.J.A.C. 6:11-3.3 is not evident from the record herein.

> pertinent part "For purposes of calculating seniority entitlement, there shall be no distinction between academic years and calendar years." Accordingly, when a teaching staff member is reassigned within the scope of his tenured position from twelve-month employment to ten-month employment, he moves from one full-time assignment to another full-time assignment. Accordingly, there has been no reduction in the number of teaching staff members. This legitimate distinction between full-time employment and part-time employment is emphasized by the decision of the Commissioner in *Adele Vexler v. Board of Ed. of Red Bank*, 1980 S.L.D. 272. Therein the Commissioner determined that refusal by a school psychologist of part-time employment after her full-time position was abolished did not free the Red Bank Board of Education of its obligation to place Vexler on a preferred eligibility list.
>
> . . .
>
> Based upon all of the foregoing, I **CONCLUDE** that the approach which best balances the competing interests of teaching staff members and boards of education is the one adopted most recently by the Commissioner in *Avery, supra*, and directed by Judge Errickson in the *East Brunswick Board of Education* case, *supra*, *i.e.*, if the full-time assignment to which petitioner's tenure and seniority rights entitle him is a ten-month employment as opposed to previous twelve-month employment, *N.J.S.A.* 18A:28-9, when read in conjunction with *N.J.S.A.* 18A:28-5, prevents the Board of Education from reducing the annual salary of that teaching staff member. This approach implements the intention of the statutory scheme to provide teaching staff members with both job security and salary protection and at the same time permits the board to make adjustments required by reasons of economy or changing enrollments. As pointed out during oral argument by petitioner's counsel, the board has still accomplished savings by eliminating the salary of the previous holder of the 10-month teacher of auto mechanics position who was "bumped" by petitioner and by eliminating the requirement of future salary increases to petitioner for a substantial period of time until the 10-month guide reaches his prior compensation.

As previously noted hereinabove, there are some differences in the within matter from the facts in DiMaggio and Avery. Petitioner herein held his position Job Developer pursuant to his

Educational Services Certificate and accordingly, his tenured position title was not simply "teacher" as in DiMaggio and Avery. Therefore, respondent could not have transferred petitioner from his 12-month tenured position to the 10-month position Teacher of Industrial Arts in the absence of a valid reduction in force. The parties herein agree, however, that petitioner's employment as Job Developer was abolished as part of a legitimate reduction in force for reasons of economic efficiency. When petitioner's particular employment was abolished there was no other full-time position within the same category. Accordingly, petitioner reverted to the category in which he had held employment prior to his employment as Job Developer and was again assigned to teach Industrial Arts, a 10-month assignment. I **CONCLUDE** that the slight factual differences in this case do not warrant a different conclusion concerning the salary issue, however. In Stolte v. Willingboro Board of Education, 1981 S.L.D. 770, discussed at pages 10-11 in the DiMaggio opinion attached, Stolte's salary was frozen at its existing level (but he was not advanced on the guide) after he was bumped from his principal position back to a teaching position. In that case the salary distinction resulted from different salary guides for administrators and teachers. In the present matter petitioner would still be paid on the same salary guide, but respondent would prorate the salary to reflect a 10-month work year as opposed to a 12-month work year. In this regard petitioner herein is exactly the same as the petitioners in DiMaggio and Jeanette Williams. Like those teaching staff members petitioner herein could not have refused his current 10-month assignment and requested placement on a preferred eligibility list, and still have maintained his tenure rights in the district.

Respondent's brief in the within matter makes one additional argument which was not made in the DiMaggio case, i.e., that a valid reduction in force for reasons of economy constitutes "good cause" pursuant to N.J.S.A. 18A:28-5. That statute, as noted at page 5 in the DiMaggio opinion attached hereto, defines the tenure rights of teaching staff members who have satisfied certain conditions and have obtained tenure in the district and provides in pertinent part that those persons:

> . . . shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching

> staff member or other just cause and then only in the manner prescribed by (*N.J.S.A.* 18A:6-9 *et* seq.) . . .

The words which directly follow the phrase "other just cause" make it perfectly clear, however, that even with "other just cause" the procedures set forth in N.J.S.A. 18A:6-10 must be followed. That statute provides:

> No person shall be dismissed or reduced in compensation,
>
> (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, or
>
> (b) if he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner;
>
> except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.
>
> Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law. (emphasis added)

The last paragraph in the above-quoted statute provides further support for the Commissioner's determination in Avery and for the opinion in DiMaggio, attached hereto: a valid reduction in force can result in a tenured teaching staff member losing his or her full-time position, but as long as a full-time position is maintained, that staff member's then current compensation cannot be reduced.

For all of the foregoing reasons, it is hereby **ORDERED** that petitioner's motion for summary decision is **GRANTED**. Respondent is ordered to restore petitioner's salary and benefits to those he received during the 1996-97 school year and to reimburse petitioner for back pay and benefits. Such salary and benefits must be maintained until such time as petitioner's salary level corresponds with the salary guide for the assigned position on a 10-month basis.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P. O. Box 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 11, 1999
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

6-14-99
DATE

Debbi Antasnatles/HP
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 16 1999
DATE

Barbara A Harnek
OFFICE OF ADMINISTRATIVE LAW

cc

OAL DKT. NO. EDU 6586-97
AGENCY DKT. NO. 275-7/97

WILLIAM BUCKLEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision issued by the Office of Administrative Law have been reviewed. Respondent's exceptions and petitioner's reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Respondent's exceptions and petitioner's reply essentially reiterate those arguments previously considered by the Administrative Law Judge (ALJ) in the instant matter and also in *DiMaggio, supra,* the initial decision which the ALJ incorporates as part of the present initial decision; therefore, they shall not be repeated herein. Additionally, petitioner's reply raises the argument that the recent Appellate Division decision in the matter entitled *Edward Carpenito v. Board of Education of the Borough of Rumson, Monmouth County*, decided by the Commissioner August 21, 1996, *rev'd* State Board February 4, 1998, *rev'd* New Jersey Superior Court, Appellate Division, Docket No. A-3731-97T3,[1] supports the correctness of the ALJ's recommended decisions in this matter and in *DiMaggio.*

[1] The Appellate Division decision in *Carpenito, supra,* was issued on June 29, 1999, subsequent to the filing of the initial decisions in *DiMaggio, supra,* and the instant matter. Consequently, the ALJ who issued the initial decision in both these matters did not have the court's decision in *Carpenito* before her for consideration.

Petitioner's reply exceptions aver that:

> In *Carpenito*, the Appellate Division reiterates the principles stated in *Avery*, *DiMaggio*, and this matter, that "[a] tenured teacher may be involuntarily transferred to another position within his or her Certification where no loss of salary or other reduction in employment is suffered and the teacher is not singled out for the transfer on a prohibited basis." (Opinion, p. 8.) In its opinion, the Appellate Division cited *Williams v. Plainfield Board of Ed.*, 1979 *S.L.D.* 220, reversed State Board of Ed. 1980 *S.L.D.* 1552, affirmed 176 *N.J. Super.* 154 (App. Div. 1980), as did [the ALJ], holding that the transfer of a high school principal to the position of elementary principal without any reduction in compensation or a reduction in rank did not violate the principal's tenure rights. (Petitioner's Reply Exceptions at p. 5)

Upon thorough review of the record of the present matter, the initial decision and the parties' exceptions, the Commissioner declines to adopt the recommended decision of the ALJ granting summary decision to petitioner for the following reasons. Subsequent to the filing of the initial decision in this matter, the Commissioner issued his final decision in *DiMaggio, supra*, on July 8, 1999. In that decision, the Commissioner noted that the ALJ, in determining how to apply the diverse and inconsistent body of case law spanning several decades to the dispute therein, had opted to rely primarily on the Commissioner's decision in *Avery, supra.* The same has occurred in the instant matter as well. However, as noted by the Commissioner in *DiMaggio*, the Commissioner's holding in *Avery* was premised upon the conclusion that the petitioners therein had *not* been subject to a *reduction in force* but had been merely *transferred* from one full-time (12-month) teacher position to another full-time (10-month) teacher position. Consequently, it was determined that petitioners had impermissibly suffered a reduction in their salary when the Board acted to prorate their salaries for 10 months of employment based on their previously held 12-month positions.

Significantly, however, the Commissioner's decision in *DiMaggio* held that both that matter and *Avery* now had to be viewed in light of the Appellate Division decision in

Carpenito, wherein the court's determination refined the concepts of transfer and reduction in force to hold that when a board of education acts to abolish a teaching staff member's position pursuant to *N.J.S.A.* 18A:28-9 and reassigns that individual to another position with no loss of tangible employment benefit, that action does *not* constitute a reduction in force, but is instead tantamount to a *transfer.*

The petitioner in *DiMaggio* was found to have suffered a tangible loss of employment benefit in the form of a reduction in work year/hours and a concomitant reduction in annual salary as a result of the Board's actions taken pursuant to *N.J.S.A.* 18A:28-9. Therefore, in view of the court's decision in *Carpenito,* the Commissioner held that DiMaggio had been the subject of a reduction in force, *not a transfer.* Moreover, because the factual circumstances were thus distinguishable from prior court rulings involving transfers, such as *Williams, supra,* and *Piscataway, supra,* the Commissioner further concluded that

> it was permissible for respondent *** to reduce [DiMaggio]'s annual salary, given that the position to which he was entitled based on his tenure and seniority was a ten-month position as opposed to a twelve-month one as held prior to the reduction in force effectuated by the Board, and particularly in light of the fact that the Board maintained petitioner's *rate* of salary based on his prior twelve-month position. *See Casey v. Board of Education of the Township of Cinnaminson,* 95 *N.J.A.R.*2d (EDU) 585. (*DiMaggio, supra,* at p. 20)

In the instant matter, petitioner has suffered the same loss of tangible employment benefit as occurred in *DiMaggio, i.e.,* a reduction in work year/hours and a concomitant reduction in annual salary. Consequently, the Commissioner finds and determines that under the factual circumstances presented herein, petitioner was the subject of a reduction in force, not a transfer as the Board avers. Moreover, consistent with his holding in *DiMaggio,* the Commissioner finds and concludes that because the Board acted pursuant to *N.J.S.A.* 18A:28-9 to abolish petitioner's 12-month position and reassigned him to a 10-month position in

accordance with his tenure and seniority entitlements, its action to reduce petitioner's annual salary is permissible, particularly because his 10-month salary is prorated based upon the salary for his prior 12-month position and his *rate* of salary has been maintained (*Casey).*

Accordingly, for the reasons expressed herein, the Commissioner grants summary decision to the City of Trenton Board of Education. [2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

July 30, 1999
Date of Mailing, July 30, 1999

247+-99 AMENDED DECISION

WILLIAM BUCKLEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a teaching staff member, alleged that respondent Board violated his tenure and seniority rights when it reassigned him from a 12-month position to a 10-month position and prorated his annual salary to reflect his 10-month work schedule as opposed to the 12-month work schedule in his prior assignment.

The ALJ granted petitioner's motion for summary decision, following the rationale of her initial decision in *Rocco DiMaggio v. Board of Education of the City of Trenton, Mercer County*, issued prior to the Appellate Division's recent decision in *Edward Carpenito v. Board of Education of the Borough of Rumson, Monmouth County.*

In light of *Carpenito, supra*, the Commissioner reversed the initial decision of the ALJ which granted petitioner's motion for summary decision, finding that, as in *DiMaggio*, it was permissible for the Board to reduce petitioner's salary upon abolishment of his 12-month position and reassignment to a 10-month position as part of a bona fide reduction in force. Matter was remanded to the OAL for further proceedings strictly limited to any remaining issues in the record which have not been decided by way of the instant decision.

September 16, 1999

OAL DKT. NO. EDU 6586-97
AGENCY DKT. NO. 275-7/97

AMENDED DECISION

WILLIAM BUCKLEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision issued by the Office of Administrative Law have been reviewed. Respondent's exceptions and petitioner's reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Respondent's exceptions and petitioner's reply essentially reiterate those arguments previously considered by the Administrative Law Judge (ALJ) in the instant matter and also in *DiMaggio, supra,* the initial decision which the ALJ incorporates as part of the present initial decision; therefore, they shall not be repeated herein. Additionally, petitioner's reply raises the argument that the recent Appellate Division decision in the matter entitled *Edward Carpenito v. Board of Education of the Borough of Rumson, Monmouth County*, decided by the Commissioner August 21, 1996, *rev'd* State Board February 4, 1998, *rev'd* New Jersey Superior Court, Appellate Division, Docket No. A-3731-97T3,[1] supports the correctness of the ALJ's recommended decisions in this matter and in *DiMaggio.*

[1] The Appellate Division decision in *Carpenito, supra,* was issued on June 29, 1999, subsequent to the filing of the initial decisions in *DiMaggio, supra,* and the instant matter. Consequently, the ALJ who issued the initial decision in both these matters did not have the court's decision in *Carpenito* before her for consideration.

Petitioner's reply exceptions aver that:

> In *Carpenito*, the Appellate Division reiterates the principles stated in *Avery*, *DiMaggio*, and this matter, that "[a] tenured teacher may be involuntarily transferred to another position within his or her Certification where no loss of salary or other reduction in employment is suffered and the teacher is not singled out for the transfer on a prohibited basis." (Opinion, p. 8.) In its opinion, the Appellate Division cited *Williams v. Plainfield Board of Ed.*, 1979 *S.L.D.* 220, reversed State Board of Ed. 1980 *S.L.D.* 1552, affirmed 176 *N.J. Super.* 154 (App. Div. 1980), as did [the ALJ], holding that the transfer of a high school principal to the position of elementary principal without any reduction in compensation or a reduction in rank did not violate the principal's tenure rights. (Petitioner's Reply Exceptions at p. 5)

Upon thorough review of the record of the present matter, the initial decision and the parties' exceptions, the Commissioner declines to adopt the recommended decision of the ALJ granting summary decision to petitioner for the following reasons. Subsequent to the filing of the initial decision in this matter, the Commissioner issued his final decision in *DiMaggio, supra*, on July 8, 1999. In that decision, the Commissioner noted that the ALJ, in determining how to apply the diverse and inconsistent body of case law spanning several decades to the dispute therein, had opted to rely primarily on the Commissioner's decision in *Avery, supra.* The same has occurred in the instant matter as well. However, as noted by the Commissioner in *DiMaggio*, the Commissioner's holding in *Avery* was premised upon the conclusion that the petitioners therein had *not* been subject to a *reduction in force* but had been merely *transferred* from one full-time (12-month) teacher position to another full-time (10-month) teacher position. Consequently, it was determined that petitioners had impermissibly suffered a reduction in their salary when the Board acted to prorate their salaries for 10 months of employment based on their previously held 12-month positions.

Significantly, however, the Commissioner's decision in *DiMaggio* held that both that matter and *Avery* now had to be viewed in light of the Appellate Division decision in

Carpenito, wherein the court's determination refined the concepts of transfer and reduction in force to hold that when a board of education acts to abolish a teaching staff member's position pursuant to *N.J.S.A.* 18A:28-9 and reassigns that individual to another position with no loss of tangible employment benefit, that action does *not* constitute a reduction in force, but is instead tantamount to a *transfer.*

The petitioner in *DiMaggio* was found to have suffered a tangible loss of employment benefit in the form of a reduction in work year/hours and a concomitant reduction in annual salary as a result of the Board's actions taken pursuant to *N.J.S.A.* 18A:28-9. Therefore, in view of the court's decision in *Carpenito,* the Commissioner held that DiMaggio had been the subject of a reduction in force, *not a transfer.* Moreover, because the factual circumstances were thus distinguishable from prior court rulings involving transfers, such as *Williams, supra,* and *Piscataway, supra,* the Commissioner further concluded that

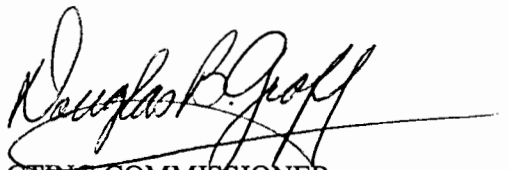
> it was permissible for respondent *** to reduce [DiMaggio]'s annual salary, given that the position to which he was entitled based on his tenure and seniority was a ten-month position as opposed to a twelve-month one as held prior to the reduction in force effectuated by the Board, and particularly in light of the fact that the Board maintained petitioner's *rate* of salary based on his prior twelve-month position. *See Casey v. Board of Education of the Township of Cinnaminson,* 95 *N.J.A.R.*2d (EDU) 585. (*DiMaggio, supra,* at p. 20)

In the instant matter, petitioner has suffered the same loss of tangible employment benefit as occurred in *DiMaggio, i.e.,* a reduction in work year/hours and a concomitant reduction in annual salary. Consequently, the Commissioner finds and determines that under the factual circumstances presented herein, petitioner was the subject of a reduction in force, not a transfer as the Board avers. Moreover, consistent with his holding in *DiMaggio*, the Commissioner finds and concludes that because the Board acted pursuant to *N.J.S.A.* 18A:28-9 to abolish petitioner's 12-month position and reassigned him to a 10-month position in

accordance with his tenure and seniority entitlements, its action to reduce petitioner's annual salary is permissible, particularly because his 10-month salary is prorated based upon the salary for his prior 12-month position and his *rate* of salary has been maintained (*Casey).*

Accordingly, for the reasons expressed herein, the Commissioner reverses the initial decision issued by the ALJ which grants summary decision to petitioner and, because there are remaining issues in the record which have not as yet been heard by the ALJ, the Commissioner remands the matter to the OAL for further proceedings strictly limited to those issues specified in the record which have not been decided by way of the instant decision. [2]

IT IS SO ORDERED.



ACTING COMMISSIONER

[2] This decision, as the Commissioner's final determination with respect to those issues set forth in petitioner's motion for summary decision, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to

September 16, 1999
Date of Mailing, September 16, 1999

K.O. AND O.O., on behalf of minor child, W.O.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners challenged the Board's residency determination.

The ALJ dismissed the petition, pursuant to *N.J.A.C.* 1:1-14.14, due to petitioners' failure to comply with the May 17, 1999 discovery order of the Court and granted the Board's counterclaim for $7,600, representing the annual tuition for W.O.'s attendance in the District's schools during the 1997-98 school year, together with pre- and post-judgment interest.

The Commissioner concurred with the determination of the ALJ except for the award of pre- and post-judgment interest. The Commissioner did not accept that pre-judgment interest should be awarded since he concluded that the record was insufficient to persuade him definitively that the actions or inactions of petitioners were ascribable to bad faith or a deliberate violation of law or regulation. Similarly, the Commissioner determined that an award of post-judgment interest was inappropriate since a claim for such interest would only arise if petitioners fail to satisfy the judgment awarded in this decision within 60 days of its award, pursuant to *N.J.A.C.* 6:24-1.16(c)2.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 07084-98N

AGENCY DKT. NO. 150-5/98

K.O. AND O.O. ON BEHALF OF MINOR CHILD, W.O.,

Petitioners,

v.

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,

Respondent.

Olubukola O. Adetula, Esq., for petitioners

Joanne L. Butler, Esq., for respondent (Schenck, Price, Smith and King, attorneys)

Record Closed: May 24, 1999 Decided: June 10, 1999

BEFORE **JEFF S. MASIN**, ALJ:

This matter was originally filed at the Office of Administrative Law on July 23, 1998, after having been transmitted from the Commissioner of Education. Petitioners K.O. and O.O. sought an order granting the petitioner child, W.O., admission into the school district of South Orange and Maplewood as a student eligible for free public education and reversing a decision of the respondent boards of education which had denied the student eligibility for a free public education within the school district. The Board of Education filed an answer and a counter-claim seeking the dismissal of the petition and seeking by way of counter-claim an order granting judgment to

the Board against K.O. removing W.O. from the school district and ordering that tuition be paid for the period of ineligible attendance of W.O. as well as attorneys fees, costs of suit, pre- and post-judgment interest and such further relief as deemed appropriate. Following transmittal the matter was assigned to the Honorable Linda Baer, ALJ, and discovery commenced. Judge Baer became ill and resigned from the Office of Administrative Law and the matter was reassigned to this judge.

In the interim on February 17, 1999, counsel for the board filed a notice of motion seeking to dismiss the petition and to award the counter claim due to the petitioners' failure to answer interrogatories. By letter of May 5, 1999, this judge advised counsel for petitioners that unless a response was received by Friday, May 14, 1999, respondent's motion would be granted. Thereafter, counsel for petitioners advised counsel for the board on May 13, 1999, that he would be sending answers to interrogatories, but that petitioner O.O.'s certification would not be signed because he was not in town. On May 17, 1999, Ms. Butler advised that there was a question concerning the certification date for the answers of petitioner K.O. as they reflected a certification date of May 12, 1999, although according to Mr. Adetula, K.O. was coming to his office of May 13, 1999, to sign the answers. In addition, no documents had been provided in the answer to discovery and the answers allegedly prepared to O.L. were uncertified. Thereafter, by letter of May 17, 1999, this judge advised counsel that although he was appreciative of Ms. Butler's concerns as to the lengthy delay in obtaining certified answers to interrogatories, he was reluctant to see the case resolved other than on the merits. The judge therefore ordered Mr. Adetula to provide a certified set of answers to interrogatories from Mr. O. no later than 12:00 Noon on May 24, 1999, and in addition to provide Ms. Butler with an explanation as to why the answers certified by K.O. reflected a certification date of May 12, 1999, rather than May 13, 1999. The letter to counsel dated May 17, 1999, which is attached hereto, specifically noted "If the certified answers to Mr. O.'s interrogatories and the explanation of the certification date for K.O.'s interrogatories are not in Ms. Butler's office by Noon on May 24, 1999, I will grant Ms. Butler's motion to dismiss and will grant her counter-claim."

By letter dated May 21, 1999, Ms. Butler advised that the board was questioning the veracity of the answers to interrogatories because of the indication that the certification bore an incorrect date.

On May 28, 1999, Ms. Butler wrote advising that a copy of a Certification of O.O. and certified answers to interrogatories were received by her firm at 2:14 P.M. on May 24, 1999. She therefore requests that the petition be dismissed and the counterclaim granted as "Petitioners have not complied with Your Honor's deadline with regard to receipt of certified answers to interrogatories."

As emphasized in the letter to counsel for the petitioners on May 17, 1999, the discovery process in this matter has gone on for a great length of time. Mr. Adetula did not see fit to respond to the motion originally filed before Judge Baer on February 17, 1999, and only filed a response thereto by way of letter of May 13, 1999, in which he merely indicated that he had sent discovery (although as it turned out, far from complete) and requested that the motion be withdrawn. Thereafter, despite having ample opportunity to do so, and fair warning of the consequences, the petitioners' counsel failed to assure that the answers and certifications were appropriately in the hands of Ms. Butler by the deadline of Noon on May 24, 1999. This was even more egregious given the indication in the letter of May 17 that while a further stretch was permitted in order to allow the matter to be resolved by the merits, there had to be a limit even to the tribunal's patience.

It is obviously most appropriate that cases be resolved on their merits. At the same time, there is a point at which a party must comply with the requirements of discovery. Counsel and clients cannot blithly ignore motions, receive the advantage from the delay in processing a pending motion caused by the unfortunate illness and resignation of the motion judge, then file incomplete certifications and answers, and then string out the response even further. In this case the petitioners were given more than ample opportunity to comply with the discovery requirements and the deadline to do so and of the consequences. Their failure to comply by the set time is not excusable. Therefore, I **FIND** that the petitioners failed to comply with the discovery order of May 17, 1999, and that pursuant to *N.J.A.C.* 1:1-14.14 the petition is **DISMISSED** and the

counterclaim of the board of education is **GRANTED**. It is therefore **ORDERED** that the petitioners shall pay to the board of education annual tuition for Columbia High School for the 1997-1998 school year in the amount of $7,600 as well as pre and post-judgment interest thereon.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 10, 1999
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

6-18-99
DATE

Debbie Antanaitis/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 22 1999
DATE

Barbara A Harnah
OFFICE OF ADMINISTRATIVE LAW

mjm

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
PO Box 049
Trenton, New Jersey 08625-0049
(609) 588-6582

JEFF S. MASIN
DEPUTY DIRECTOR
ADMINISTRATIVE LAW JUDGE

Fax. No. (609) 588-3730

May 17, 1999

BY FACSIMILE TRANSMISSION AND REGULAR MAIL

Olubukola O. Adetula, Esq.
134 Evergreen Place
East Orange, NJ 07018

Joanne L. Butler, Esq.
Schenck, Price, Smith & King
10 Washington Street
PO Box 905
Morristown, NJ 07963-0905

Re: K.O. and O.L. on behalf of minor child, W.O. v. Bd. of Ed. of the South Orange and Maplewood School District, Essex Co.
OAL DKT. NO. EDU 07084-98N
AGENCY DKT. NO. 150-5/98

Dear Counsel:

I have reviewed your correspondence of the last several days regarding the above matter. Although I am appreciative of Ms. Butler's concern as to the lengthy delay in obtaining certified answers to interrogatories, I am reluctant to see this case resolved other than on the merits. Mr. Adetula must provide a certified set of answers to interrogatories from Mr. Oduwole no later than 12:00 Noon on May 24, 1999. In addition he must provide Ms. Butler with an explanation as to why the answers certified by petitioner K.O. reflect a certification date of May 12, 1999, rather than May 13, 1999, as noted in the May 17, 1999, letter from Ms. Butler. If the certified answers to Mr. O.'s interrogatories and the explanation of the certification date for K.O.'s interrogatories are not in Ms. Butler's office by Noon on May 24, 1999, I will grant Ms. Butler's motion to dismiss and will grant her counter-claim.

Mr. Adetula must be aware that this discovery process has gone on too long and there has been more than sufficient opportunity to respond to the interrogatories. While I am prepared to give a bit of a further stretch in order that the matter can be resolved on the merits,

there is a limit. I trust that there will be no further problems with regard to discovery in this case. However, if there is, the matter will be brought to a close.

Yours very truly,

Jeff S. Masin

mjm
c William Speziale, Deputy Clerk

OAL DKT. NO. EDU 7084-98
AGENCY DKT. NO. 150-5/98

K.O. AND O.O., on behalf of minor child, W.O.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon his independent review of the record, the Commissioner concurs with the determination of the Administrative Law Judge (ALJ) that the within Petition of Appeal be dismissed, pursuant to *N.J.A.C.* 1:1-14.14, due to petitioners' failure to comply with the May 17, 1999 discovery order of the Court. He further concurs with the ALJ that the Board's counterclaim in the amount of $7,600, which represents the annual tuition for W.O.'s attendance in the District's schools during the 1997-98 school year, is appropriately awarded. The Commissioner does not, however, accept that pre-judgment interest should be awarded to the Board in this matter, since he concludes that the record before him is insufficient to persuade him definitively that the actions or inactions of petitioners in this matter are ascribable to bad faith or a deliberate violation of law or regulation. Similarly, he determines that an award of post-judgment interest in the instant matter is inappropriate, since a claim for such interest would only

arise if the petitioners fail to satisfy the judgment awarded in this decision within 60 days of its award. *See N.J.A.C.* 6:24-1.16(c)2.

Accordingly, the initial decision of the OAL, as amended above, is affirmed for the reasons stated therein. The instant Petition of Appeal is dismissed and petitioners are hereby directed to pay the Board tuition in the amount of $7,600.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

July 30, 1999
Date of Mailing, July 30, 1999

249-99

J.M., on behalf of minor child, J.A.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

July 30, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 503-99
AGENCY DKT. NO. 557-12/98

J.M. ON BEHALF OF MINOR CHILD J.A.M.,
Petitioner,
v.
BOARD OF EDUCATION OF TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY,
Respondent.

John A. Underwood, Esq., for petitioner (Underwood & Micklin, attorneys)

David A. Luthman, Esq., for respondent (Toll, Sullivan, Luthman & Bilotti, attorneys)

Record Closed: May 18, 1999 Decided: June 15, 1999

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter was transmitted to the Office of Administrative Law on February 11, 1999, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

June 15, 1999
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

June 16 1999
DATE

D. M. Gentanastis Jr.
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 17 1999
DATE

Barbara A Harnack
OFFICE OF ADMINISTRATIVE LAW

cc

TOLL, SULLIVAN, LUTHMAN & BILOTTI
800 North Kings Highway
Suite 400
Cherry Hill, New Jersey 08034
(609) 482-2010
Attorneys for Respondent

RECEIVED
STATE OF NEW JERSEY
DEPT OF EDUCATION
1999 MAY 18 A 10:09

J.M. ON BEHALF OF MINOR CHILD, J.A.M. Petitioners, vs. BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN CAMDEN COUNTY Respondent	OAL DKT. NO EDU 503-99 AGENCY DKT. NO. 557-12/98

CONSENT ORDER

This matter having come before M. Kathleen Duncan, ALJ for hearing on a Petition filed with the Department of Education and the Hearing having been scheduled for May 11, 1999, and on that date the parties having appeared represented by counsel and it then being represented to the Court that a settlement had been reached, it is by consent of the parties recommended that the following determination be adopted:

1. That J.A.M., minor child, be permitted to remain enrolled in the public schools of the Respondent.

2. In the event that the Respondent subsequently and successfully moves for disenrollment on the basis of non-residence, the Respondent shall be entitled to tuition reimbursement from the Petitioner retroactive to December 4, 1998.

3. That except as set forth herein, this matter shall be dismissed without prejudice or other further relief.

M. KATHLEEN DUNCAN, ALJ

We hereby consent to the form and entry of the within Consent Order.

UNDERWOOD & MICKLIN
Attorneys for Petitioner

By: _____
John A. Underwood

TOLL, SULLIVAN, LUTHMAN & BILOTT
Attorneys for Respondent

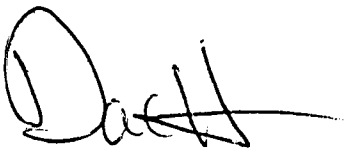
By: _____
David A. Luthman

OAL DKT. NO. EDU 503-99
AGENCY DKT. NO. 557-12/98

J.M., on behalf of minor child, J.A.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, consent order, and initial decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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



COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.
July 30, 1999
Date of Mailing, July 30, 1999

250-99

J.F.A., on behalf of minor son, S.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WESTFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

July 30, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. No. EDU 7149-97

AGENCY DKT. No. 157-5/97

J.F.A. ON BEHALF OF MINOR SON, S.A.,

Petitioner,

v.

BOARD OF EDUCATION

OF THE TOWN OF WESTFIELD,

Respondent.

John G. Geppert, Esq., for petitioner (Wiley, Malehorn & Sirota, attorneys)

Richard J. Kaplow, Esq., for respondent

Record Closed: May 27, 1999 Decided: June 14, 1999

BEFORE **DIANA C. SUKOVICH,** ALJ:

On May 15, 1999, J.F.A. filed a petitioner with the State Department of Education (DOE), on behalf of her minor son, S.A., regarding a residency determination by the Westfield Board of Education (respondent) for the 1996-1997 school year. The DOE transmitted the matter to the Office of Administrative Law on July 14, 1997 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

A hearing scheduled for May 27, 1999 was adjourned at the requests of the parties because a resolution of the matter had been reached; respondent rescinded its

claim for tuition reimbursement for the school year in question. An executed Stipulation of Settlement was filed on May 27, 1999, on which date the record was closed.

Having reviewed the terms of the Stipulation of Settlement, which is attached hereto and made part hereof, I **FIND** as follows:

1. The parties voluntarily have agreed to the terms and conditions of the settlement as evidenced by the signatures contained thereon.

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

Therefore, I **ORDER** that the parties comply with the terms of the settlement and that these proceedings be and are hereby **CONCLUDED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

June 14, 1999
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

6-18-99
DATE

Debbie Antanaitis/BP
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 22 1999
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

\mvh

WILEY, MALEHORN AND SIROTA
250 MADISON AVENUE
MORRISTOWN, NEW JERSEY 07960
(973)539-1313

Attorneys for Petitioner

J.F.A. ON BEHALF OF MINOR SON S.A.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF WESTFIELD, UNION COUNTY,

Respondent.

STATE OF NEW JERSEY
DEPARTMENT OF EDUCTION
OAL DOCKET NO.: C7149-97N
AGENCY DOCKET NO.: 157-5/97

CIVIL ACTION

STIPULATION OF SETTLEMENT

THIS MATTER being opened to the Office of Administrative Law by John G. Geppert, Jr., attorney for Petitioner, and Richard Kaplow, Esq. attorney for Respondent, Westfield Board of Education, and it appearing that the parties entered into a settlement of the above matter, and the parties intending to finally and conclusively resolve all issues, matters, claims, potential claims, disputes and potential disputes between them, the parties hereby agree as follows:

WHEREAS, petitioner initiated this petition challenging the Board of Education's residency determination for the 1996-1997 school year; and

WHEREAS, the Board of Education has submitted a letter to the court dated May 14, 1999, wherein the Board determined that it will rescind its claim for tuition reimbursement for the 1996-1997 school year and requests that this matter be closed; and

WHEREAS, Petitioner withdraws her petition based upon the Board of Education's rescission of its determination.

1. This matter is settled and dismissed with prejudice and without costs to any party.

Date: _____

Richard Kaplow, Esq.
Attorney for Respondent
Westfield Board of Education

Wiley, Malehorn, & Sirota,
Attorney for Petitioner

Date: May 21, 1999 BY: _____

John G. Geppert, Jr., Esq.

OAL DKT. NO. EDU 7149-97
AGENCY DKT. NO. 157-5/97

J.F.A., on behalf of minor son, S.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WESTFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement, and initial decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

July 30, 1999
Date of Mailing, July 30, 1999

IN THE MATTER OF THE TENURE	:	
HEARING OF CHARLES MOTLEY,	:	
STATE-OPERATED SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF NEWARK,	:	DECISION
ESSEX COUNTY.	:	
	:	

SYNOPSIS

District certified tenure charges against respondent teacher for unbecoming conduct and insubordination/neglect of duty.

The ALJ found that the District sustained its tenure charges of unbecoming conduct and neglect of duty and concluded that the appropriate penalty was a permanent reduction in compensation of one step on the salary guide and forfeiture of 120 days' salary already withheld.

The Commissioner affirmed the findings and conclusions of the ALJ but, in light of respondent's unprofessional, uncooperative and defiant conduct, modified the penalty to include, in addition to the permanent reduction of one step on the salary guide and the 120 days' salary already withheld, an additional forfeiture of two months' salary and concomitant emoluments.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7421-97
AGENCY DKT. NO. 212-6/97

IN THE MATTER OF THE TENURE HEARING OF CHARLES MOTLEY

Gregory G. Johnson, Esq., for petitioner

Eugene G. Liss, Esq., for respondent,

Record Closed: February 16, 1999 Decided: May 5, 1999

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

Statement of the Case

This is a teacher tenure proceeding under *N.J.S.A.* 18A:6-10 to -18. Tenured teaching staff members hold employment in the public school system "during good behavior and efficiency." Petitioner State-Operated School District of the City of Newark ("District") has brought charges of unbecoming conduct and neglect of duty against respondent Charles Motley ("Motley") arising out of a series of incidents that occurred in February 1996 and during the 1996-97 academic year.[1] Specifically, the District accuses Motley of exhibiting disrespectful behavior toward other teachers or

[1]Although the tenure charges also accused Motley of yelling at students and staff and in 1993-94 and 1994-95, the District failed to elicit any evidence in support of these allegations.

students on six separate occasions and of failing to provide any instruction to his class on numerous occasions.[2] Basically, the outcome of this dispute depends on an assessment of the witnesses' credibility. If any of the tenure charges is sustained, the Commissioner of Education ("Commissioner") must determine whether dismissal or some lesser penalty is warranted.

Procedural History

On May 1, 1997, Motley's building principal filed tenure charges, together with a sworn statement of supporting evidence, with the district superintendent. Motley filed a timely response. Upon review of these papers, the district superintendent determined that there exists probable cause to credit the supporting evidence and that the charges, if true, warrant some type of disciplinary action.[3] Accordingly, on June 16, 1997, the district superintendent certified the tenure charges to the Commissioner. Thereafter, on July 18, 1997, Motley filed an answer in which he denied all the charges.

Subsequently, on July 29, 1997, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The OAL held eight days of hearing ending on December 3, 1998. Both parties submitted post-

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[2]Charges relating to failure to teach are best handled under the general category of neglect of duty. While the District also categorizes such conduct as "insubordination," the facts do not fit neatly within the usual sense of insubordinate as defiance of or unwillingness to submit to authority. WEBSTER'S NEW INTERNATIONAL UNABRIDGED DICTIONARY 1172 (3rd ed. 1976).

[3]On July 5, 1996, the Commissioner of Education entered an order removing the Newark Board of Education, creating a state-operated school dstrict, and authorizing the Commissioner to appoint a state district superintendent to direct all operations of the new district. *Contini v. Newark Bd. of Educ.*, 96 *N.J.A.R.*2d (EDU) 196, 228, *aff'd* 286 *N.J. Super.* 106 (App. Div. 1995). Ordinarily, it is the local school board that would determine the existence of probable cause and certify tenure charges to the Commissioner. *N.J.S.A.* 18A:6-11. But the enabling legislation authorizing creation of a State-Operated School District confers board powers on the State District Superintendent "to perform all acts and do all things consistent with the law necessary for the proper conduct, maintenance and supervision of the schools in the district." *N.J.S.A.* 18A:7A-35(e). *See also N.J.S.A.* 18A:7A-38(b).

hearing briefs on February 16, 1999. Witnesses and exhibits are listed in the appendix.

Findings of Fact

General Background Facts

Most of the background facts are undisputed. Charles Motley has been a teacher in the Newark school system for nearly twenty-six years. He holds a bachelor's degree in elementary education from Shore University, a master's degree in administration from Kean College, and is certified as both an elementary teacher and a supervisor. Before coming to Newark, he taught summer school at a junior high school in Brooklyn, New York. In September 1971, Motley began his employment as an elementary-school teacher in Newark. While teaching in the Newark school system, Motley actively participated in union activities as an officer of the Newark Teacher's Union and a trustee of the supplemental fringe-benefit fund. He also helped to set up a personal hygiene program for young students and donated his own money to buy shirts and ties for third grade boys. In addition, he participated in a counseling program whereby teachers would "adopt" a student and work with him or her after school.

During the 1995-96 academic year, he was assigned as a "Title I"[4] or "basic skills" teacher for the first and fourth grades at Alexander Street School. His duties were to provide remedial instruction in reading, writing and mathematics to children identified as deficient in those areas. As a result of complaints about his conduct from other staff members, Motley was transferred in mid-September 1996 to the 13th Avenue School, where he performed similar duties for the fourth, seventh and eighth grades. When school administrators continued to receive complaints from teachers

[4]Teachers of compensatory education are known as "Title I" teachers because funding for basic skills improvement programs in New Jersey derives from amendments to Title I of the Elementary and Secondary Education Act of 1965, 20 *U.S.C.A.* §2701 *et seq.* Improving America School Act of 1994

about Motley's conduct in their classrooms, the District suspended him without pay, effective June 9, 1997, and instituted the present charges.

Prior to 1994-95, the Newark school system employed a "pull-out model" for delivery of basic-skills instruction, in which small groups of students would leave the regular classroom to receive compensatory education services in a separate room. Starting in 1994-95, the State mandated that the District switch to an "in-class model," where the Title I teacher comes into the regular classroom to assist selected students. In order for the in-class model to work, the two teachers must coordinate their activities and agree on the objectives of the lesson.

Transition to the in-class model in the District did not go smoothly, in part because the school administration failed to provide adequate training to those expected to implement it. While Title I teachers received training on the in-class model as early as October 1994, the District did not begin training groups of classroom teachers until two years later in October 1996. Moreover, the District's handbook on the in-class model was not ready for distribution until sometime in 1996-97. Some of the classroom teachers regarded the in-class model as an implicit criticism of their job performance. As Motley put it, "they did not welcome the idea of another teacher being assigned to work with them." Several of the regular teachers apparently viewed him as a "spy," who would report any problems in their classrooms to the central office. Of course, this delicate situation made it all the more imperative for Motley to work cooperatively with the classroom teachers and be sensitive to their concerns.

Conduct Unbecoming a Teacher

Each separate instance of unbecoming conduct will be discussed under an appropriate heading.

(1) Belittling a New Teacher in Front of Her Students

Dawn Levin had recently graduated from college and was in her first year of teaching. She began in September 1996 as a substitute teacher at the 13th Avenue School and was soon given a fourth-grade class of her own. At the hearing, Levin came across as an enthusiastic and sincere young woman who is genuinely interested in the welfare of her students. Originally, the District had assigned another Title I teacher, Joyce Thompson, to her classroom. Levin and Thompson worked harmoniously together. They would meet either before or after class or during a preparation period to prepare their lessons and review each other's plans. Levin praised Thompson as being "wonderful with my children" and as helping with whatever lesson she was working on.

In late December 1996 or early January 1997, Motley replaced Thompson as the Title I teacher in Levin's class. From the outset, their relationship was strained and uncomfortable. Motley was assigned to Levin's classroom for one period every Monday. Unlike Thompson, Motley refused to meet with Levin outside of class time to plan lessons in advance. Instead, he demanded that Levin put a copy of her lesson objectives and worksheets in his mailbox by the preceding Thursday or Friday. He also asked Levin to gather educational materials for him, claiming that she had more resources available than he did. Suspicious that Motley was trying to avoid having to write his own lesson plans, the building principal, Glenda Johnson-Green, instructed Levin that she did not have to make separate plans for Motley, but she should share her plan book with him.

During his first few visits to her class, Levin related, Motley would patrol the perimeter of her classroom and openly make critical comments to her, such as "Why aren't your children writing in cursive" or "Why do you have work on your wall that is not corrected?" Often he would yell at her in front of her students. It got so bad that Levin "hate[d] coming to school on Mondays because he's coming to my room." On February 28, 1997 Levin complained to Principal Johnson-Green about Motley's

treatment of her. At the hearing, Johnson-Green testified that it is unhealthy and "very negative" for children to see their teachers quarreling with each other in the classroom. Although Motley introduced testimony suggesting that Levin had difficulties with classroom management and sought help from other staff members, the record does not support the contention that Levin required more guidance than any other first-year teacher. Indeed, Levin appeared perfectly capable of handling her fourth-grade students, her problem was dealing with Motley's efforts to undermine her authority.

Events culminated in a "confrontation" between Levin and Motley in the presence of her students on March 3, 1997. Significantly, Motley admits that Levin had deposited in his mail box on Friday February 24, 1997 a copy of her teaching objectives and study materials consisting of short biographies of famous African Americans and a related set of written exercises. Nonetheless, Motley came to her class on Monday March 3, 1997 unprepared to teach a lesson or assist the children in completing their desk work. Since he had missed the prior two Monday sessions (on February 17, 1997 school was closed and on February 27, 1997 he had been out sick), Motley maintained that he did not know what material had already been covered or the specific subject matter on which she wanted to focus that day. He made no effort, however, to contact her before class to clarify the scope of the lesson or to review her plan book.

Levin testified that Motley began yelling at her from across the room so that the whole class could hear what he was saying. He reportedly made disparaging remarks about her abilities as a teacher, such as "You don't get the program, you just don't want to teach" and "You're just wasting time." Additionally, he demeaned her role as the classroom teacher, asking "Who are you that I should have to come look at your plan book." Levin was so upset at Motley's conduct that she left the classroom and reported the incident to Vice Principal Brenda Jack-Watkins. A memorandum that Levin prepared on March 5, 1997 corroborates her testimony at the hearing. A few days later, Jack-Watkins removed Motley from Levin's classroom. For his part, Motley denied that he raised his voice or made any discourteous comments. According to his version, "all [he] was trying to do was get her to continue with her lesson," and he offered to discuss the study materials with her "at a later date."

I FIND that on March 3, 1997, as well as several prior occasions, Motley belittled and humiliated Levin by making critical comments about her teaching style and attitude in the presence of her students. As a more experienced teacher sent into her classroom to provide compensatory instruction, Motley should have been supportive of Levin's efforts rather than ridiculing her and downplaying her abilities. Certainly he knew better than making negative statements about a teacher in front of her students. Moreover, if he truly did not understand Levin's teaching objectives for a particular day, Motley should have contacted her for clarification rather than come to class unprepared to teach.

(2) Criticizing Another Teacher's Homework Assignments

Steven Cooper, another new teacher at 13th Avenue School, also complained about Motley's public denunciation of his teaching methods. He holds a bachelor of science degree in finance and obtained his teaching certificate through the alternate route. In 1996-97, Cooper taught reading and language arts to seventh-grade students. Although it was his first year as a teaching staff member, Cooper had previously worked for four years as a substitute in the District. Motley was assigned to Cooper's classroom on Wednesdays. None of the administrators told him about Motley's duties, but Cooper believed that Motley's responsibility was to teach basic skills to children who were below grade level. From the date that Motley first entered his classroom in September 1996, the two of "didn't get along" and "didn't see eye to eye on many issues." At times their relationship was so bad that the two of them were not on speaking terms.

Shortly after his arrival, on September 24, 1996, Motley advised Cooper that he was "assign[ing] too much homework to the students" and "should take into consideration that other teachers give [his] students homework as well." This encounter occurred at the rear of the classroom, where Cooper was arranging the bulletin board. Cooper took offense because Motley only visited his class once a week

and had never sat down with him to go over the issues. Motley explained that it was Cooper who initially raised the topic of his students not doing their homework. Responding to Cooper's concern, Motley recommended various "strategies" and reminded Cooper to consider "the amount of work other teachers were assigning." He offered his advice "in a professional way" and was not intentionally "negative or critical." In its tenure charges, the District implied that Motley told Cooper's students "not do the homework assigned." In fact, however, the conversation took place between Motley and Cooper and was never communicated to the class. On cross-examination, Cooper admitted that Motley did not challenge him "in front of the children," but only "in front of Mrs. Johnson, my in-service mentor." Evelyn Johnson, a retired teacher serving as Cooper's mentor, was in the back of the room, but she did not hear what Motley was saying. M.M., then a twelve-year-old student seated in the front of Cooper's classroom, recalled an "altercation" between Motley and Cooper, both of whom were near Ms. Johnson.[5] While M.M. sensed that Cooper was "upset" because his face was "turning red," she did not hear the substance of their conversation.

I FIND that Motley was trying to help Cooper solve the problem of getting children to do their homework and that Cooper overreacted by treating Motley's advice as a personal criticism of his performance. Indeed, the record indicates that Motley may reasonably have believed that Cooper was soliciting his advice about homework problems. Motley's recommendation to check the amount of homework assigned by other teachers was a constructive suggestion intended to give Cooper the benefit of Motley's greater experience. Undoubtedly, it would have been preferable for Motley to have made his suggestion outside of the classroom. However, none of the other witnesses present in the classroom overheard their conversation, and there is no reason to believe that Motley intended to embarrass Cooper in front of his class.

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[5]Although M.M. did not know the date of this event, she was certain that Evelyn Johnson was also present. Ms. Johnson testified that she served as Cooper's mentor for only twenty days at the beginning of 1996-97. Thus, it is likely that M.M. was talking about the incident which occurred on September 24, 1996.

(3) Blaming Another Teacher for His Own Inadequacies

A second incident, which Cooper regarded as "the worst day of all," occurred on November 6, 1996. That particular day, a child from sixth grade was temporarily placed in Cooper's seventh-grade class for disciplinary reasons. Cooper had to interrupt his lesson and leave the classroom in order to retrieve more work for the sixth grader. During his absence, Motley was in charge of Cooper's class. Cooper estimates that he was gone only "three to five minutes." While Cooper was gone, however, the students were disruptive and uncooperative. Upon Cooper's return, Motley appeared to him to be "highly upset" and "very emotional." In front of the entire class, Motley blamed Cooper for causing the problem and accused him of being the reason why the kids were misbehaving. Motley's critical comments were made "in front of [the] students" and "the kids heard [what was said.]" Cooper admits that he "retaliated" and that their dialogue degenerated into what Motley described as "an exchange of words."

I FIND that both Motley and Cooper acted unprofessionally by arguing with each other during a lesson, but that Motley provoked the incident by blaming Cooper for his own inability to control the class. If Motley had anything negative to say about Cooper's classroom performance, he should have waited until after the class was over.

(4) Yelling at a Colleague

Violet Kee Chee, who taught seventh grade science at 13th Avenue School in 1996-97, had served the Newark public schools for twenty-five years and was nearing retirement. Motley was assigned to enter her class to deliver Title I services. Accustomed to the pull-out model, Kee Chee felt it would be "much easier" if Motley did not come into her classroom because she taught science and he taught basic skills.

In or about the second week of the 1996-97 school year, Motley approached Kee Chee in the hallway while classes were changing. Her classroom was empty,

although there were children passing in the halls. Kee Chee thought that Motley had a scheduling problem, but Motley insisted that he was scheduled to teach in her class. Their conversation started "in a normal tone of voice," but Kee Chee said that Motley got "a little loud." Motley was holding an activity schedule and, at one point, he allegedly "flung the paper in [her] face." Kee Chee stated that she could understand his frustration at trying to figure out a schedule involving so many classes and conflicting lunch periods. She did not consider the incident serious enough to report to any supervisor.

Motley presented a different version of what occurred. By the time of this incident, his scheduling problems had been resolved and he was supposed to be in her class. Kee Chee was standing outside the door to her classroom when Motley appeared and introduced himself. Saying that she didn't need Title I services, Kee Chee refused to let him come into her room. When Motley tried to explain that he was just following the schedule, Kee Chee responded, "Don't yell at me." Motley maintains that he never yelled at her, although he may have spoken loudly enough to be heard above the noise made by the children changing classes. He denies that he tossed any papers in her face. Since Kee Chee was close to retirement anyway, the administration relented and directed Motley to stop coming to her class. Therefore, the children in Kee Chee's class were deprived of Title I services.

I FIND that Motley and Kee Chee had a misunderstanding over whether he should be allowed to teach her class. Kee Chee is an experienced teacher and did not believe that his assistance was necessary. In the course of their discussion outside her classroom, Motley raised his voice to an unacceptably loud level. Kee Chee was not a totally objective witness, and there is insufficient independent proof that Motley threw any papers at her.

(5) Referring to Students in Derogatory Terms

Motley was also assigned to provide Title I services to Gail Holiday's self-contained fourth grade class during the 1996-97 school year. Ms. Holiday was a relatively new teacher who had been in the district for less than three years. Purportedly she had experienced some difficulty with classroom management. Motley acknowledges that the boys in her room were "pretty rough [and] pretty tough" and that he was put into her room to help control her class. Often his mere presence was enough to cause the children to settle down. He tried to assist Holiday by suggesting management techniques, such as contacting parents or changing the seating arrangements or determining whether a particular child needed medication. There came a time, however, when Motley grew weary of working with "children who acted up on a consistent basis." Not all of these children happened to be eligible for Title I services and some of the children who were eligible for Title I did not receive services. One day, when Holiday sent a group of children to work with him, Motley announced that he did not want "those problem kids" or "the kids with problems." According to Holiday, Motley spoke those words, or words to that effect, within earshot of the children. She felt uncomfortable because "you don't say those things in front of the kids, even if you've got a problem." Motley never denied that he openly discussed "problem children" with Holiday in her classroom. Instead, he defended his conduct by maintaining that he should not have been expected to work only with the disruptive students.

I FIND that, on an unknown date during the 1996-97 school year, Motley used the pejorative phrase "problem children" to refer to certain students in the classroom. Regardless of the merits of his disagreement with Holiday, it was indefensible for Motley to stigmatize his students by using such harsh language in front of their peers. Motley's labeling was particularly destructive to children of such a young age, who are apt to form their own feelings of self-esteem and worth from the attitude taken by important adults in their life. As an experienced teacher with an awareness of his

influence over children under his control, Motley clearly knew better. Again, he should have waited until an appropriate time to discuss his grievance with his fellow teacher outside the presence of the students.

(6) Pulling the Arm of a First Grade Student, Yelling at Students and Pushing Their Teacher

While these are the most serious charges against Motley, they have already been dealt with in a prior disciplinary action that resulted in letter of reprimand. Thus this incident cannot form the basis of the current tenure charges against Motley, but rather are part of his past disciplinary record which should be considered in determining the appropriateness of any penalty. The record shows that on February 8, 1996, while assigned to Carol Guddy's first grade class at Alexander Street School, Motley got into a dispute with the teacher over seating arrangement in the classroom. This argument ended in a virtual tug-of-war over one hapless young girl, with Guddy holding onto the child's left arm and Motley grabbing her right arm. In a written report, the District's hearing officer found that Motley and Guddy "engaged in a heated argument" in a classroom filled with children. Further, the report continues:

> Ms. Guddy stepped between Mr. Motley and one of the students that Mr. Motley sought to separate and teach. Mr. Motley called the student's name. Ms. Guddy told the student to remain in her seat. Mr. Motley moved Ms. Guddy aside and took the student by the arm. Thereafter both teachers taught their students. Vice Principal Josephine McDowell was immediately summoned to the room and told Mr. Motley to go to another room.

As a consequence of this incident, Motley's annual evaluation report directed him to "continue to refine and expand skills in the area of behavior management." Motley was able to avoid more substantial punishment only because, as of that time, he had a "twenty five year employment history without prior disciplinary problems."

Neglect of Duty
Failing to Provide Instruction

Various witnesses reported that Motley frequently sat at the back of the classroom without doing any teaching or performing any school-related activity. In general, Motley claimed that the classroom teachers had not provided him with the lesson objectives in sufficient time for him to prepare his own lesson plans, as if that excuse, even if true, somehow absolved him of the responsibility to do his own job. For example, Steven Cooper recited that on four consecutive Wednesdays during October 1996, Motley "would come in the room and go straight to the back of the room and sit there." M.M., one of the students in Cooper's class, verified that on two or three occasions Motley didn't do any teaching, but "just sat in the back of the room doing paperwork." When Cooper and his mentor asked Motley to work with students who had received low scores on standardized achievement tests, he refused. Part of the blame must be shared by the administration, which never clearly defined the Title I teacher's role, in particular whether Motley was to work with small groups of students or to assist Cooper in teaching the whole class. Notwithstanding genuine confusion about their working relationship, however, no one can seriously argue that Motley was being paid to sit there and not do any teaching.

Glenda Johnson-Green, principal of 13th Avenue School, observed Cooper's class on November 20, 1996 and confirmed that Motley "sat in the rear of the room the entire period" and engaged in "no interaction with the students." In a written admonition, Johnson-Green pointed out that Motley was the only basic skills instructor who acted this way and reminded him of his responsibility to work with students. Motley insisted that he was performing an accepted technique known as "in-class observation," which involved observing the students' behavior, attitudes and performance during regular classroom instruction. Nonetheless, he failed to produce notes or any other record of the observations he purportedly made on that date.

Rosa Ramos, director of the Title I Program in Newark, testified that a Title I teacher might take a day or two at the beginning of the academic year in September to see how the children are functioning, but that, after such initial observation period, "it should never happen." Another administrator, Josephine McDowell, a vice principal who supervised the Title I program at Alexander Street School when Motley taught there in 1995-96, agreed that it would be inappropriate for a Title I teacher to sit in the back of the room and observe a class for an entire period, other than "to get the feel of the class" at the outset of the year.

Other teachers made similar complaints that Motley often sat in their classrooms without providing any instruction to students. Dawn Levin, the fourth-grade teacher at 13th Avenue School, testified that, on March 3, 1997 and two prior occasions, Motley came to her classroom, but failed to provide any instruction. Levin and Motley "never sat down together and prepared a lesson." Unless Levin provided him with her objectives by Thursday or Friday of the preceding week, Motley refused to teach the children in her class. When she put items in his mail box, Motley would complain that the material was "too much" or "unclear. Several times, while Levin was teaching, Motley would be "at the back of the room" not engaging in any educational activity. Similarly, Gail Holiday recounted an instance where Motley was so upset that "he just went and sat at another table" and Holiday "wasn't able to get his assistance[.]"

I FIND that, at numerous times throughout 1996-97, Motley failed to provide any teaching services to children he was supposed to be teaching. Principal Johnson-Green, building administrator of 13th Avenue School, personally saw Motley sitting at the back of the room and doing nothing for an entire class period. Severa; teachers, including Cooper, Levin and Holiday, reported similar instances where Motley simply sat in the back of their classrooms or walked around its perimeter, without providing any instruction. Motley's explanations do not justify his failing to provide any educational services. Proofs show that Motley was unprepared to teach even when he received copies of the classroom teacher's lesson plans or objectives. If he needed more information to prepare his lessons, it was Motley's responsibility to confer with the

classroom teacher before or after class or at some other mutually convenient time. In the event that he was unsure of his appropriate role, Motley should have consulted an administrator for guidance. Motley's claim that watching from the back of the room is a recognized method for delivery of services is contrary to the unanimous expert opinion that Title I teachers are expected to interact with their students.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that the District has sustained its tenure charges of unbecoming conduct and neglect of duty against Motley and that the appropriate penalty is a reduction in compensation.

Tenure protects teachers from arbitrary dismissal for "unfounded, flimsy or political reasons." *Spiewak v. Rutherford Bd. of Educ.*, 90 *N.J.* 63, 73 (1982). It is designed to aid in the establishment of "a competent and efficient school system" by affording to teachers a measure of security in the ranks they hold after years of service. *Viemeister v. Prospect Park Bd. of Educ.*, 5 *N.J. Super.* 215, 218 (App. Div. 1949). Toward that end, N.J.S.A. 18A:6-10 provides that no tenured teacher shall be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct or other just cause." Additional procedural safeguards, including the right to a list of charges, a sworn statement of evidence and an impartial hearing, are written into the law.

"Unbecoming conduct" is an elastic term broadly defined to included any conduct "which has a tendency to destroy public respect for [government] employees and competence in the operation of [public] services." *Karins v. City of Atlantic City,* 152 *N.J.* 532, 554 (1998). Behavior rising to the level of unbecoming conduct "need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. *Hartmann v. Police Dep't of Ridgewood*, 258 *N.J. Super.* 22, 40

(App. Div. 1992). Despite the apparent vagueness of this standard, "it fairly and adequately conveys its meaning to all concerned." *Laba v. Newark Bd. of Educ.*, 23 *N.J.* 364. 384 (1957). In the context of a school tenure case, "the touchstone is fitness to discharge the duties and functions of one's office or position." *In re Tenure Hearing of Grossman*, 127 *N.J. Super.* 13, 29 (App. Div. 1974), *certif. den.* 65 *N.J.* 292 (1974).

Motley was involuntarily transferred from Alexander Street School to 13th Avenue School after complaints about his conduct from colleagues and an incident in which he got into a pulling match over a first-grade child. Having been given the opportunity for a fresh start, one might expect that Motley would avoid future conflicts with his co-workers and students. Unfortunately, the record reflects a repeated pattern of instances where Motley exhibited his contempt for other teachers in the presence of their students. Although the District has been unable to prove all of its allegations, it has presented compelling evidence that Motley belittled Dawn Levin in front of her students, provoked an argument with Cooper during a lesson, yelled at Kee Chee in the hallway, and referred to impressionable children in derogatory language. Sent into the classroom to assist in educating children at risk, Motley undermined the authority of the classroom teachers and sapped the self-confidence of students who looked to him for support. He was particularly rude and disrespectful to younger and less experienced teachers, who needed his help. Such a gross distortion of his appropriate teaching function represents unfitness to discharge his duties and responsibilities amounting to "unbecoming conduct."

As if this were not serious enough, Motley is also guilty of neglect of duty constituting "other just cause" for dismissal. Generally, the term "neglect" connotes a deviation from normal standards of conduct. *In re Kerlin*, 151 *N.J.* Super. 179, 186 (App. Div. 1997). "Duty" signifies conformance "to the legal standard of reasonable conduct in light of the apparent risk." *Wytupeck v. Camden*, 25 *N.J.* 450, 461 (1957). A teacher who does not teach is worse than useless, because funds used to pay his salary could be put to better use for the benefit of the children. In addition, the children in his class are deprived of educational services to which they are legally entitled.

Factors to be considered in assessing penalty include the nature and gravity of the offense; any extenuating or aggravating circumstances; and the effect on the maintenance of discipline and the proper administration of the school system. *In re Fulcomer*, 93 *N.J.Super.* 404, 420-422 (App. Div. 1967). Getting paid for not teaching is a major offense, particularly in a special-needs district like Newark where many of the children require extra help to overcome socioeconomic obstacles to their success.

In terms of extenuating circumstances, several of Motley's colleagues testified that they got along well with him and were satisfied with his services. Felicia Petway, a fourth-grade teacher at 13th Avenue School in 1996-97, said that Motley "motivated and challenged" her students and that at no time did he sit around doing nothing in her class. Annette Walker Long, another fourth-grade teacher at 13th Avenue School, stated that she and Motley worked well together and that he never sat in the back of the room and did nothing. Mildred Moss, a guidance counselor at 13th Avenue School, described Motley as very professional, supportive and courteous and stated that she saw him going from desk to desk working with students individually. Maurice Hill, a second grade math teacher at 13th Avenue School, agreed that Motley came to his class well prepared and never sat down without doing any work. Iris McMurray-Matthews, a behavior-modification teacher at 13th Avenue School, worked cooperatively with Motley to develop a program to improve fourth-graders' writing scores on the early warning test. Barbara Jenkins, a fifth grade teacher at Alexander School in 1995-96, regards Motley as a good teacher who "seemed to do a little extra." Likewise, some of the parents had positive experiences with Motley. Lisa Shelton, the mother of a seventh-grade student at 13th Avenue School, credits Motley with raising her son's reading skills to grade level. She praised him for taking the trouble to stop at her house to make sure that her son was progressing. Thus, it appears that Motley was not always derelict in his duties and is capable of performing valuable service to the children of Newark.

In light of his many years of satisfactory service, his willingness to volunteer for extracurricular duties and the fact that Motley's prior disciplinary record consists of only

one written reprimand, the ultimate penalty of removal would be too harsh. To suspend him for any length of time would be disruptive to the system and might further widen the recent estrangement between Motley and some of his colleagues. Under all of the circumstances, the most appropriate penalty is a reduction in compensation.

Order

It is **ORDERED** that Motley suffer a permanent reduction of one step on the salary guide.

If is further **ORDERED** that Motley forfeit all salary and all benefits that would otherwise have accrued during the first 120 days of his suspension pending the disposition of this tenure proceeding.

And it is further **ORDERED** that, before resuming his teaching duties, Motley shall, at the District's option, satisfactorily complete an in-service or continuing education program covering his professional relationships with staff and his responsibilities to his students.

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

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

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

May 5, 1999
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

5/7/99
DATE

Debbie Antanaitis/tp
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 10 1999
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

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APPENDIX
List of Witnesses

1. Robert H. Mobley, vice principal, Newark Public School District
2. Evelyn M. Johnson, retired teacher, Newark Public School District
3. Stephen Cooper, teacher, Newark Public School District
4. Dawn Levin, teacher, Newark Public School District
5. M.M., student
6. Violet Kee Che, retired teacher, Newark Public School District
7. Glenda Johnson-Green, principal, Newark Public School District
8. Gale Holiday, teacher, Newark Public School District
9. K.H., student, Newark Public School District
10. Rosa Ramos, director of Title I, Newark Public School District.
11. Carol Guddy, teacher, Newark Public School District
12. Rhoda M. Allwood, teacher, Newark Public School District
13. O.M., student
14. Felicia Petway, teacher, Newark Public School District
15. Annette Walker Long, teacher, Newark Public School District
16. Mildred Moss, guidance counselor, Newark Public School District

17. Iris McMurray-Matthews, behavior modification teacher and test coordinator, Newark Public School District

18. Maurice Hill, teacher, Newark Public School District

19. Lisa Shelton, parent

20. Barbara Jenkins, teacher, Newark Public School District

21. Charles Motley, respondent

22. Patrick A. Guzzo, former assistant director, Title I Program, Newark public School District

23. Josephine McDowell, principal, Newark Public School District

List of Exhibits

No.	Description
J-1	Copy of letter to Charles Motley from Randall N. Kanter, dated May 2, 1997
J-2	Admissions by Charles Motley, dated September 28, 1998
P-1	Memo dated March 13, 1997 from Vice Principal Brenda Jack-Watkins to Mr. Motley
P-2	Memo dated March 7, 1997 from teacher Levin to Principal Johnson-Green
P-3	Memo dated March 5, 1997 from 4th grade teacher Dawn Levin to Vice Principal Brenda Jack-Watkins
P-4	Memo dated March 2, 1997 from Principal Johnson-Green to teacher Levin

P-5		Memo dated December 2, 1996 from principal Johnson-Green to respondent
P-6		Memo dated November 7, 1996 from Principal Glenda Johnson-Green to Dr. Don Marianaro, AS
P-7		Handwritten note dated November 6, 1996 by teacher Steven Cooper
P-8	Id.	Handwritten note dated November 6,1 996 by student L. S.
P-9	Id.	Handwritten note dated November 6, 1996 by student V. T.
P-10	Id.	Handwritten note dated November 6, 1996 by student A.B.
P-11	Id.	Handwritten note dated October 29, 1996 by teacher Steven Cooper
P-12		Handwritten note dated October 9, 1996 by teacher Steven Cooper
P-13		Handwritten note dated September 24, 1996 by teacher Steven Cooper
P-14	Id.	Memo dated June 18, 1996 from Acting Principal Josephine McDowell regarding student allegations
P-15	Id.	Withholding of Increment letter dated April 1, 1996
P-16	Id.	Copy of incident report form, dated November 4, 1996
P-17	Id.	Letter dated March 8, 1996 from Dr. Don Marianaro to respondent
P-18		Memo dated February 20, 1996 from Principal Arthur Hooper to respondent

P-19		Memo dated February 9, 1996 from Principal Hooper to AS Marianaro
P-20	Id.	Incident Report Form dated February 8, 1996, with attachments - first two pages only
P-21	Id.	Memo dated January 18, 1996 from Josephine McDowell, Vice Principal of Alexander Street School to Arthur Hooper, Principal of Alexander Street School
P-22		Letter by Ms. E.M. Johnson, dated October 4, 1996
P-22	(a)	Attached list of students
P-23		Respondent's teaching schedule for 1996-97
P-24		Memo dated October 9, 1996 from Vice Principal Robert Mobley to Dr. Don Marianaro
P-25	Id.	Letter dated July 17, 1996 from Dr. John P. Duggan, Office of School Operations regarding an incident on May 30, 1996
P-26		Handwritten note dated October 1, 1996 from Rudine Holmes-Williams
P-27	Id.	Booklet entitled Title I Program - In-Class Support - A Professional Handbook, undated
P-28	Id.	Sample calendar for the 1996-97 school year
P-29	Id.	Copy of memo to 1st grade staff from Josephine McDowell, dated March 8, 1996
R-1		June 1993 Annual Evaluation of Charles Motley prepared by Principal Hooper

R-2	June, 1994 Annual Evaluation of Charles Motley prepared by Principal Hooper
R-3	June, 1995 Annual Evaluation of Charles Motley prepared by Vice Principal McDowell
R-4	June, 1996 Annual Evaluation of Charles Motley
R-5	January 13, 1997 Teacher Observation of Charles Motley prepared by Vice Principal Brenda Jack
R-6	Plans of Dawn Levin
R-7	Text given to Charles Motley by Dawn Levin
R-8	Memo dated March 13, 1997 to Charles Motley from Brenda Jack
R-9	Plans of Ms. Holiday given to Charles Motley on April 28, 1997
R-10	Plan discussing African American History received by Charles Motley on February 18, 1997
R-11	February 8, 1996 letter of Charles Motley to Arthur Hooper regarding Ms. Guddy
R-12	February 9, 1996 letter from Charles Motley to Principal Hooper
R-13	Letter from Charles Motley to Principal Green regarding mode of classroom dated December 3, 1996
R-14 Id.	Procedure Charles Motley followed on November 2, 1997 in Room 407
R-15 Id.	Letter to Charles Motley from Assistant Superintendent Mariano
R-16	Decision regarding Charles Motley's increment denial dated January 22, 1997

R-17	Id.	Incident Report of December 16, 1996 regarding Lamar Smith
R-18	Id.	June 18, 1996 DYFS letter to Charles Motley
R-19	Id.	July 17, 1996 letter from John Duggan, Ed.D. to Charles Motley
R-20	Id.	March 13, 1997 memo to Charles Motley from Vice principal Brenda Jack-Watkins
R-21		July, 1994 Compliance Investigation Report Volume 2
R-22		New Jersey Department of Education Office of Basic Skills Comprehensive Compliance Investigation of Newark School District
R-23	Id.	Daily Schedule for R.C. Motley, Room 317, undated
R-24	Id.	Policy Manual for In-Class Instructors, undated
R-25		List of options for in-class services
R-26		August 16, 1996 letter to Charles Motley from Beverly L. Hall, Ed.D.
R-27		Sample school visitation document

IN THE MATTER OF THE TENURE	:	
HEARING OF CHARLES MOTLEY,	:	
STATE-OPERATED SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF NEWARK,	:	DECISION
ESSEX COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Both respondent's and the District's exceptions are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in deciding the within matter.

Having conducted his own careful review of the entire record in this matter, including transcripts from the eight days of hearing at the OAL, all exhibits brought to the record, as well as each of the exceptions advanced by the parties, the Commissioner determines to affirm the findings and conclusions of the Administrative Law Judge (ALJ), with modification as set forth herein. In so doing, the Commissioner notes that these findings and conclusions are well grounded in the record before him, and such record provides the Commissioner with no cause to disturb the weight ascribed to evidence or the credibility assessments made by the ALJ.

Initially, the Commissioner determines that the testimonial and documentary record amply supports the ALJ's finding that the District has proven by a preponderance of credible evidence that respondent is guilty of unbecoming conduct by virtue of his: (1) belittling

Ms. Levin, a new teacher, in front of her students;[1] (2) refusing, on November 6, 1996, to teach students in Mr. Cooper's classroom;[2] (3) raising his voice to an unacceptable level when addressing a colleague, Ms. Kee Chee; and (4) using the pejorative phrase "problem children" to refer to students in Ms. Holiday's class.[3] Additionally, although not identified as a specific finding by the ALJ, yet nevertheless listed by the District as one of its charges (Statement of Charges at p. 3), the Commissioner finds that the record supports the conclusion that the poor interpersonal skills displayed by respondent in working with other staff members was a significant reason, if not the sole basis, for Principal Arthur Hooper's recommendation that he be transferred from the Alexander Street School to another school. (Exhibit P-19)

Further, the Commissioner concurs that the District has proven that respondent is guilty of neglect of duty and insubordination for, *inter alia*, the reasons set forth in the initial decision at pp. 13-15.[4] Here, the Commissioner concurs with the District's view that insubordinate behavior need not necessarily manifest itself in an "overt exhibition of disrespect or verbal refusal to perform duties required of his position," *In the Matter of the Tenure Hearing of Peter Loria, State-Operated School District of the City of Newark, Essex County,* January 26, 1998 slip. op. at p. 69, *aff'd* State Board August 7, 1998, but, rather, may be found

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[1] Although respondent objects to the ALJ's characterization of Ms. Joyce Thompson as a "Title I teacher," rather than "a staff developer assigned to teachers having problems" (Respondent's Exceptions at p. 5), the distinction, to the extent one actually exists, is not necessarily significant. Even if Ms. Thompson's role was, as respondent urges, designed to be supportive of teachers rather than students, thereby explaining her harmonious working relationship with Ms. Levin, the Commissioner finds that, in view of the total record, respondent cannot credibly rely on this role differentiation to in any way justify his unbecoming conduct.

[2] The ALJ appropriately captions this behavior, "Blaming Another Teacher for His Own Inadequacies." (Initial Decision at p. 9)

[3] Here, respondent finds it relevant that there is no evidence that he was yelling at the time, or that any children overheard his exchange with Ms. Holiday. (Respondent's Exceptions at p. 21) However, it is not relevant. As the ALJ noted, given respondent's experience as a teacher, it is indefensible that he would use such language in front of the students, and then attempt to characterize the exchange as a professional collaboration. (Respondent's Exceptions at p. 21, asking, "Isn't it reasonable that peers, having to work collaboratesly (sic), would discuss such subjects professionally in class?")

[4] The District identifies its second charge as "Insubordination/Neglect of Duty" (Statement of Charges at p. 2) and objects to the ALJ's notation on page 2 of the initial decision that the "[c]harges relating to failure to teach are best handled under the general category of neglect of duty" rather than insubordination. (District's Exceptions at p. 4) In either event, the ALJ properly states that these charges constituted "other just cause." (Initial Decision at p. 16)

by an employee's "willful and intentional disregard of the lawful and reasonable directives of [an employee's] duly authorized supervisor ***." (*Id.*) In the instant matter, the Commissioner notes that, even after the letter of reprimand issued to respondent following the February 8, 1996 incident in Ms. Guddy's class (Exhibit R-16), respondent continued to exhibit inappropriate conduct toward his colleagues (*see* findings of unbecoming conduct, *supra*), thereby intentionally disregarding the District's reasonable expectation that he should *work in partnership* with the classroom teachers in order to effectuate the goals of the Title I program. (Transcript of September 28, 1998 at p. 87) Moreover, the Commissioner finds respondent's own writing to Ms. Johnson-Green, Principal of the 13th Avenue School, to be fairly illustrative of his attitude at the time these events occurred, and, also, consistent with his demeanor at the within hearing. Specifically, following Ms. Johnson-Green's November 20, 1996 classroom observation of Mr. Motley in which she notes he "sat in the rear of the room the entire period with no interaction with the students," and that it was his "responsibility to 'work' with the students ***" (Exhibit P-5), Mr. Motley responded, in pertinent part:

> As you can well observe I was not just sitting for the period. My presence indicates to the classroom teacher and to the students that I come to assist in any way I can. Previous lessons had classroom teacher's mentor, students, and myself engaged in the lesson when classroom teacher deemed necessary.
>
> I regret that you were unaware of Room 407's procedures, however I hope this clears your understanding of the matter.
>
> I have worked with teachers and students in Grades 4, 7 and 8 *** covering subject matter of Reading, Writing, Mathematics, Social Studies, and Science. So when you refer that it's my responsibility to work with students, I hope you would observe a little more carefully before you jump to irrational conclusions after only observing one period in one class. (Exhibit R-13)

Respondent's memorandum to his principal goes beyond that which may be considered a professional rebuttal or justification of his pedagogical techniques, being both disrespectful and

insolent. It is also noteworthy that Ms. Johnson-Greene testified that, upon meeting with respondent to discuss the problems he was having with the classroom teachers, respondent yelled at her, until it became necessary for her to end the conversation. (Transcript of September 25, 1998 at pp. 40-41)

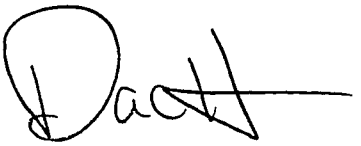
Finally, although the Commissioner agrees that the circumstances herein do not warrant dismissal of respondent from his tenured position for the reasons set forth in the initial decision,[5] he recognizes that, under certain circumstances, it is necessary to impress upon a respondent the seriousness of his actions. *Cf. In the Matter of the Tenure Hearing of William Morales, Board of Education of the City of Trenton, Mercer County*, decided by the Commissioner July 7, 1997, wherein the Commissioner, in order to impress upon respondent the seriousness of the charges proven, increased respondent's penalty from loss of 120 days' salary and two increments to include a six-month loss of salary, notwithstanding that the Board did not prove all of its charges; *In the Matter of the Tenure Hearing of DiPillo, School District of the Township of Randolph, Morris County*, 95 *N.J.A.R.*2d (EDU) 206, 208, wherein the State Board of Education increased the penalty assigned by the Commissioner to respondent, noting the need to impress upon respondent the seriousness of her actions. In the instant matter, finding that respondent's conduct was both repeated and unrepentant, and noting that such unprofessional and defiant conduct cannot be tolerated, the Commissioner herein orders that respondent shall suffer a permanent reduction of one step on the salary guide, and shall forfeit the 120 days' salary already withheld, together with an additional two months' salary and concomitant emoluments. In so determining, the Commissioner also notes that, although he is without the authority to compel respondent to attend training classes as noted by the ALJ (Initial Decision at

[5] It is herein noteworthy that the District acknowledges that *either* removal or an eight-month suspension without pay is an appropriate penalty in this matter. (District's Exceptions at p. 2)

p. 18), the District may elect to do so, within the confines of respondent's tenure and contractual rights.

Accordingly, the initial decision of the ALJ is affirmed, with modification, as set forth above.

IT IS SO ORDERED.[6]



COMMISSIONER OF EDUCATION

[6] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

August 4, 1999
Date of Mailing, August 4, 1999

252-99

EDU #7421-97
C # 252-99
SB # 38-99

IN THE MATTER OF THE TENURE :
HEARING OF CHARLES MOTLEY, :
STATE-OPERATED SCHOOL DISTRICT :
OF THE CITY OF NEWARK, ESSEX :
COUNTY. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, August 4, 1999

For the Petitioner-Respondent, Gregory G. Johnson, Esq.

For the Respondent-Appellant, Eugene G. Liss, Esq.

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

December 1, 1999

Date of mailing DEC 03 1999

M.D.'A., on behalf of minor son, P.D.'A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

August 4, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO.: EDU 9132-98

AGENCY DKT. NO. 419-9/98

M.D.'A., on behalf of minor son, P.D.'A.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,

Respondent.

M.D.'A., on behalf of minor son, **P.D.'A.,** *pro se*

Stephen J. Christiano, Esq., represented respondent

Record Closed: June 15, 1999 Decided: June 22,1999

BEFORE: **THOMAS E. CLANCY**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL), on September 23, 1998 for determination as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Agreement.

Having reviewed the contents of the attached Agreement, I **FIND:** (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, **I CONCLUDE** that the attached Agreement meets the requirements of *N.J.A.C. 1:1-19.1.1*, and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **TERMINATED**.

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

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

6-22-99
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALJ

June 25, 1999
DATE

Receipt Acknowledged:
D. N. Castanoutis /g
DEPARTMENT OF EDUCATION

JUN 29 1999
DATE

Mailed to Parties:
Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

/g

The Public Schools
West Orange, New Jersey

OAL
DKT. #
EDU 9132-98
per thomas E.
Clancy - Administrative LAW
Judge
6/15/99

AGREEMENT

Re: Philip D'Amore - West Orange High School Student

The parties listed below are in agreement with the following conditions relative to the return of Philip D'Amore to West Orange High School. PHILIP WILL:

1. Remain on suspension through Friday, January 29, and return to school on Monday, February 1, 1999, to complete the second semester of his senior year.

2. Continue to cooperate and maintain good behavior with home instruction personnel.

3. Attend a meeting with high school security guards to resolve issues in order to avoid future problems.

4. Not drive on school property at any time without prior permission from the school administration.

5. Attend counseling sessions. Parent(s) agree to sign release form permitting consultation and reports between counselor and school officials in order to assist Philip while he remains at West Orange High School. (The counselor will verify on a monthly basis that Philip is attending the counseling sessions.)

6. Submit the results of a substance abuse assessment from LabCorp which will be paid for by the school district.

1/25/99		1/25/99	
Jerry P. Tarnoff	*Date*	*Maryann D'Amore - Parent*	*Date*
Superintendent of Schools			
1/25/99		1/25/99	
Thomas F. Finnegan	*Date*	*Philip D'Amore - Student*	*Date*
Principal, West Orange High School			

OAL DKT. NO. EDU 9132-98
AGENCY DKT. NO. 419-9/98

M.D.'A., on behalf of minor son, P.D.'A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, settlement agreement and initial decision issued by the Office of Administrative Law (OAL) have been reviewed. Upon such review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter, which included a request for emergent relief, notwithstanding that the Board did not approve the agreement prior to its submission to the Administrative Law Judge, as per *N.J.A.C.* 1:1-19.1(a).[1] The matter is hereby dismissed.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] Upon inquiry seeking confirmation of the Board's approval of the within agreement, counsel for the Board affirmed that P.D.'A. has, since the agreement was signed, graduated from high school. Accordingly, the Commissioner finds no cause to remand this matter to the OAL to compel compliance with *N.J.A.C.* 1:1-19.1 *et seq.*

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

August 4, 1999
Date of Mailing, August 4, 1999

25 4 - 9 9

P.S., on behalf of minor child, B.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning parent appealed minor child's expulsion.

The ALJ dismissed the petition as untimely filed. The Commissioner concurred with the ALJ that the within matter was untimely filed, pursuant to *N.J.A.C.* 6:24-1.2(c). The Commissioner further agreed with the ALJ that even assuming, *arguendo*, the petition was timely filed, petitioner failed to satisfy her burden of proving that the Board's decision to expel B.S. was arbitrary, capricious, unreasonable, or otherwise taken in bad faith. The petition was dismissed.

August 4, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10886-98

AGENCY REF. NO. 371-8/98

P.S. ON BEHALF OF MINOR

CHILD, B.S.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY

OF ATLANTIC CITY, ATLANTIC COUNTY,

Respondent.

P.S. on behalf of B.S., petitioner, *pro se*

Michael Epps, Esq., for respondent

Record Closed: June 18, 1999 Decided: June 23, 1999

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals from an action by the Atlantic City Board of Education (Board) to expel her son, B.S., from the Board's public school. Petitioner contends that the Board's expulsion of her minor child was arbitrary, capricious and/or unreasonable and, therefore, seeks his reinstatement.

The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

Petitioner file her Petition of Appeal before the Commissioner, dated August 3, 1998, and was received by the Bureau of Controversies and Disputes (Bureau) on August 6, 1998. By way of letter, dated September 22, 1998, the Director of the Bureau advised petitioner that on August 7, 1998 and again on September 3, 1998, petitioner was in receipt of notice from the Director that the petition of appeal would not move forward until petitioner had submitted proof that she had served a copy of the petition upon the respondent Board, pursuant to *N.J.A.C.* 6:24-1.2(a). The Director of the Bureau provided petitioner ten days in which to served the necessary proof of service.

A telephone prehearing conference was held by this tribunal on March 12, 1999, at which, among other things, the issues to be determined by this tribunal were agreed upon as follows:

Issues:

1. Whether the Board's expulsion of B.S. from its schools was arbitrary, capricious and/or unreasonable?

2. Whether petitioner is time-barred from seeking the reinstatement of B.S. pursuant to *N.J.A.C.* 6:24-1.2(c)?

Pursuant to the Prehearing Order, the hearing was held on June 18, 1999, at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City, New Jersey. The hearing record closed on June 18, 1999.

Prior to the hearing, the Board propounded and served a Notice of Motion to Dismiss Petition for Failure to File a Timely Appeal. Petitioner did not respond to the Board's Motion. Therefore, the undersigned reserved decision until such time as petitioner had the opportunity to respond.

At the hearing, the Board set forth its Statement of Facts on the record as follows:

Statement of Facts

This matter arises out of a decision by the Atlantic City Board of Education (Board) to expel minor child B.S. from the Atlantic City Public Schools.

B.S. was charged with being involved in a group fight on Monday, February 23, 1998, at the end of the school day. It is further alleged that the incident involved bricks and sticks and physical assault on at least one student. It is further alleged that this was the fourth incident involving students in this group, including the petitioner's minor child. (See Exhibit A, Charge Sheet).

Thereafter, on or after March 23, 1998, P.S. was forwarded a Notification of Students Rights Concerning Expulsion/Suspension Hearings. (See Exhibit B, Notification of Students Rights). This notice advised P.S. that an expulsion/suspension hearing had been scheduled for her minor child, B.S., on April 7, 1998. The notice further advised her of her rights at the hearing. Specifically, the notice advised P.S. of her right to counsel. The notice also advised that the hearing would be conducted pursuant to *N.J.S.A.* 18A:37-2.4 (See Exhibit B).

The hearing took place on April 7, 1998. P. S. appeared with B.S. and was given an opportunity to cross-examine all witnesses and an opportunity to be heard in defense of the charge. After deliberation, the Board voted that the minor child B.S. should be placed on home instruction until age sixteen at which time he would be expelled.

Thereafter, on or about April 8, 1998, P.S. was forwarded notification of the Board's decision concerning her child. In that notice she was advised of her right to appeal the Board's decision to the Commissioner of Education. (See Exhibit C, Notice of Decision dated April 10, 1998). The instant appeal is signed by the petitioner on August 3, 1998. (See Exhibit D, Petition).

Petitioner admits that she was properly noticed of her son's rights concerning the expulsion hearing. The Notice is set forth below as follows:

> Please be advised that B.S. has been recommended for expulsion. B.S. may be expelled or further suspended.
>
> You have the right to a hearing before the Board which has been scheduled for April 7, 1998, at 5:00 p.m. at 1809 Pacific Avenue, Atlantic City, NJ, second floor Board Conference Room.
>
> B.S. has a right to be notified of the charges against him and attached is a charge sheet doing so.
>
> You and B.S. have a right to copies of the statements and affidavits of those adverse witnesses; those may be obtained by contacting Mr. Michael Epps, Esquire/General Counsel or by telephone at 343-7300 extension: 106.
>
> B.S. has a right to be heard in his own defense at the hearing scheduled above, and the right to present witnesses on his behalf.
>
> B.S. has a right to cross examine all witnesses presented on behalf of the Board of Education.
>
> You and B.S. have a right to the opportunity to be represented by counsel. If you wish the hearing postponed, to have additional time so as to obtain your own attorney you must notify Mr. Epps, Atlantic City High School, 1400 Black Horse Pike, Atlantic City, New Jersey 08401 *five (5) days* before the hearing. If you do not do this, no postponement will be granted.
> This hearing is being brought pursuant to *N.J.S.A.* 18A:37-2.4. In the event that you and the student fail to appear at the hearing the hearing will be conducted in your absence and adverse action may be taken. (Board's Exhibit B)

Petitioner admits she attended the Board's hearing on April 7, 1998, where teaching staff members and the principal of the school appeared and testified as to petitioner's son's behavior and conduct. Petitioner further admits that she did not call any witnesses nor offer any proofs to counter the Board's witnesses. Nevertheless, petitioner asserts that the Board's expulsion hearing of her son was unfair. She stated on this record that she believed her son was not involved in any alleged assault upon a fellow pupil in the school. Petitioner further admits she was not present when the alleged incident of physical assault on the pupil occurred.

The Board sets forth its legal arguments as follows:

Legal Argument

In the Notification of Students Rights Concerning Expulsion/Suspension Hearings the petitioner was advised that the hearing would be conducted pursuant to *N.J.S.A.* 18A:37-2.4. *N.J.S.A.* 18A:37-2.4(c) provides as follows:

> The decision of the Board shall be made within five days after the close of the hearing. Any appeal of the Board's decision shall be made to the Commissioner of Education within 90 days of the Board's decision.

Petitioner was informed of the Board's decision immediately following the hearing. Thereafter, she was given written notice of the decision. Any appeal of this decision should have been filed not later than July 8, 1998. The instant petition was filed on or about August 3, 1998 and received by the Board on or about August 6, 1998. (See Exhibit D Petition). In the body of the petition the petitioner acknowledges that the petition is not timely filed.

The Board requests that its action be sustained by the Commissioner.

DISCUSSION AND CONCLUSIONS

The charges against petitioner's son are set forth in the Board's Charge Sheet, as follows:

> 1. The above named student, upon information supplied by other, is liable to punishment, suspension or expulsion from school, in that on or about:
>
> Day: Monday Date: February 23, 1998 Time: 2:35p.m.
>
> The above named student: Was involved in a group fight on Monday, February 23, after school. Several students ran back and forth across Route 40 chasing another student. Bricks and sticks were used to assault the student they were chasing, and the student was hit in the face with a brick. This group of students have been involved in continued and willful disobedience with four separate incidents of this nature occurring during the school year. Two of these incidents occurred on the above date.
>
> 2. These facts if established would constitute a violation of *N.J.S.A.* 18A:37-2(d) and P.L. 12979, Chapter 189.
> (Board's Exhibit A)

Petitioner, without any proofs, asserts that the Board's action against her son was unfair. As the Commissioner observed and stated in the matter of *Mr. and Mrs. Angelo Capri and their son, Sam Capri v. Board of Education of the City* of *Burlington and Robert F. Dotti Superintendent of Schools, Burlington County*, 1972 *S.L.D.* 67, the guidelines of a pupil's right to due process were set down in *State ex rel. Sherman v. Hyman*, 180 *Tenn.* 99, 171 *S.W.* 2*d.* 822 (1942), *cert. den.* 319 *U.S.* 748 (1943), in answer to the question, "What form must such hearing take?" The Court said:

> We think the student should be informed as to the nature of the charges as well as the names of at least the principal witnesses against him when requested, and given a fair opportunity to make his defense. *** The testimony against him may be oral or written, not necessarily under oath, but he should be advised as to its nature, as well as the persons who have accused him.

> Also, in *Dixon v. Alabama State Board of Education,* 294 *F.* 2*d.* 150 (5th *Cir.* 1961), the Court provided an elaboration of some of the guidelines as enunciated, *ante*, and said, "*** If these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we feel that the requirements of due process of law will have been fulfilled." 1972 *S.L.D.* 67

Consequently, I **FIND and CONCLUDE** that petitioner's son's due process rights were preserved by the Board where he was confronted with those who accused him of his misdeeds and, every opportunity was afforded him to present any defenses available to him.

During the 1997-98 school year, the Board was faced with an extraordinary amount of violent behaviors on the part of some of its pupils. As a consequence, the Board established a low tolerance for such violent behavior. Parents and pupils were advised that such conduct would not be condoned and that serious consequences could result. Petitioner's son did not heed the Board's advice.

The Board further asserts that petitioner's Petition of Appeal was untimely filed with the Commissioner. In support of its assertion, it cites *N.J.S.A.* 18A:37-2.4(c) which held that:

> The decision of the board shall be made within five days of the close of the hearing. Any appeal of the board's decision shall be made to the Commissioner of Education within 90 days of the board's decision.

The Facts demonstrate that petitioner was advised by letter, dated April 8, 1998, of the Board's action to place her son on home instruction until April 29, 1998, and his expulsion from its schools upon his achieving his sixteenth birthday, on April 27, 1998. Ninety days from April 8, 1998, fell on July 7, 1998. Petitioner did not file her Petition of Appeal until August 3, 1998, nor had she perfected her appeal by October 8, 1998, through her failure to properly serve the Board.

Our Supreme Court has held that the Commissioner and the State Board have the authority to adopt *regulations* establishing a 90 day limitation for tenured personnel to file disputes under the school law. *Kaprow v. Board of Educ. of Berkeley Twp.* 131 *N.J.* 527 (1993).

In the instant matter a *statutory* rather than a *regulatory* 90 day limit is in place in which the aggrieved *must* file its appeal with the Commissioner. Petitioner failed to do so within the statutory constraints. I, therefore, **FIND and CONCLUDE** that petitioner failed to file her appeal in a timely matter under *N.J.S.A.* 18A:37-2.4(c).

I **CONCLUDE** that petitioner has failed to carry her burden of proof, by a preponderance of the reliable and credible evidence, that the Board's action against her son was arbitrary, capricious and/or unreasonable. I **CONCLUDE**, for all of the reasons set forth above that the herein Petition of Appeal should be dismissed and the Board's actions sustained.

ORDER

Accordingly, it is **ORDERED** that the herein Petition of Appeal be and is hereby **DISMISSED** and the Board's action to expel petitioner's son is **SUSTAINED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

23 June 1999
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

June 25, 1999
DATE

D. M. Antanaitis Jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 28 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

For Petitioner:

P.S.

B.S.

For Respondent:

None

OAL DKT. NO. EDU 10886-98
AGENCY DKT. NO. 371-8/98

P.S., on behalf of minor child, B.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions.

Upon review, the Commissioner concurs, for the reasons set forth in the initial decision, that the within matter was untimely filed, pursuant to *N.J.A.C.* 6:24-1.2(c). However, even assuming, *arguendo*, that the petition was timely filed, the Commissioner agrees with the Administrative Law Judge (ALJ) that petitioner has failed to satisfy her burden of proving that the Board's decision to expel B.S. was arbitrary, capricious, unreasonable, or otherwise taken in bad faith.

Accordingly, the initial decision is affirmed and the Petition of Appeal is hereby dismissed.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

August 4, 1999
Date of Mailing, August 4, 1999

SPURGEON BUTLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE GREATER EGG HARBOR REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

OAL DKT. NO. EDU 6702-98
AGENCY DKT. NO. 343-7/98

SPURGEON BUTLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE GREATER EGG HARBOR REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

August 9, 1999
Date of Mailing, August 9, 1999

256-99

RON CIOCCI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MONMOUTH-OCEAN EDUCATIONAL SERVICES COMMISSION, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

August 9, 1999
date of mailing, August 9, 1999

OAL DKT. NO. EDU 10239-97 and 10066-98
AGENCY DKT. NO. 430-11/97 and 427-9/98

RON CIOCCI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MONMOUTH-OCEAN EDUCATIONAL SERVICES COMMISSION, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

Douglas B. Groff

ASSISTANT COMMISSIONER OF EDUCATION

DOMINICK DE GLORIA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

August 9, 1999

OAL DKT. NO. EDU 7335-98
AGENCY DKT. NO. 204-6/98

DOMINICK DE GLORIA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

August 9, 1999
Date of Mailing, AUGUST 9, 1999

B.E., on behalf of minor child, H.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LINDEN, SUPERINTENDENT JAMES CLARKE, PRINCIPAL JOSEPH MARTINO AND VICE-PRINCIPAL PAUL IOZZI, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

August 9, 1999

OAL DKT. NO. EDU 1757-99
AGENCY DKT. NO. 22-2/99

B.E., on behalf of minor child, H.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LINDEN, SUPERINTENDENT JAMES CLARKE, PRINCIPAL JOSEPH MARTINO AND VICE-PRINCIPAL PAUL IOZZI, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

August 9, 1999
Date of Mailing, August 9, 1999

259-99

F.S.G., on behalf of minor child, E.K.J.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

August 9, 1999

OAL DKT. NO. EDU 9806-98
AGENCY DKT. NO. 450-10/98

F.S.G., on behalf of minor child, E.K.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

August 9,1999
Date of Mailing, August 9,1999

COTA POSSIEN-KANIA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DUNELLEN, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, tenured school social worker and substance awareness coordinator, contended that the Board's assigning her to be an in-class support instructor was violative of law and code since she did not possess certification as a teacher. She sought appointment to one of two positions for which she was qualified.

ALJ determined that because the relief requested by petitioner could no longer be granted in this matter due to changed circumstances since petitioner was no longer assigned to the position of in-class support instructor, the case did not present any issue of great public importance compelling a definitive resolution. ALJ granted the Board's motion to dismiss this matter as moot.

Noting that there was clearly a reasonable potential for recurrence of the alleged improper assignment, the Commissioner reversed the ALJ's initial decision dismissing the matter as moot. Commissioner remanded matter to the OAL for a determination on petitioner's underlying claim that the Board's assignment of her to an in-class support instructor position was improper.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL FOR MOOTNESS

OAL DKT. NO. EDU 10342-98

AGENCY DKT. NO. 471-10/98

COTA POSSIEN-KANIA,

Petitioner,

v.

THE BOARD OF EDUCATION OF THE BOROUGH OF DUNELLEN,

Respondent.

Nancy I. Oxfeld, Esq., for petitioner (Balk, Oxfeld, Mandell & Cohen, attorneys)

Suzanne M. Cerra, Esq., for respondent (Stanton, Hughes, Diana, Salsberg, Cerra & Mariani, attorneys)

Record Closed: June 22, 1999 Decided: June 23, 1999

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, petitioner holds certificates and has attained tenure with respondent as a substance awareness coordinator and as a school social worker, and she contends that respondent's assignment of her as an in-class support instructor in the Health Program for school year 1998-1999 constitutes an assignment for which a teaching certificate is required and which

petitioner does not possess. Therefore, she seeks a determination that this assignment is a violation of the law and she requests an assignment to a position compatible with her certificates.

Petitioner filed a petition on October 13, 1998, respondent filed an answer on November 2, 1998, and the matter was transmitted to the Office of Administrative Law (OAL) on November 20, 1998, for hearing as a contested case. The matter was assigned to Honorable Jeff S. Masin, ALJ on January 4, 1999, and was scheduled for a prehearing conference on February 3, 1999. Following this prehearing conference, a prehearing order was entered by Judge Masin on February 10, 1999, and the matter was scheduled for hearing on April 27, 1999. The hearing scheduled for April 27, 1999, was adjourned because of attorney for respondent's maternity leave and the matter was rescheduled for hearing on June 22, 1999. At the hearing scheduled for June 22, 1999, attorney for petitioner made a motion to dismiss for reasons of mootness. After consideration of the arguments of counsel and the taking of testimony on this issue, the motion to dismiss the matter as moot was granted on June 22, 1999, whereupon the record closed.

FACTUAL DISCUSSION

At the commencement to the hearing in this matter, attorney for respondent moved to dismiss the petition on the basis of mootness. After hearing the representations of the attorney for respondent, respondent was directed to produce testimony or documentary evidence with respect to its factual contentions supporting its motion. As a result, respondent produced Dr. Arthur Travlos, respondent's Superintendent of Schools, to testify in this matter.

Dr. Travlos testified that he is Superintendent of Schools for the School District of the Borough of Dunellen, Middlesex County. He testified that during the 1998-1999 academic year, petitioner was assigned duties as a substance abuse coordinator and was also assigned to help support the Health Program. He indicated that petitioner's assignment as an in-class support instructor in the Health Program was for the purpose of supporting health teachers in those areas of the health curriculum where petitioner has expertise. He testified that petitioner was advised when this assignment was made that it was a limited assignment for the purpose of assisting health teachers in the Health Program until they became fully familiar with the subject area within

petitioner's area of expertise. She was advised that when it was determined that her expertise and assistance were no longer necessary she would be reassigned.

Dr. Travlos indicated that the decision was made in April 1999 by Dr. Burkhart, the building Principal, that petitioner's expertise would no longer be needed for the next school year. As a result, it was determined that petitioner would be taken out of this in-class support instructor position for the 1999-2000 School Year. Dr. Travlos emphasized that if petitioner's expertise and assistance had been needed for the 1999-2000 school year, her assignment would have continued. However, based upon the determination having been made that her assistance was no longer needed, the assignment was ended.

Dr. Travlos testified as to petitioner's School Year 1999-2000 assignment. He confirmed that she has been removed from the assignment as in-class support instructor and she will not be returned to the program. For School Year 1999-2000 petitioner will be assigned as a school social worker to conduct small group counseling sessions. He testified that as a courtesy petitioner was advised of her reassignment by Dr. Burkhart approximately one and half weeks ago. He indicated that this is not an assignment that requires Board of Education approval, because such approval is necessary only for transfers between buildings or in matters involving transfers between areas which are the subject of certificates. Thus, the Board will not take formal action with respect to this action, and the action of assigning petitioner to small group counseling sessions is his decision. He testified that he has made this decision.

On cross-examination, Dr. Travlos admitted that this reassignment of petitioner could be changed, and he emphasized that petitioner would still be in the Health Program as an in-class support instructor if she was needed, or if she is needed in the future. However, that is not his present intention. He further testified that the assignment for the 1999-2000 school year to conducting small group counseling sessions is presently planned for participation by seventh and ninth graders, although he is not ruling out the participation of eighth graders in the program. He admitted that this is a new program that has never taken place before. He also indicated that he anticipates sitting down with petitioner in September to further define the small group counseling program.

Petitioner did not present any testimony or documentary evidence challenging this testimony on the part of Dr. Travlos.

LEGAL DISCUSSION

It has been held that court-fashioned doctrines for the handling of litigation do have some genuine utility and relevance in administrative proceedings. *City of Hackensack v. Winner*, 82 *N.J.* 1, 29 (1980). One of those court-fashioned doctrines is the doctrine of mootness, see, 1A C.*J.S.*, *Actions*, §§38-45, which may be found to apply in cases in which no effective relief can be granted. *Handabaka v. Division of Consumer Affairs*, 167 *N.J. Super.* 12 (App. Div. 1979) (case ruled as moot where applicant sued for a civil service appointment but no longer desired the appointment).

In *Anderson v. Sills*, 143 *N.J. Super.* 432, 437 (Ch. Div. 1976), it was stated that there are two basic reasons for the doctrine of mootness.

> First, for reasons of judicial economy and restraint, courts will not decide cases in which the issue is hypothetical, a judgment cannot grant effective relief, or the parties do not have concrete adverse of interest. Second, it is a premise of the Anglo-American judicial system that a contest engendered by genuinely conflicting self-interests of the parties is best suited to developing all relevant material before the court.

An issue is "moot" when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy and where the conflict between the parties has become merely hypothetical. *In re Conroy*, 190 *N.J. Super.* 453, 458 (App. Div. 1983); *Barshatky v. Freehold Regional High School District Board of Education*, 95 *N.J.A.R. 2d* (EDU) 73. The courts and the Commissioner of the Department of Education ordinarily will refuse to review questions which become academic prior to the issuance of a decision out of reluctance to render a legal decision in the abstract and a desire to conserve judicial or administrative resources. *In re Conroy*, *supra* at 459; *Carolyn Henry v. Board of Ed. of the City Wildwood*, 1975 *S.L.D.* 1, 3. On the other hand, as was made clear in *Conroy*, the courts will decide a moot case that presents issues of great public importance or is based on a controversy

capable of repetition, yet evading review because of the short duration of any single plaintiff's interest.

In the present case, the positions of the parties were clearly adversarial during the 1998-1999 school year, and it appears that their dispute was a contested case, as defined by *N.J.S.A.* 52:14B-2(b). The relief being sought by petitioner in this matter is: (1) a determination that respondent violated the law when it assigned petitioner to the position of in-class support instructor, a position for which she asserts that is not certified; and (2) directing that the petitioner be assigned to a position compatible with her certificate and endorsements. However, the relief being requested by petitioner can no longer be granted in this matter because of changed circumstances since petitioner is no longer assigned to the position of in-class support instructor

Attorney for petitioner argues that a ruling on this issue would be helpful in assuring that such illegal assignments are not made in the future and will greatly assist future boards of education by providing guidance as to this issue. However, I can see no compelling reason which would require a determination of an issue which will have no practical impact on the rights and responsibilities of the parties. In this matter, I **FIND** that this case does not present any issue of great public importance compelling a definitive resolution. See, *In re Conroy*, *supra* at 459; *Oxfeld v. New Jersey State Board of Examiners of Education,* 68 *N.J.* 301 (1975). Based on the foregoing I intend, by this Initial Decision, to grant respondent's motion to dismiss this matter as moot.

DECISION AND ORDER

For the reasons stated above, it is hereby **ORDERED** that respondent's motion to dismiss the petition as moot is hereby **GRANTED,** and the petition is hereby **DISMISSED.**

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

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

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

June 23, 1999
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

JUN 24 1999
DATE

D.N. Antanaitis Jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 25 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/lam

APPENDIX

LIST OF WITNESSES

For petitioner:

None

For respondent:

Arthur Travlos

LIST OF EXHIBITS

None

OAL DKT NO. EDU 10342-98
AGENCY DKT. NO. 471-10/98

COTA POSSIEN-KANIA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DUNELLEN, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner requested and was granted an extension of time within which to file exceptions to the Administrative Law Judge's (ALJ) decision. Such exceptions and the Board's reply thereto were submitted in accordance with the modified schedule.

Petitioner's exceptions aver that, although the ALJ correctly recounted the law with respect to mootness, he, nonetheless, misapplied it to the within matter. (Petitioner's Exceptions at p. 3) In this regard, she claims that the ALJ failed to recognize that because the Board maintains that it has the right to assign petitioner to the in-class support position in the future if it so chooses, "we have a situation that is likely of repetition, a reason relied upon by the courts in determining that an issue is not moot." (*Id.*) Petitioner cites a number of New Jersey Supreme Court and Appellate Division cases which were dismissed for mootness for the proposition that central to each of them was the court's determination that the particular situation

challenged was not likely to recur. (*Id.* at p. 4) Such is not the case here, she argues, since "the Superintendent of Schools clearly testified at the hearing that he would reassign the Petitioner to the in-class support position at any time he deemed it necessary," and, therefore, by the Board's own admission, the situation is capable of repetition. (*Id.* at pp. 5-6) Petitioner further buttresses her argument that the instant matter is not moot by observing that, considering the customary time lag in the adjudication of administrative matters, "a challenge to any assignment of a year's duration would always be rendered moot simply by the passage of time, allowing repeated assignment of Petitioner outside the scope of her certificate and endorsements, so long as each assignment was of no more than one year's duration." (*Id.* at p. 3) Petitioner, therefore, urges that the initial decision be reversed and this matter returned to the OAL for hearing.

In reply the Board attempts to discount petitioner's argument and her cases cited for the proposition that a finding by the court that an action is not capable of repetition is a prerequisite to a finding that an issue is moot, asserting that none of the cases identified *specifically* so states. (emphasis added) (Board's Reply Exceptions at p. 5) As an example, it points to *Gayder v. Spiotta*, 206 *N.J. Super.* 556 (App. Div. 1985) where it posits "the memorandum being challenged **could** have been re-adopted, but the court found there was 'nothing to suggest that the substance of that memorandum [was] *likely* to be adopted.'" (emphasis in text) (*Id.*) The Board further urges that even if the Commissioner were to agree with petitioner and accept such a finding as a requisite for mootness, affirmance of the ALJ's decision is still mandated here. It argues, "[d]espite Petitioner's attempt to overstate the testimony of Dr. Travlos, there is absolutely no foundation in the record on which to base a finding that the situation involved is one that *is* likely of repetition. This is pure surmise and speculation by Petitioner and cannot serve as the basis for rejecting the ALJ's Initial Decision."

(emphasis in text) (Board's Reply Exceptions at p. 7) Moreover, it advances, just because the Board contends that it has the right to reassign petitioner to this position in the future does not create a current controversy. Clearly, it advances, if such an assignment were to occur in the future, and petitioner continued to believe it was inappropriate, it could be addressed at that time. (*Id.* at pp. 7-8) The Board, therefore, urges adoption of the initial decision.

Upon careful and independent review of the record in this matter, the Commissioner determines to reverse the initial decision of the ALJ, finding, instead, that petitioner's reassignment does not render moot her action challenging the Board's assignment of her to an in-class support instructor position since this alleged improper action, under the circumstances here, is one capable of repetition yet evading review. *Cain v. New Jersey State Parole Board*, 78 *N.J.* 253, 255 (1978), *citing State v. Allen*, 73 *N.J. 132, 138-139 (1977).* The Commissioner's review persuades him that requisite to a finding of mootness in this matter must be a conclusion that there is no reasonable expectation that the act complained of will be repeated. *See Galloway Township Board of Education v. Galloway Township Education Association,* 78 *N.J.* 25 (1978). Such is not the case here. Notwithstanding the attestations of the Board with respect to the remoteness of the possibility, nothing in the record of this matter provides any assurance that the specific action of the Board complained about will not be repeated in the future. To the contrary, because of the existence of a continuing relationship between the parties and the specific admission of the Superintendent that he would not hesitate to assign petitioner to the in-class support position anytime he deemed it necessary, the Commissioner is persuaded that there is clearly a reasonable potential for recurrence of the alleged improper assignment.

Accordingly, the initial decision of the OAL dismissing this case as moot is reversed and this matter is remanded to the OAL for a determination on petitioner's underlying claim that the Board's assignment of her to an in-class support instructor position was improper.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

August 9, 1999
Date of Mailing, August 9, 1999

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

261-99 M

STATE OF NEW JERSEY
BEFORE THE COMMISSIONER OF EDUCATION
AND THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

THE TENURE HEARING OF
BARBARA DIRK,

-and-

OAL Docket No. EDU 5169-99
Agency Docket No. 78-4/99

BOARD OF EDUCATION OF THE
PASSAIC COUNTY MANCHESTER
REGIONAL HIGH SCHOOL,
PASSAIC COUNTY.

MANCHESTER REGIONAL HIGH SCHOOL
BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-99-325

MANCHESTER REGIONAL HIGH SCHOOL
DISTRICT EDUCATIONAL SECRETARIES
ASSOCIATION,

Charging Party.

Appearances:

For the Board, Fogarty and Hara, attorneys
(Stephen R. Fogarty, on the brief)

For the Association and Barbara Dirk, Bucceri & Pincus,
attorneys (Sheldon H. Pincus, on the brief)

DECISION

On April 15, 1999, the Manchester Regional High School District Board of Education certified tenure charges against Barbara Dirk and suspended her without pay. On May 5, the

Commissioner of Education referred the matter to the Office of Administrative Law for disposition.

On April 22, 1999, the Manchester Regional High School District Educational Secretaries Association filed an unfair practice charge with the Public Employment Relations Commission alleging that the tenure charges were filed to interfere with Dirk's role as Association president and to discriminate against her because of her protected activity.

On May 4, 1999, the Board advised Dirk that she would be denied her salary increments for the 1999-2000 school year. On May 14, the Association amended the unfair practice charge to include the increment withholding. On May 18, an appeal of the increment withholding was filed with the Commissioner of Education.

On June 10, 1999, a Complaint and Notice of Hearing on the unfair practice charge issued.

On June 14, 1999, Dirk filed a motion for consolidation and predominant interest determination. The motion sought consolidation of the tenure charge matter, the unfair practice charge, and the appeal of the increment withholding. The motion also sought a finding that the Commission has the predominant interest in these cases.

On June 25, 1999, the Board filed a response supporting consolidation but arguing that the Commissioner has the predominant interest.

On July 1, 1999, Dirk filed a reply.

On July 7, 1999, Administrative Law Judge Thomas R. Vena recommended that the motion for consolidation be denied. He found that the salary increment and unfair practice proceedings would be much different from the tenure charge case. He noted that the Association is the moving party in the unfair practice case; the Board does not have the burden of proof in the unfair practice and increment withholding cases; and the standard of proof differs between the increment withholding case and the tenure charges. Lastly, he found that L. 1998 c. 42 requires that the tenure case be handled expeditiously.

On July 16, 1999, Dirk and the Association filed exceptions. They argue that the cases should be consolidated and that the Commission should be found to have the predominant interest.

On July 20, 1999, the Board filed exceptions. It also argues that the cases should be consolidated, but that the Commissioner should be found to have the predominant interest.

Having independently evaluated the record and considered the Administrative Law Judge's order, the Commissioner of Education on ~~July~~ August 9, 1999 and the Chair of the Public Employment Relations Commission, acting pursuant to authority delegated to her by the full Commission, on ~~July~~ August 3, 1999, made the following determination in this matter.

The unfair practice charge and the tenure charges should be consolidated. The parties are identical; the principal factual

and legal issues overlap; consolidation will save time and expense, avoid duplication, and prevent inconsistency; and dissimilar questions of fact and law will cause some delay but not prejudice or confuse any party. See N.J.A.C. 1:1-17.3. We share the Judge's concern about the timelines in L. 1998, c. 42, but both matters can be handled expeditiously. The danger of inconsistent results and concomitant protracted litigation outweigh the possibility of some delay in the initial proceedings.

Ordinarily, we would consolidate the cases to be heard in a single proceeding. The record would then be forwarded to the Commission to determine whether Dirk engaged in activity protected under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. and whether the activity, if protected, was a substantial or motivating factor in the bringing of tenure charges and the withholding of her increment. See In re Bridgewater Tp., 95 N.J. 235 (1984). The Commission's decision and the complete record would then be sent to the Commissioner to determine whether the adverse personnel actions were for legitimate business reasons and were otherwise warranted under education law. However, the Commissioner of Education does not have jurisdiction to review Dirk's increment withholding under N.J.S.A. 18A:29-14 since that statute covers only teaching staff members. The Commission should therefore consider all issues relevant to the unfair practice charge concerning the increment withholding, including whether legitimate business reasons motivated the withholding and whether

it would have occurred for such reasons absent Dirk's protected activity. And since the same analysis would have to be made concerning the tenure charges, the Commission should do that analysis at the same time. Accordingly, in addition to determining whether protected activity motivated increment withholding and tenure charges, the Commission will determine whether those actions were also motivated by legitimate business reasons and would have occurred absent Dirk's protected activity. The consolidated matter will then be sent to the Commissioner to determine whether the tenure charges were otherwise warranted under education law. The increment withholding petition filed before the Commissioner shall separately proceed to dismissal based upon the Commissioner's lack of jurisdiction over withholdings of increments for persons who are not teaching staff members.

ORDER

The unfair practice charge and the tenure charges are consolidated for hearing before an Administrative Law Judge. The Administrative Law Judge will first offer recommended findings of fact and conclusions of law to both the Public Employment Relations Commission and the Commissioner of Education disposing of all issues in controversy through a single initial decision under N.J.S.A. 1:1-18.3 and consistent with N.J.A.C. 1:1-17.8(a); and

Upon transmittal of the initial decision to both agencies, the underlying record will be forwarded to the Commission to determine whether the bringing of the tenure charges and the withholding of the increment violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.; and

The Commission's decision and the complete record will then be sent to the Commissioner of Education to determine whether the tenure charges were otherwise warranted under education law.

DECISION RENDERED BY THE
COMMISSIONER OF EDUCATION
AUGUST 9, 1999.

DAVID C. HESPE
COMMISSIONER

DECISION RENDERED BY THE
CHAIR OF THE PUBLIC
EMPLOYMENT RELATIONS
COMMISSION
AUGUST 3, 1999

MILLICENT A. WASELL
CHAIR

Date of Mailing, August 10, 1999

262-99

GREGORY T. DONAHUE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF OCEAN CITY, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a tenured teaching staff member, alleged that the Board failed to recognize his tenure rights as a principal with the school district and his entitlement to the vacant position of principal in the Board's high school.

The ALJ granted summary decision to petitioner, concluding that petitioner was entitled to the position of high school principal by virtue of his tenure rights as principal.

The Commissioner affirmed the recommended decision of the ALJ, particularly in light of the court's holding in *Schienholz et al. v. Board of Education of the Township of Ewing, Mercer County.*

August 12, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 4795-98

AGENCY DKT. NO. 122-4/98

GREGORY T. DONAHUE,

Petitioner,

v.

BOARD OF EDUCATION OF THE OCEAN CITY SCHOOL DISTRICT, CAPE MAY COUNTY,

Respondent.

Wayne J. Oppito, Esq., for petitioner (New Jersey Principals and Supervisors Association)

Michael P. Stanton, Esq., for respondent (Taht, Stanton and McCrosson, attorneys)

Record Closed: May 18, 1999 Decided: June 30, 1999

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Gregory T. Donahue, a tenured teaching staff member with the Board of Education of the Ocean City School District (Board) alleges, among other things, that the Board

has failed to recognize his tenure rights as a principal with the school district and his entitlement to the vacant positions of principal in the Board's High School in violation of the school laws in general and including, but not limited to *N.J.S.A.* 18A:28-1 to -14.

The matter was transmitted from the Commissioner of Education (Commissioner) to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. Subsequent to a prehearing conference and settlement negotiations, which were unsuccessful, petitioner propounded a Motion for Summary Decision, pursuant to *N.J.A.C.* 1:1-12.5.

Having carefully considered the criteria for summary judgment as established by our Supreme Court in the matter of *Judson v. Peoples Bank & Trust Co. Of Westfield*, 17 *N.J.* 67 (1954) and, having considered the entire record before me, I **FIND** and **CONCLUDE** that the instant matter is ripe for summary decision.

PETITIONER'S POSITION

STATEMENT OF FACTS

The facts in this matter have been stipulated and are set forth as follows:

1. Petitioner, Gregory T. Donahue, is a tenured teaching staff member in the Ocean City School District having been continuously employed since on or about February 16, 1971.

2. Petitioner's employment history in the Ocean City School District is as follows:

   Special Education Teacher
   February 16, 1971 - June 30, 1974

Director of Special Education
July 1, 1974 - August 14,1989

Principal - Intermediate School
August 15, 1989 - June 30, 1992

Assistant Principal - Intermediate School
July 1, 1992 - Present

3. Effective July 1, 1992, respondent abolished the position of T&E Administrator, held by Lyle Alverson. Mr. Alverson was petitioner's predecessor as principal of the Intermediate School and has greater seniority than petitioner to the position.

4. When the position of T&E Administrator was abolished, Mr. Alverson was reassigned as Intermediate School principal in accordance with is tenure and seniority rights.

5. Petitioner had tenure and seniority rights to the position of Director of Special Education. At the time, respondent had recently employed a minority female as Director of Special Services and wished to continue her employment.

6. Respondent approached petitioner about its desire to retain the incumbent Director of Special Education who was non-tenured in the school district. Respondent and petitioner agreed that petitioner would accept the position of vice principal at the Intermediate School, effective July 1, 1992, but that he would continue to be paid as a principal and retain his tenure rights. (The Agreement is attached as Exhibit A.) To date, respondent continues to pay petitioner as a principal.

7. Effective February 1, 1998, the high school principal retired. The retirement of the high school principal resulted in the first vacancy of principal in the school district since the abolishment of the position of T&E Administrator.

8. Currently, respondent has employed an interim principal at the high school pending a decision in this matter.

ARGUMENT

PETITIONER IS ENTITLED TO THE POSITION OF HIGH SCHOOL PRINCIPAL BY VIRTUE OF HIS TENURE RIGHTS AS A PRINCIPAL

It is uncontroverted that petitioner was a tenured principal in the Ocean City High School District when the position of T&E Administrator was abolished effective July 1, 1992, resulting in a reduction in force (rif) and petitioner being assigned as a vice principal. On or about February 1, 1998, the first vacancy in the position of principal since the 1992 rif occurred when the high school principal retired. Respondent's failure to employ petitioner in the aforesaid position is volatile of his tenure right.

The overwhelming body of decisional law clearly holds that non-tenured personnel cannot be retained or hired over a tenured individual with reference to a position for which the individual has attained tenure. *Capodilupo v. West Orange Twp. Ed. Bd.*, 218 *N.J. Super.* 520 (App. Div. 1987); *Bednar v. Westwood Bd. of Ed.*, 221 *N.J. Super.* 239 (App. Div. 1987). In *Capodilupo, supra*, the Appellate Division affirmed the reemployment of a high school teacher who had attained tenure as a teacher with an endorsement in Physical Education to the position of elementary school Physical Education teacher despite the fact that the teacher had no demonstrable experience in the elementary school position over a non-tenured, certified teacher with actual experience in the position. In its decision, the Appellant Division upheld the State Board of Education's determination that:

> seniority provides a mechanism for ranking all *tenured* teaching staff members so that reduction among the tenured force can be effected in an equitable fashion and in accordance with sound

> educational policies. See *Lichtman v. Ridgewood Bd. of Ed.*, *supra*, 93 *N.J.* at 368. 218 *N.J. Super.* at 514.

The Court further averred "a tenured teacher, however, is entitled to retention as against a nontenured teacher under the tenure law. To hold otherwise would be to defeat the purpose of tenure which was to give a measure of security to teachers after the prescribed number of years of service. See *Viemeister v. Prospect Park Bd. of Ed.*, 5 *N.J. Super.* 215, 218 (App. Div. 1949)." 218 *N.J. Super.* at 514-15.

Subsequent to the *Bednar* and *Capodilupo* decisions, school law decisions have consistently and emphatically held that tenured individuals are entitled to positions held by non-tenured individuals within the position that an individual attained tenure. In *Mirandi v. Bd. of Ed. of Twp. of West Orange, Essex County*, 1988 *S.L.D.* 1988 aff'd, as mod. State Bd. 1989 *S.L.D.* 3057, petitioner, a tenured assistant principal at the high school who was "riffed" and reassigned to a position of high school social studies teacher, was held to be entitled to the position of middle school assistance principal despite having had no experience in the latter position as against a non-tenured individual with actual experience.

Likewise, in *Burke v. Bd. of Ed. of Boro. of Union Beach*, 1988 *S.L.D.* 1318, petitioner, a tenured school social worker who had been "riffed," was found to be entitled to the position of student assistance counselor as opposed to a non-tenured individual who was employed in that position. Moreover, in *Burke*, the Commissioner recognized that where a petitioner has "a statutory entitlement to [a] position by virtue of her tenure states . . . [i]t[s] the Board's duty to recognize her tenure status and notify her of the fact it was available to her."

Other noteworthy decisions are *Schaeffer v. So. Orange-Maplewood Bd. of Ed.*, 1988 *S.L.D.* 553, aff'd State Bd. 1989 *S.L.D.* 3077 and *Herbert v. Middletown Bd. of Ed.*, 1989 *S.L.D.* 2148, aff'd State Bd. 1990 *S.L.D.* 1759, aff'd App. Div. A318-90T1, May 22, 1991. In *Schaeffer*, *supra*, petitioner, a tenured junior high school and middle school department chairperson for English who had been "riffed" and reassigned to a classroom teaching position, w as found to be entitled to the district-wide position of Director of Language Arts/English (K-8) as opposed to a non-tenured individual who was employed in that position. While in *Herbert*, *supra*,

the Commissioner affirmed the decision that a tenured Supervisor of Elementary Education who had been "riffed" was entitled to the position of Supervisor of Special Services, a highly regulated and substantially complicated area, as against a non-tenured supervisor. As the Administrative Law Judge determined.

> As the line of cases discussed above makes clear the tenure law grants the tenured teaching staff member a right over a non-tenured teaching staff member to any position for which the tenured staff member qualifies him or her. The tenure laws do not contain any exemptions or exceptions. The legislature has determined that a person who obtains an endorsement is qualified for all positions under that endorsement. To allow subjective educational reasons to override the tenure law is to ignore the law and is clearly impermissible.
>
> The incumbent undoubtedly is qualified for the position. The Board may believe that she would perform better than the petitioner as Supervisor of Special Services. But the law gives the petitioner an unequivocal right to the position. He cannot be deprived of his tenure rights by virtue of the Board's impression that the incumbent would do the job better. This approach may not be the best educational policy, but it is the law, and only the Legislature can change the law. That the position in this case may differ from the petitioner's prior positions more than the positions at issue in *Bednar* or *Mirandi* does not alter the outcome. The tenure laws cannot be modified by a board's belief that a particular position is somehow unique. The point of *Bednar* and *Mirandi* is that the tenure laws must apply despite the particular experience or inexperience of the person involved. Not only is there no measurable way of determining when a position is unique to a degree that would allegedly exempt it from the strictures of the tenure law, the law simply does not permit that type of analysis or exemption.
>
> The petitioner is entitled as a matter of law to the position held by the non-tenured incumbent. He must be instated, with retroactive seniority, to that position with all back pay.

As it is uncontroverted that petitioner is tenured as a principal, it is convincingly clear that he is entitled to the position of principal of Ocean City High School as opposed to a non-tenured person.

While in each of the above reference decisions, the Commissioner of Education found *Bednar*, *supra* and *Capodilupo*, *supra* to hold that a non-tenured person cannot be employed over a tenured person. The case directly on point to this matter is *Schienholz et al v. Ewing Bd. of Ed.*, 1989 *S.L.D.* 1860 aff'd State Bd. 1990 *S.L.D.* 1809, aff'd App. Div. A-2905-89T3 (Nov. 19, 1990), cert. denied _____ *N.J.* _____ (March 5, 1991). In *Schienholz*, *supra*, the Board of Education closed three elementary schools in 1982 and 1983 resulting in the Fuller and Wayne Pickering. Schienholz and Fuller accepted teaching positions, while Pickering resigned his teaching position for an administrative position in another school district.

In 1988, there was a vacancy for a high school principal. The board decided to appoint a highly qualified candidate from outside the state. Before the out of state candidate was formally appointed, the three riffed elementary principals claimed the position of high school principal. In the Initial Decision, the ALJ determined that one of the three petitioners was entitled to the position based on his tenure rights as principal. However, the ALJ further determined that the petitioners were barred from asserting their rights based on waiver and estoppel. The Commissioner affirmed the Initial Decision that the petitioners were entitled to the high school position, but rejected the finding that Schienholz and Fuller were barred by waiver and estoppel. The Commissioner decided that Pickering was barred because he resigned from the school district. The Commissioner ordered the Board to choose between Schienholz and Fuller for the position of high school principal.

On appeal, the State Board of Education affirmed that the petitioners were entitled to the position and that Schienholz and Fuller were not barred. The State Board reversed the Commissioner and held that Pickering also had entitlement to the position. The State Board reasoned that Pickering resigned from his teaching position, but remained on the preferred eligible list for principal. The Appellate Division affirmed the decision of the State Board in all respects. (A copy of the decisions are attached hereto as Appendix B.) See also *Williams v. Plainfield Bd. of Ed.*, 176 *N.J. Super.* 163 (App. Div. 1980), cert. den. 87 *N.J.* 306 (1981) wherein the Appellate Division held that the transfer of a high school principal to an elementary school as principal was proper because Mrs. Williams' tenure rights were as a principal and thus, the transfer was to a position of equivalent rank. See also *N.J.S.A.* 18A:28-5 which clearly lists

"principal" as the position one may attain tenure and not high school principal or elementary principal.

In this matter, as in *Schienholz*, *supra*, petitioner is a tenured principal who was removed from his position of principal as a result of a rif in 1992. At that time, he could have asserted his tenure and seniority rights to his former position of Director of Special Education. However, he was approached by respondent and asked to accept a position of vice principal. In accepting the position of vice principal, respondent and petitioner agreed that petitioner "shall retain *all* of his tenure rights and will not lose any tenure rights whatsoever by his accepting the position of Vice Principal at the Intermediate School" (Appendix A). The vacancy in the position of high school principal was the first vacancy in the position of principal since the rif in 1992. *N.J.S.A.* 18A:28-12 and *Schienholz*, *supra*, require respondent, Ocean City Board of Education, to reemploy petitioner in the position of principal now that a vacancy has occurred in said position. The fact that the vacancy has occurred in the position of high school principal does not diminish petitioner's entitlement to the position. *Schienholz*, *supra*.

For all the foregoing, it is respectfully requested that the ALJ find and determine that petitioner, as a tenured principal, is entitled to the position of principal at the Ocean City High School rather than a nontenured principal and order respondent to employ petitioner as the high school principal with all salary, benefits and emoluments, retroactive to February 1, 1998.

THE BOARD'S POSITION

STATEMENT OF THE CASE

In this matter, petitioner, Gregory T. Donahue, contends that he is entitled to the position of the high school principal or some other position of principal by virtue of his tenure. The respondent, Ocean City Board of Education (the "Board"), contends that petitioner is not so entitled because of a written agreement made between the parties on July 25, 1992.

ISSUES

1. Whether the Board failed to recognize petitioner's tenure rights as a principal.
2. Whether petitioner is entitled to a vacant position as a principal.

PROCEDURAL HISTORY

The petitioner filed a petition on or about April 29, 1998. The respondent filed an answer on or about June 3, 1998. A telephone prehearing conference in this case was held on August 27, 1998. A prehearing order was signed on September 2, 1998. On March 12, 1999, the hearing was scheduled and at that time the petitioner and respondent agreed on stipulation of facts which was signed off on by the parties.

Briefs were ordered to be submitted on or before April 30, 1999.

LEGAL ANALYSIS

At issue is whether the petitioner is entitled to a position of principal by virtue of his tenure. After a review of all the facts, especially the Memorandum of Agreement dated July 25, 1992, and executed by the petitioner and respondent (the "Agreement") (see Agreement attached as Exhibit A to the Stipulation of Facts), it is clear that the petitioner is not entitled to the position of high school principal.

The respondent is fully aware of the matter of *Schienholz v. Ewing Township Board of Education*, decided by the Commissioner June 19, 1989, affirmed in part, State Board of Education, February 2, 1990, affirmed by the Appellate Division, November 19, 1990. In that matter, two former principals who had served as principals only at the elementary and middle school levels were found to have greater entitlement to the high school principalship than did the nontenured holder of the position whose experience as principal was primarily at the secondary level. However, that case is not dispositive of this matter. The respondent is not arguing that the

petitioner is not entitled to the high school principalship because his experience is primarily at elementary and middle school levels.

The respondent's position is quite simple and that is that agreement settles the issue. As set forth in the Stipulation of Facts, paragraph 6, the petitioner as part of the agreement agreed to accept the position of vice principal at the Intermediate School as long as he remained at the principal salary guide and retained all of his tenure rights. The respondent performed pursuant to the agreement by compensating the petitioner as a principal and petitioner has retained his tenure rights as though he was the principal at the Intermediate School. Accordingly, the petitioner's transfer to the Intermediate School did not result in a reduction of salary and did not affect his tenure status.

Petitioner has brought this action in an attempt to receive more rights than he would otherwise possess. Respondent argues that the petitioner is not entitled to more rights than any other principal within the district. For instance, there is no question that Dr. Alverson, Principal at the Intermediate School, is not entitled to the high school principal's position. Accordingly, the petitioner is not entitled to the position. If petitioner had not entered into the agreement, had not remained on the principal's salary guide, and had not retained his tenure rights as principal, then he would be so entitled.

At the time petitioner entered into the agreement and at the time he accepted the position of vice principal, he chose not to exercise his tenure rights to the position of Director of Special Services, a position in which he had previously held and in which he had seniority (Stipulation of Facts, paragraph 5). Petitioner is now attempting to exercise those rights even though he remained on the principal salary guide and has retained all of his tenure rights. The respondent in good faith entered into the agreement when the petitioner and respondent has lived up to and will continue to abide by its obligation under the agreement. It is quite evident that there has been no violation of petitioner's tenure rights. He has been treated as a principal and will continue to be so treated.

Respondent has not taken action relative to petitioner's employment which violated his rights under applicable law, including, but not limited to *N.J.S.A.* 18A:28-5 *et seq.*, and *N.J.A.C.* 6:3-5.1 *et seq.*

Respondent has not failed to recognize petitioner's tenure rights as a principal and petitioner is not entitled to a vacant position as a principal.

CONCLUSIONS

New Jersey education laws afford protection to those teaching staff members who meet the precise conditions for a tenure status with a board of education. *Zimmerman v. Newark Bd. of Ed.*, 38 *N.J.* 65 (1962). The court has held that the tenure statutes, *N.J.S.A.* 18A:28-5 to -12, "should be liberally construed to further its beneficial purpose of affording seniority to teaching staff who meet its standard of length of service." *Bednar v. Westwood Board of Education*, 221 *N.J. Super.* 239, 241 (App. Div. 1987). The *Bednar* court continued to say that "the tenure provisions in our school laws were designed to aid in the establishment of a competent and efficient school system by affording to principals and teachers a measure of security in the ranks they hold after years of service." *Viemeister v. Board of Education of Prospect Park*, 5 *N.J. Super.* 2115, 218 (App. Div. 1949).

In the instant matter, the Board relies upon an agreement entered into between it and petitioner, dated July 25, 1992, and which provides as follows:

> MEMORANDUM OF AGREEMENT
> BACKGROUND
>
> Gregory T. Donahue is presently employed by the Ocean City Board of Education as a Principal at the Intermediate School.
>
> Mr. Donahue and the Board of Education have discussed at length the concerns which each of them has, and believe it is in the best interest of both the Board of Education and Mr. Donahue that Mr. Donahue be transferred to the position of Vice-Principal at the Intermediate School under the terms and conditions hereinafter set forth.

AGREEMENT

1. Mr. Donahue shall remain on the principal salary guide, Classification II, said guide being set forth in the Professional Employees Agreement between the Ocean City Administrators' Association and the Board of Education of Ocean City.

2. Mr. Donahue shall retain all of his tenure rights and will not lose any tenure rights whatsoever by his accepting the position of Vice-Principal at the Intermediate School.

Thus, the agreement between the Board and petitioner was a form of a contract, *i.e.*, the Board persuaded petitioner to forbear his superior claim to the position of Director of Special Education in consideration for his assignment as vice principal of the Intermediate School and remain on the principal's salary guide. Our Supreme Court addressed the issue of a teaching staff member's tenure status and contract, in *Spiewak v. Rutherford Bd. of Ed.*, 90 *N.J.* 63 (1982). In *Spiewak*, the Court overturned an Appellate Division decision which held that certain remedial and Title I teachers were not "teaching staff members" as defined by *N.J.S.A.* 18A:1-1 and, therefore, not eligible for tenure protection under *N.J.S.A.* 18A:28-5. The court stated, at 72, that:

> . . . The Tenure Act, *N.J.S.A.* 18A:28-1 to -18, specifically defines the conditions under which teachers are entitled to the security of tenure. The statute makes a mandatory term and condition of employment. It therefore supercedes [*sic*] contractual terms (citations omitted).

The Court continued, at 76 to hold:

> It is now well settled that public employees and employers may not agree to contractual terms that contravene a specific term or condition of employment set by a statute. "If the Legislature establishes a specific term or condition of employment that leaves no room for discretionary action, then negotiation on that term is fully preempted." *In re IFPTE Local 195 v. State*, 88 *N.J.* at 403. We have specifically stated that the tenure provisions of *N.J.S.A.* 18A:28-5 constitute a mandatory contractual term that may not be waived or bargained away.

And, at 77:

> . . . Tenure is a "statutory right imposed upon a teacher's contractual employment," *Zimmerman v. Newark Bd. of Ed.*, 38 *N.J.* at 72. It may not be forfeited or waived, *Red Bank Ed. Ass'n v. Red Bank Bd. of Ed.*, 78 *N.J.* at 141.

Thus, the agreement, or contract, entered into between the Board and petitioner may not contravene petitioner's tenure rights. The Board's argument that petitioner is seeking more tenure rights than he possesses is misplaced. Rather, petitioner seeks only those seniority and tenure rights to which he is entitled.

I **CONCLUDE**, therefore, by virtue of petitioner's superior seniority and tenure rights, and pursuant to *Capodilupo, supra, Bednar, supra,* and *Spiewak, supra,* that petitioner is entitled to the position of high school principal in the Board's employ.

ORDER

Accordingly, it is **ORDERED** that summary decision be and is hereby **ENTERED** on behalf of petitioner. It is further **ORDERED** that the Board of Education of the Ocean City School District place petitioner in the position of high school principal beginning for the 1999-2000 school year.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is

otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

30 June 1999
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

July 2, 1999
DATE

D. N. Centanaitis Jr.
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 6 1999
DATE

Barbara A Hernal
OFFICE OF ADMINISTRATIVE LAW

cd

MEMORANDUM OF AGREEMENT
BACKGROUND

Gregory T. Donahue is presently employed by the Ocean City Board of Education as a Principal at the Intermediate School.

Mr. Donahue and the Board of Education have discussed at length the concerns which each of them has, and believe it is in the best interest of both the Board of Education and Mr. Donahue that Mr. Donahue be transferred to the position of Vice-Principal at the Intermediate School under the terms and conditions hereinafter set forth.

AGREEMENT

1. Mr. Donahue shall remain on the principal salary guide, Classification II, said guide being set forth in the Professional Employees Agreement between the Ocean City Administrators' Association and the Board of Education of Ocean City.
2. Mr. Donahue shall retain all of his tenure rights and will not lose any tenure rights whatsoever by his accepting the position of Vice-Principal at the Intermediate School.

IN WITNESS WHEREOF, the parties have hereto set their hand and seal the 25th. day of July, 1992.

ATTEST:

Matthew Tomlin

WITNESS:

OCEAN CITY BOARD OF EDUCATION

BY: Laura Katz

LAURA KATZ, President

Gregory T. Donahue

GREGORY T. DONAHUE

OAL DKT. NO. EDU 4795-98
AGENCY DKT. NO. 122-4/98

GREGORY T. DONAHUE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF OCEAN CITY, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

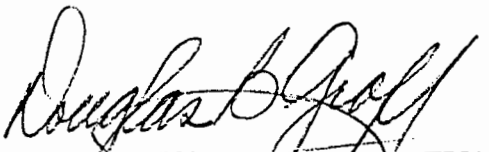
The record and initial decision issued by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review of the record, the Commissioner agrees with the recommended decision of the Administrative Law Judge granting summary decision to petitioner based upon his tenure rights as a principal, particularly in light of the court's holding in *Schienholz et al., supra.* Moreover, even accepting *arguendo* that the agreement, entered into by the parties as a result of a reduction in force in 1992 which "bumped" petitioner from his tenured position as principal, is the only factor controlling this matter as the Board asserts, the Commissioner concludes that the plain wording of the agreement does not in any way contravene the relief sought by petitioner. The agreement explicitly states that petitioner "*will not lose any tenure rights whatsoever by accepting the position of vice-principal at the Intermediate School.*" (emphasis supplied) In 1998, when the first principal's position came open to which petitioner was entitled by virtue of his tenure rights, he chose to exercise his right to that position because,

in accordance with the terms of the agreement, he had not lost any of his tenure rights when he acquiesced to the Board's desire to retain a nontenured staff member in the position to which he had been entitled in 1992.

Accordingly, summary decision is hereby granted to petitioner.[1]

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

[1] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

August 12, 1999
Date of Mailing, August 12, 1999

263-99

F.P., on behalf of minor children, N.P. AND S.P.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT BEACH, OCEAN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

August 12, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2706-99

AGENCY DKT. NO. 378-8/98

F.P., N.P. & S.P.,

Petitioner,

v.

POINT PLEASANT BEACH BOARD OF EDUCATION,

Respondent.

Richard J. Kaplow, Esq., for petitioners

Seymour J. Kagan, Esq., for respondent (Berry, Kagan, Sahradnik, Kotzas & Riordan, attorneys)

Record Closed: July 1, 1999 Decided: July 1, 1999

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

This case concerns the petitioners' domicile and the parties' rights and duties under N.J.S.A. 18A:38-1.

This matter is the subject of the contested case docketed as EDU 6951-98 which was the subject of a February 24, 1999 initial decision and an April 12, 1999 Commissioner of Education Decision, remanding the case. As shown in the attached "Settlement Agreement," the case has been settled.

PROCEDURAL HISTORY

This matter is the subject of the contested case docketed as EDU 6951-98 which was the subject of a February 24, 1999 initial decision and an April 12, 1999 Commissioner of Education Decision, remanding the case. The procedural history set forth in the initial decision is adopted and supplemented by the following: Pursuant to the April 12, 1999 Commissioner of Education Decision the case was remanded to the Office of Administrative Law (OAL) where, on April 29, 1999, it was filed as a contested case bearing docket number EDU 2706-99. N.J.S.A. 18A:6-11, N.J.S.A. 52:14B-2(b). The case was scheduled for a hearing on June 17, 1999 in the Point Pleasant Beach municipal building. At that time and place, the attorneys and I engaged in a settlement conference; the parties entered into the Settlement Agreement, subject to approval by the Point Pleasant Beach Board of Education (BOE); and a taped record was made, during which the Settlement Agreement was marked "J-1" and described and F.P. stated that he had voluntarily and intelligently entered into the Settlement Agreement, etc. On the record closed date, I received the BOE's attorney's letter wherein he represented that, during the BOE's June 29, 1999 meeting, it had adopted a resolution approving the settlement.

FINDINGS OF FACT

The attorneys, both of whom are experienced and competent, particularly in education law, represent and I find that the parties have intelligently, voluntarily and lawfully agreed to the Settlement Agreement. J-1.

Substantial and complicated issues of fact and law remained in this case, including issues relating to the domicile of the petitioners and their responsibility for tuition that may be owed to

the BOE. The Settlement Agreement will avoid the time and expense that both parties would incur if the case were to be fully litigated.

CONCLUSIONS OF LAW

Given the above-noted Substantial and complicated issues of fact and law, the Settlement Agreement is reasonable and lawful; will avoid time and expense for both parties which would be incurred in full litigation; disposes of all issues in controversy; and is in the public interest. N.J.A.C.1:1-19.1.

ORDER

I **ORDER** the parties to comply with the settlement agreement.

The petition will be deemed withdrawn and the case transmitted back to the Department of Education.

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

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

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

July 1, 1999
DATE

John R. Tassini
JOHN R. TASSINI, ALJ

Receipt Acknowledged:

7-7-99
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 8 1999
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

Re: EDU 2706-99

F.P. et al. v. BOE of Pt. Pl. Beach

SETTLEMENT AGREEMENT

The parties agree to settle their claims on the following terms:

(1) F.P. will enroll S.P. & N.P. in the Brick Twp BOE school system ~~for~~ beginning with the 1999-2000 school years and S.P. & N.P. will attend school in that school system

(2) Effective upon the start of the 1999-2000 school year the BOE of Pt. Pl. Beach will have no further obligation to educate S.P. & N.P.

(3) F.P. is obligated to the BOE of Pt. Pl. Beach in the amount of $50,000. However, the BOE of Pt. Pl. Beach shall waive $37,500. of that $50,000 conditioned upon (a) S.P. & N.P. not being enrolled at any time in future in the school district of the BOE of the Pt. Pl. Beach and (b) F.P., S.P. & N.P. not seeking any reimbursement for costs of education of S.P. & N.P.

(4) The $12,500 owed by F.P. to the BOE of Pt. Pl. Beach will be paid to Berry et al., as attorneys for the BOE, no later than August 31, 1999.

EDU 2706-99

NOTE:
ATTACH TO INITIAL DECISION APPROVING SETTLEMENT

J-1 EV (1/3)

(5) If F.P. either (a) fails to make payment of the $12,500 by August 31, 1999 or (b) if F.P. seeks to enroll his children in the BOE of Pt. Pl. Beach school system, then the entire $50,000 will be immediately due & payable & at that time, the said $50,000 may be reduced to a judgment and may be executed on pursuant to law.

(6) In the event F.P. or the custodian of S.P. & N.P. enrolls or attempts to enroll S.P. and/or N.P. in the BOE of Pt. Pl. Beach school system and the custodian S.P. & N.P. are legitimate domiciliary of the BOE of Pt. Pl. Beach school district, upon such attempt the above-described $50,000 shall be due & payable as a condition precedent to enrollment in the BOE's school district.

(7) Unless & until there is a material breach of this agreement by F.P., the BOE of Pt. Pl. Beach will not record any judgment based upon this settlement agreement.

(8) The parties waive and release any other claims they may have against one another.

(9) This settlement agreement is subject to approval by the BOE of Pt. Pl. Beach and subject to approval by the ALJ, by way of an initial decision approving settlement and

EDU 2706-99

approved by the Commissioner of Education by way of final decision.

June 17, 1999

X _____
Frank Pasalano (F.P.)

X _____
F. Thos Crowley,
Superintendent of Schools

X _____
Richard J. Kaplow,
a Horney for F.P.

X _____
Seymour Kagan,
a Horney for BOE

EDU 2706-99

3/3

OAL DKT. NO. EDU 2706-99
AGENCY DKT. NO. 379-8/98

F.P., on behalf of minor children, N.P. AND S.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT BEACH, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record, settlement agreement and initial decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter as clarified below.

Term 6 of the settlement states that:

> "[i]n the event F.P. or the custodian of S.P. [and] N.P. enrolls or attempts to enroll S.P. and/or N.P. in the [Board of Education of Point Pleasant Beach] school system and the custodians [of] S.P. and N.P. are legitimate domiciliaries of the [Point Pleasant Beach] school district, upon such attempt the above-described $50,000 shall be due [and] payable as a condition precedent to enrollment in the [Point Pleasant Beach] school district."

The Commissioner approves this settlement term but with the express clarification that the term cannot serve to prevent S.P.'s or N.P's attendance in the Point Pleasant Beach school system during the pendency of payment of the obligated monies by petitioner and/or the Board's pursuit

of their collection, if S.P. and N.P. meet the requirements of *N.J.S.A.* 18A: 38-1 so as to be entitled to free attendance in respondent's school system.

The matter is hereby dismissed, subject to compliance with the terms of the settlement as clarified herein.*

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

August 12, 1999
Date of Mailing, August 12, 1999

EARL JOHN PARSONS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DOVER, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

August 13, 1999

OAL DKT. NO. EDU 3766-98
AGENCY DKT. NO. 73-3/98

EARL JOHN PARSONS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DOVER, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

August 13, 1999
Date of Mailing, August 13, 1999

265-99

ETZEL BROWER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
SALEM COUNTY BOARD FOR VOCATIONAL EDUCATION *ET AL.*, SALEM COUNTY,	:	DECISION
RESPONDENTS.	:	
	:	

August 13, 1999

OAL DKT. NO. EDU 6010-97
AGENCY DKT. NO. 191-6/97

ETZEL BROWER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
SALEM COUNTY BOARD FOR VOCATIONAL EDUCATION *ET AL.*, SALEM COUNTY,	:	DECISION
RESPONDENTS.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

August 13, 1999
Date of Mailing, August 13, 1999

266-99

BOARD OF EDUCATION OF LOWER CAMDEN COUNTY REGIONAL SCHOOL DISTRICT NO. 1,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, DIVISION OF SCHOOL FINANCE,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning Board appealed determinations made by respondent Department of Education, Division of School Finance, providing that two individuals, T.J. and A.B., be assigned to the Board's district for the 1998-99 school year pursuant to the State Facilities Education Act of 1979, *N.J.S.A.* 18A:7B-1 to –13.

As to T.J., the ALJ granted summary decision to respondent, finding that because the present district of residence cannot be determined, the district of residence shall be the district in which the child resided prior to admission or placement, namely the Lower Camden County Regional High School District. As to A.B., the ALJ determined that the State has fiscal responsibility because the custodial parent for A.B. on October 15, 1997 was his mother, who resided in Philadelphia.

The Commissioner adopted the ALJ's recommended decision granting summary decision to respondent as the controversy pertains to T.J. for the reasons set forth in the initial decision. As to A.B., the Commissioner determined that the ALJ appropriately found *N.J.S.A.* 18A:7B-12(d) to be controlling, and the statute's plain meaning is that the State has fiscal responsibility for the tuition of a student placed in a State facility when the district of residence is identified to be outside of New Jersey.

August 13, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NOS. EDU 8578-98 &
EDU 8579-98
AGENCY DKT. NOS. 369-8/98 &
370-8/98

BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL SCHOOL DISTRICT NO. 1,

Petitioner,

v.

STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, BUREAU OF SCHOOL FINANCE,

Respondent.

Barry Chatzinoff, Esq., for petitioner (Weinberg, McCormack, Chatzinoff & Paul, attorneys)

Arlene Goldfus Lutz, Deputy Attorney General, for respondent (John J. Farmer, Jr., Attorney General of New Jersey, attorney)

Record Closed: June 4, 1999 Decided: June 28, 1999

BEFORE **BRUCE R. CAMPBELL** ALJ:

The Lower Camden County Regional High School District No. 1 ("Board" or "petitioner") appeals determinations made by the Department of Education, Office of School Finance ("Department" or "respondent"), providing that two individuals, T.J. and A.B., be assigned to the Board's district for the 1998-99 school year pursuant to the State Facilities Education Act of 1979, *N.J.S.A.* 18A:7B-1 through -13.

These matters were opened by verified petitions of appeal filed before the Commissioner of Education. *N.J.S.A.* 18A:6-9. The Board contests the assignments of T.J. and A.B. to it based upon the Board's investigation establishing that the current residences of these individuals' parents or guardians, with whom they lived prior to their most admission to a State facility, were not in the Lower Camden County Regional High School District. The matters were transmitted to the Office of Administrative Law for determination as contested cases, pursuant to *N.J.S.A.* 52:14F-1 through -13. The appeals were consolidated for hearing. A prehearing conference was held by telephone on January 12, 1999. It was determined that the issues would be considered upon the filing of dispositive motions. Both parties have propounded and responded to interrogatories.

Counsel timely filed all papers and, with receipt of the Department's reply on April 13, 1999, I considered the record closed.

STIPULATED FACTS

The parties stipulate the following facts. T.J. was born on July 5, 1981. The parties disagreed as to the date of his first placement in a State penal institution. The Department maintained it occurred on May 13, 1997 and the Board maintained it occurred on June 17, 1997. Upon discovering this discrepancy, I wrote to counsel stating

> Inasmuch as I have been unable to hold a conference of counsel this week to resolve a factual issue, I have had to keep the record open in these cases until we can discuss and resolve the problem.
>
> In your submissions, I find disagreement as to the placement dates for both A.B. and T.J. Concerning A.B., Mr. Chatzinoff says he was placed on or about April 1, 1997 (petitioner's memorandum at

> 4). Mrs. Lutz says he was placed on June 3, 1997 (respondent's brief, unpaginated). Obviously, the more than two month discrepancy could be important.
>
> Concerning T.J., Mr. Chatzinoff says he was placed on June 17, 1997 (petitioner's memorandum at 8). Mrs. Lutz says he was placed on June 3, 1997 (respondent's brief, unpaginated). Although a lesser gap, this time also could be important.

Counsel responded in writing and by telephone. After discussing the matter with counsel, I am satisfied that A.B. was placed on June 3, 1997 (see respondent's exhibit G) and T.J. was placed on May 13, 1997 (see respondent's exhibit A).

The sole issue to be determined is whether the named pupils were bona fide residents of the Board's district on the last school day prior to October 16 of the relevant year.

The Board argues that A.B. was first placed at the Camden/Lakeland Preparatory Facility on or about April 1, 1997. At that time, the custodial parent was his father, A.B., Sr., who resided at X. Street in a municipality that is within the petitioner's district. After the respondent notified the petitioner of the assignment of A.B. to the Board, on or about December 17, 1997, the petitioner indicated its rejection of the assignment. It provided information supplied by A.B.'s stepmother, J.C. Ms. J.C. indicated that prior to A.B.'s most recent placement, custody of him had been transferred to his mother, D.D., who resided with A.B. in Philadelphia.

On June 24, 1998, the Director of the Office of School Finance wrote to the Board's Superintendent indicating

> This is in response to your rejection of assignment of [A.B.] to your district in accordance with the provisions of the State Facilities Education Act of 1979. The Department of Law and Public Safety-JJC has indicated that the child was in the Camden/Lakeland preparatory facility as of April 15, 1997. His legal guardian, [A.K.B., Sr.] was a resident at [X Street, in a certain municipality] as of that date.
>
> In view of this information the assignment of [A.B.] to the Lower Camden County Regional High School District will stand for the

> 1998-99 school year. A district board of education desiring to appeal this determination may initiate a formal proceeding by filing a Petition of Appeal with the Commissioner pursuant to the provisions of *N.J.A.C.* 6:24-1.1 *et seq.*

The petitioner's Director of Security conducted an investigation. This was provided to the Department. In pertinent part, this report provides

> On August 4, 1997, [A.] appeared in Court in reference to Docket No. . . . . Various issues were addressed during that hearing. According to Mrs. [B.], [A.B.'s] stepmother, custody of [A.] was granted to his natural mother, [D.D.] and he was released to live with her at her residence located in Philadelphia, Pennsylvania. Mrs. [B.] indicated that Mrs. [D.] currently resides on [C.] Street in Philadelphia, but was not sure what street she lived on during the time custody was transferred. Mrs. [B.] said that [A.] has not lived with her and her husband since then.

Further investigation showed Mrs. D.D.'s exact address was N. Street, Philadelphia, Pennsylvania, on August 4, 1997.

An affidavit submitted by A.'s stepmother has also been supplied to the Department. Petitioner's exhibit D. In pertinent part, the affidavit provides

> 3. On August 4, 1997, there was a hearing before Judge Thomas A. Brown, Jr., at the Superior Court of New Jersey, Camden County. At this hearing, Judge Brown transferred custody of [A.B.] to his natural mother, [D.D.]. Ms. [D.D.'s] address is [N.] Street, Philadelphia, Pennsylvania.
>
> 4. Following the August 4, 1997 hearing, [A.B.] was replaced in the facility at Lakeland. On the date of this placement, [A.B.'s] custodial parent was [D.D.] and [A.B.] had lived with [D.D.] from the date of August 4, 1997.
>
> 5. After [A.B.] was replaced at Lakeland, he left that facility. Thereafter, on or about October 1, 1997 until a date late in February 1998 or early March 1998, [A.B.] was detained in the Camden County Jail. Thereafter, [A.B.] was sentenced to three years incarceration. [A.B.] has been in either

> Yardville State Prison or Trenton State Prison since that time. He is currently at Yardville.

The documentation the Board submitted to the Department confirms that A.B.'s custodial parent was D.D. on the date of his last placement in a State facility and that D.D. lives in Philadelphia. Despite receiving this information, the Department has remained unwilling to change the assignment of A.B.

The Department has conceded, in its response to interrogatories, the following

> 6. Describe the manner in which the Commissioner of Education, and those persons acting on his behalf, determines the district of residence for children pursuant to the obligations as set forth in *N.J.S.A.* 18A:7B-12.
>
> Answer - As the facts differ with each student, decisions are made on a case by case basis, based upon information provided to the respondent by the agency responsible for the student.
>
> 7. What action, if any, does the Commissioner of Education, and those persons acting on his behalf, take to ensure the residency of the children?
>
> Answer - See answer to No. 6.
>
> 8. Describe what action, if any, the Commissioner of Education, and those persons acting on his behalf, took with respect to the determination of the residency of [A.B.] and/or [A.B., Jr.], prior to his most recent admission to a State facility or most recent placement by a State Agency.
>
> Answer - The determination was based upon information provided by the agency that was responsible for the student. When the district rejected the determination, respondent requested additional information from the agency. The agency verified the address as stated previously, and respondent affirmed its determination that petitioner is responsible for the tuition.
>
> 9. What was the date of the most recent admission of [A.B.] to a State facility or most recent placement by a State agency?

Answer - Respondent has no knowledge whether A.B. has been placed by a State agency since the placement at issue.

14. Does the State admit that custody of [A.B.] was granted to his natural mother, [D.D.], on or about August 4, 1997?

Answer - No.

15. If the answer to the preceding interrogatory is in the negative, set forth all facts in support of the State's respondent.

Answer - Respondent has no knowledge regarding the allegation.

16. What investigation, if any, has the State performed to determine whether custody of [A.B.] was transferred to [D.D.] on or about August 4, 1997?

Answer - None.

17. Does the State admit that [A.B.] resided with [D.D.] from August 4, 1997 through December 1, 1997 in Philadelphia, Pennsylvania?

Answer - No.

18. If the answer to the preceding interrogatory is in the negative, set forth all facts in support of the State's response.

Answer - Respondent has no knowledge regarding this allegation.

19. What investigation, if any, did the State perform to determine whether [A.B.] resided with [D.D.] from August 4, 1997 through December 1, 1997?

Answer - None.

20. Has the Commissioner of Education, or someone acting on his behalf visited the [X Street], New Jersey, residence?

Answer - No.

Concerning T.J., the Board says he was placed at the Lakeland Preparatory Facility on June 17, 1997. At that time, his custodial parent was his mother, G.G., who resided at Y. Street in the municipality located within the Board's district. Subsequently, G.G. moved from that address to Z. Street, which is located in Gloucester Township. This is not within the Board's district. Information that G.G. moved from the Y. Street address was submitted to the Department, along with the Board's rejection of the assignment of T.J. dated December 17, 1997. Petitioner's exhibit F. On June 12, 1998, the Director of the Office of School Finance wrote to the Board's Superintendent, indicating

> Our office has been unsuccessful in its attempts to reassign T.J., a child who was in the Camden/Lakeland prep facility as of October 15, 1997. Since we are unable to determine the present address of the legal guardian, G.G., our determination will be based on the second criteria [*sic*] utilized in determining the district of residence (*N.J.S.A.* 18A:7B-12) which is the address of the parent or legal guardian at the time of initial placement.

Following receipt of that letter, the petitioner provided the Department with verification from Gloucester Township that G.G. is the owner of the property at Z. Street. The verification from Gloucester Township also indicated that children at the junior and senior high school levels attend the Black Horse Pike Regional School. Petitioner's exhibit H.

The Board also has provided the Department with a Complaint for Custody filed by T.J.'s maternal grandmother dated October 26, 1998. The Complaint indicates that, at that time, T.J. resided with his mother at the Z. Street address. The Board also provided the Department a copy of a student registration form completed by T.J.'s maternal grandmother on October 26, 1998 as she enrolled T.J. in the Lower Camden County district. The petitioner supplied the Department a copy of the student transfer card and a copy of T.J.'s student transcript from Highland Regional High School, which demonstrates that from the time that T.J. was released from the Lakeland facility until October 19, 1998, he was enrolled in the Highland Regional High School and that his address was the Z. Street address. Petitioner's exhibit I.

The Board also submits the Department's answers to interrogatories concerning T.J. They are virtually identical to the answers provided above as to A.B.

The Department asserts that A.B. was placed at the Camden/Lakeland facility on June 3, 1997. He was seventeen years old at the time. The Office of Education in the Juvenile Justice Commission requested that the Department determine which school district was financially responsible for A.B.'s education. The Office of Education submitted a form to the Department that identified D.D. as A.B.'s parent/guardian and noted that she resided at [a certain street] in a municipality within the Lower Camden County Regional District. Respondent's exhibit F.

The Department determined that the Board was the responsible district by virtue of the parent's residency in that particular municipality. Respondent's exhibit G.

The Board rejected the assignment. A district employee indicated that A.B.'s mother was his legal guardian. Because she was a resident of Philadelphia, the district was not responsible for A.B.'s tuition.

Because the Board rejected the assignment, the Department employee sought further information from the Office of Education. On January 28, 1998, an education program specialist with the Office of Education advised the Board that A.B. resided with his father in a municipality within the Board's district. As proof, she provided a document prepared for the Superior Court, Family Part in Camden County. According to the report, A.B. lived with his father at the particular address and in the particular municipality before his incarceration. Respondent's exhibit J. Because the evidence indicated the father resided in the particular municipality on October 15, 1997, the Department's Director of School Finance notified the district on June 24, 1998, that it remained financially responsible for A.B.'s education.

The Department argues similarly as to T.J. The Department asserts T.J. was placed in the Camden/Lakeland facility on May 13, 1997. At that time, he was not quite sixteen years old. In accordance with standard procedures, the Office of Education in the Juvenile Justice Commission, which is responsible for providing T.J. with education services, sought a determination from the Department concerning which school district would be responsible for the cost of education services. Respondent's exhibit A. The district of residence of the parent or legal guardian on October 15 is the district assigned financial responsibility for the individual. This is true even if

the pupil never attended the school in the district. The form prepared by the Office of Education and submitted to the Department identified G.G. as T.J.'s parent/legal guardian and gave her address in a municipality which is a constituent of the Regional District.

After reviewing the information, the Department assigned responsibility for T.J. to the Board. Respondent's exhibit A. Upon notification, the district rejected it. By memorandum to the district's Director of Special Education of December 17, 1997, the Director rejected the assignment because she could not verify that the mother resided at the stated address on October 15, 1997. Respondent's exhibit B.

A Department employee sought confirmation of the address from the Juvenile Justice Commission. By memorandum dated January 28, 1998, an education program specialist in the Office of Education confirmed that T.J.'s residence was in the Board's district. Respondent's exhibit C. As proof, she provided a copy of a Juvenile Pre-disposition Report. In the report, the intake office determined that T.J. was living with his mother, G.G., in the constituent municipality at the time of his disposition. Respondent's exhibit D.

The Director of the Office of School Finance again assigned T.J. to the district. He noted that because the Department was unable to determine the address of G.G. as of October 1, 1997, the assignment of residence would be based on the second criterion of *N.J.S.A.* 18A:7B-12. The address of the pupil on the date of the initial placement, which in this case was May 13, 1997, was used because the Office of Education document showed the mother was a resident of the constituent municipality on that date. Therefore, the district remained financial responsible for T.J. for the school year. Respondent's exhibit E.

The district, through its attorney, responded to the Director's letter and provided a copy of a letter dated July 23, 1998, from the Gloucester Township Tax Office. The letter indicated that G.G. owned a property in the township and the children living at that location attended the Black Horse Pike Regional School for secondary education. Respondent's exhibit F. The Department refused to accept this letter as proof that Lower Camden was not responsible for T.J.'s tuition. The letter did not prove that the mother resided at the particular address on

October 15, 1997. Any residency after that date has no effect for purposes of *N.J.S.A.* 18A:7B-12 for the year at issue. The district then filed the present petition.

The Board argues that although A.B. was placed at Lakeland on August 4, 1997, custody was transferred to his natural mother, D.D., a resident of Pennsylvania and he was released to his mother's custody. Following that date, A.B. was replaced at Lakeland and remained there until on or about August 1, 1997. Based on *N.J.S.A.* 18A:7B-12, the Commissioner of Education shall determine district residence as follows ". . . b. The district of residence for children who are in residential State facilities, shall be the present district of residence of the parent . . . with whom the child lived prior to his most recent admission to a State facility. . . ."

Because the parent's present district of residence can be determined, the second part of the statute is not relevant. Furthermore, based upon the applicable Administrative Code section, the Department is directed to determine "present district of residence" as the "district of residence of the child's parent(s) or guardian(s) as of the last school day prior to October 16."

It is unrefuted that on October 15, 1997, A.B.'s custodial parent, D.D., resided in Philadelphia. Further, it does not appear that A.B. was even placed at the Lakeland facility on October 15, 1997.

It is clear that the Department has failed to perform any investigation to determine the "present district of residence" of A.B.'s custodial parent as mandated by statute and regulation. Instead, the Department has relied on information supplied at the time of the original Disposition and placement at the Lakeland facility, dated April 1, 1997, when A.B.'s father was the custodial parent. The Department ignores the information supplied by the petitioner's investigator and the child's stepmother that A.B. was released from Lakeland on or before August 4, 1997, custody was transferred to D.D., and there was a more recent placement at Lakeland after custody was transferred. There was no investigation or any attempt whatsoever to confirm the information supplied by the Board's investigator and A.B.'s stepmother. The responses to the petitioner's interrogatories confirm that the Department has failed to investigate and determine the district of residence of A.B. as required by *N.J.S.A.* 18A:7B-12. The Board requests that A.B. be reassigned as required by the State Facilities Education Act of 1979.

As to T.J., the Department is charged with the same responsibility. It must determine the district of residence and that residence shall be "the present district of residence of the parent with whom the child lived prior to his most recent admission to a State facility. . . ." The second criterion (the district of residence shall be the district in which the child resided prior to such admission) should only be used when the present district of residence of the custodial parent cannot be determined. Through the petitioner's efforts, the Department has received information that confirms that G.G. moved from an address within the district to a Gloucester Township address and that she remained the custodial parent until at least October 26, 1998, the date that the maternal grandmother filed a custody complaint with the Superior Court of New Jersey. The Department made no attempt to determine the present residence of G.G. It is clear that the Department relies solely on the information supplied at the time of placement. The Department concedes, in its interrogatory answers, that it has no knowledge of G.G.'s address when T.J. was last placed in a State facility. It performed no investigation other than receiving information from the agency indicating that T.J. resided with his mother in a municipality within the district.

The statute requires that the Department determine the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission. Based upon the information supplied by the Board, G.G.'s present address is in Gloucester Township. Children at the high school level residing at this address attend a regional high school in the Black Horse Pike Regional School District. The Board requests that its appeal be affirmed and that T.J. be reassigned to the appropriate school district.

The Department counter-argues that the Board wrongly believes that because it could identify where T.J.'s parent lived in 1998, it has no responsibility for T.J. After-the-fact information is not relevant in determining the responsible district. Only the parent's residence on October 15 is significant. In this case, the Department was unable to determine the mother's residency on October 15, 1997. As the letter from the Department advised the Board, when the Department is unable to determine the parent's address as of October 15 of the year at issue, the statute compels the district in which the child resided prior to the initial placement to assume the obligation. Because the Department could not identify a residence for G.G. on October 15, 1997, it correctly relied on and applied the second part of the residency test. The Department concluded

that the mother lived within the petitioner's district at the time of the initial placement, May 13, 1997. The Board thus was responsible for T.J.

The Board has provided no documentation to counter the Department's finding that the juvenile lived with his mother within the district at the time of his initial placement.

A.B. was incarcerated in the Camden/Lakeland facility on October 15, 1997 because his name appears on the State facility's pupil count for that date. The Board's arguments concerning A.B. seem to be based on a misunderstanding of the operation of the statute and regulation. As in the T.J. matter, the Board misconstrues the phrase "present district of residence of the parent."

As the Department has already argued, the present district of residence of the parent is the New Jersey residence of the parent on October 15 of the school year in which the student is in a State facility. The Board alleges that A.B.'s mother was his custodial parent when he was placed in Lakeland Prep and that she resided in Philadelphia. If that is true, then she had no New Jersey district of residence on October 15. Thus, the Department was required to apply the second part of the statutory test, and determine the New Jersey district in which he resided at the time of the initial placement. It is undisputed that A.B. lived with his father within the Board's district at the time of his initial placement on June 3, 1997.

The Board insists the Department fails to recognize the proper burden of persuasion. The Department argues that the Board has the burden of proving its claims that the Department's determinations assigning responsibility for educational costs was wrong. The Department relies on a Tax Court decision to support the statement, "burden of proof is on the party asserting a claim." However, the case law indicates otherwise. The approach for the assignment of burdens of proof, producing evidence and persuasion are laid out in *Board of Education of the City of Atlantic City v. New Jersey Department of Education*, 92 *N.J.A.R.*2d (EDU) 545 (1992). In that matter, the burden was placed on the petitioner to show by a preponderance of the credible evidence that the respondent's determination was contrary to mandate or was arbitrary, capricious and unreasonable. The Board insists that the Department here acted contrary to the mandates established by the statute. It failed to attempt to determine the present districts of residence of the children's parents or guardians. The Department's determinations were based on the residences

of the respective parents on the date of placement, while ignoring the credible evidence the Board supplied that T.J.'s parent's residence changed and the custodial parent changed prior to the most recent placement in the A.B. matter. The credible evidence in the A.B. matter also shows that the child was not placed in a State facility on October 15, 1997. The respondent's actions therefore were arbitrary, capricious and unreasonable.

The Board further argues that when the Department received the Board's proofs, the burden should have shifted to the Department to demonstrate that its assignments were correct. In *J.E. on behalf of G.E. v. State*, 131 *N.J.* 552 (1993), the Supreme Court held

> We generally have imposed the burdens of persuasion and production on the party best able to satisfy those burdens. [citations omitted.] Our decisions have recognized that the party with greater expertise and access to relevant information should bear those evidentiary burdens. [citations omitted.] That result is particularly sound in less adversarial settings in which both parties maintain a common objective. In those circumstances, the goal of the parties is not so much to win as to reach the correct result.

With regard to T.J., the Department's brief indicates

> When, as in this case, the parent's residency is unknown on the date of the school census, the responsible district is the one in which the child resided at the time of its initial placement.

However, the Department cannot rely on its failure to ask the appropriate questions of the State facility and its failure to perform any investigation as a basis for concluding that the "parent's residency is unknown." *N.J.S.A.* 18A:7B-12 does not provide for the use of the second criterion because the parent's residency cannot be identified. Rather, the language provides for use of the second criterion when the district of residence cannot be determined. Clearly the intent of that clause is to provide for cases in which the parent's present location cannot be determined.

The Board has supplied sufficient information to the Department to allow the Department to perform the necessary investigation. Its failure to do anything with this information cannot be excused by its argument that the present residence of the parent cannot be identified and,

therefore, the information as of the time of the placement should be used. This would allow the Department to base its assignment on the residence as of the date of placement in every case and is not what the Legislature intended.

Concerning A.B., the Department has accepted the argument that there was a change in the custodial parent and that there was a subsequent placement, prior to October 15. However, the Department now argues that since the child's parent's present residence is not in New Jersey, the second criterion must be applied. In making this argument, the Department first concludes that an assignment must be made for the first placement of A.B. even though he was not placed on October 15, 1997. Because A.B. was not placed on this date, there should be no issue of assignment for this pupil to the Board or any other school district. *N.J.S.A.* 18A:7B-2 provides the statutory authorization for deductions from State aid for children in State facilities. Section a of that statute provides

> For each State-placed child who is a resident in a district and in a State facility on the last school day prior to October 16 of the prebudget year, and for each district-placed child who is a resident in a district and in a State facility on the last school day prior to October 16 of the budget year, the Commissioner of Education shall deduct from the State aid payable to that district an amount equal to the approved per pupil cost established pursuant to the provisions of section 24 of P.L. 1996, c. 138 (C. 18A:7F-24).

Thus, the statutory framework provides that if a pupil is not placed on the last school day prior to October 16, there should be no assignment. The unrefuted testimony of the Board's investigator and the testimony of the child's stepmother clearly show that from the time of October 1, 1997 through February 1998, A.B. was detained in the Camden County Jail. He was not in a State facility.

Further, *N.J.S.A.* 18A:7B-12 does not discuss the issue of determination of the present district of residence of the parent with whom the child lived prior to his first placement. Rather, the statute directs the Commissioner of Education to determine the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State

facility. The unrefuted testimony shows that A.B. was placed a second time after custody was granted to his mother and that placement is the "most recent placement" by a State agency.

The Department's argument inappropriately chooses to insert the words New Jersey into the legislative directive. If the respondent's argument were correct, it is clear that the statute would have specified that if a New Jersey district of residence cannot be located, then the second criterion would be applied.

The Department's failure to investigate cannot equate to an inability to determine any of these issues. The Board has come forward with information that provides the basis for its argument that both of these pupils were inappropriately assigned for the 1998-99 school year. The petitioner Board requests that these children be reassigned to the appropriate district of residence or to the State.

DETERMINATION

Burden of Persuasion

The Board misapprehends its burden. The Department receives official communications concerning placements from the Office of Education in the Juvenile Justice Commission. *N.J.A.C.* 6:20-5.3(b). That information carries a presumption of correctness. The presumption is rebuttable. This means that the party challenging the presumption must produce enough evidence that would support a finding of its nonexistence. Stated another way, once evidence tending to rebut the presumption is introduced, the presumption loses all its force.

In addition, an administrative agency's interpretation of its regulations is entitled to substantial weight. *Simon v. Board of Trustees,* 233 *N.J. Super.* 186, 195 (App. Div. 1989); *Petition of Adamar of New Jersey*, 222 *N.J. Super.* 464, 469 (App. Div. 1988).

The Department properly relied on the information it received from the Juvenile Justice Commission. If the Board wishes to challenge the accuracy or sufficiency of the information on which the Department relied, it is the Board that must do the digging and the production. This

judge knows of no requirement upon the Department to determine whether the information provided by the Juvenile Justice Commission is correct. As in virtually all other cases involving a statute or regulation of this type, the burden to show lack of accuracy or lack of sufficiency rests on the Board.

N.J.A.C. 6:2-5.3(b) clearly provides that "The Commissioner shall determine the 'present district of residence' or 'district of residence' referred to in *N.J.S.A.* 18A:7B-12(b) based upon the address submitted by the Department of Corrections or the Department of Human Services on forms prepared by the Department of Education."

A district contesting the determination of district residence must provide written notification that a dispute exists to the Assistant Commissioner, Division of Finance, within thirty days of receiving a final notice that a child has been determined to be a resident of the district. *N.J.A.C.* 6:20-5.3(d). The notice must include a written statement of the effort the district made to verify the Commissioner's determination, a written rationale for rejecting the determination, and any other information the district has obtained that might assist in redetermination of the district of residence. *Ibid.*

If, within ninety days of the written notification, the Assistant Commissioner cannot resolve the matter, a district may initiate a formal proceeding, as herein, before the Commissioner.

As in all administrative proceedings, the Uniform Administrative Procedure Rules, *N.J.A.C.* 1:1-1.1 through :21-18.1, provide hearsay evidence is admissible in the trial of contested cases. *N.J.A.C.* 1:1-15.5 provides that hearsay "shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability." Outrageous and improbable assertions will receive little weight. Evidence that responsible persons are accustomed to rely on in the course of important affairs or official business may be given equal weight with non-hearsay evidence, even if technically hearsay. *See, Weston v. State*, 60 *N.J.* 36 (1972).

Although hearsay is generally admissible even though no evidential rule exception is applicable, it is subject to the judge's overriding right to exclude it under *N.J.A.C.* 1:1-15.1(c). If

the probative value is slight, it is more likely that evidence may be ruled inadmissible under that rule. Many of the theories underlying exceptions to the hearsay rule relate to probative value. For example, declarations against interest are based on the theory that a person making such a statement would most likely be speaking the truth. Thus, it serves a party offering hearsay in an administrative proceeding to try to qualify the evidence under any exception that increases probative value.

Another reason hearsay exceptions are important is the residuum rule, *N.J.A.C.* 1:1-15.5(b). If evidence would be admissible in a court of law, the residuum rule does not come into play. The rule does apply to evidence that is inadmissible under court rules of evidence, but is allowed into evidence in an administrative hearing where the strict rules of evidence do not apply. Although hearsay evidence is admissible in an administrative hearing, the residuum rule requires that some legally competent evidence exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. Hearsay "may be employed to corroborate competent proof, or competent proof may be supported or given added probative value by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it." *Weston v. State,* at 51.

A.B.

I **FIND** that A.B. was placed in a State facility on April 1, 1997. At that time, he was in the custody of his father. The father lived within the district. However, custody changed on or about August 4, 1997, and was given to A.B.'s mother, D.D. In an affidavit dated January 27, 1999, the father's present wife certified that A.B. had not lived with his father and her since August 4, 1997. On or about October 1, 1997, A.B. was detained in the Camden County Jail. ~~In~~ February or March 1998, he was sentenced to three years' incarceration. He is currently in the correctional facility at Yardville.

T.J.

No affidavits are supplied concerning T.J. The assertions of the Board's investigator are contained in Exhibit F. I **FIND** that T.J. was placed in a State facility on June 17, 1997. He was in the custody of his mother, G.G., who lived in a constituent municipality at that time. However, G.G. moved at some time before late October 1997. A Board out-of-district child study team member was told by the present owner, who did not identify herself, that the previous owner, G.G., moved before the present owner took occupancy at the end of October 1997. G.G. moved to Gloucester Township. It is not possible on this record to say when she did so.

CONCLUSIONS AND ORDER

As in *Board of Education of the City of Atlantic City v. New Jersey Department of Education*, OAL Dkt. Nos. EDU 6179-91, 6176-91, 6251-91 and 6253-91 (May 27, 1992), adopted, Comm'r of Ed. (July 15, 1992), the Board in one case has met its burden of meeting the residuum rule through the affidavit, under oath, of A.B.'s stepmother. In the case of T.J., however, the evidence does not rise to that level and, in any event, is insufficient to determine G.G.'s residence as of October 15, 1997. In the first instance, A.B.'s stepmother would have little reason to misrepresent the facts. No responsibility would accrue to her or her husband if A.B. were still in the husband's custody and they continued to reside at an address within the district. In the second instance, there is no such reliable evidence and what was told to a Board agent by the present owner of a property within the district becomes double hearsay, without an exception.

N.J.S.A. 18A:7B-12 provides statutory guidance to the Commissioner for determining district of residence. At section b, the statute provides

> The district of residence for children who are in residential State facilities, or who have been placed by State agencies in group homes, private schools or out-of-State facilities, shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency.

> If this cannot be determined, the district of residence shall be the district in which the child resided prior to such admission or placement.

At section d, the statute provides

> If the district of residence cannot be determined according to the criteria contained herein, or if the criteria contained herein identify the district of residence outside of the State, the State shall assume fiscal responsibility for the tuition of the child.

The administrative code elaborates on the statutory scheme. *N.J.A.C.* 6:20-5.3(a) provides that the present district of residence referred to in section b of the statute shall mean the New Jersey district of residence of the child's parent(s) or guardian(s) as of the last school day prior to October 16. The rule further provides that the district of residence referred to in the second paragraph of section b shall mean the New Jersey district of residence in which the child resided with his or her legal guardian immediately prior to his or her initial admission to a State facility.

Further, *N.J.A.C.* 6:20-5.3(b) provides that, "The Commissioner shall determine the 'present district of residence' or 'district of residence' referred to in *N.J.S.A.* 18A:7B-12(b) based upon the address submitted by the Department of Corrections or the Department of Human Services on forms prepared by the Department of Education."

Present district of residence means the New Jersey district of residence of the child's parent or guardian as of the last school day prior to October 16. If this cannot be determined, the district of residence shall be the district in which the child resided prior to such admission or placement. In the case of A.B., the district of residence is sufficiently identified as Philadelphia. Because this is a district of residence outside of the State, the State shall assume fiscal responsibility for the tuition of the child. *N.J.S.A.* 18A:7B-12(d). In the case of T.J., the present district of residence cannot be determined. Therefore, the district of residence shall be in the district in which the child resided prior to admission or placement, namely, the Lower Camden County Regional High School District. *N.J.S.A.* 18A:7B-12(b).

The Department, having done what was required of it by statute and having not done anything not authorized by statute, has not acted arbitrarily, capriciously or unreasonably. And, earlier this year, it was held that it is not arbitrary, capricious or unreasonable for the Department to rely on Division of Youth and Family Services records. *State Operated School District of the City of Newark v. New Jersey Department of Education*, OAL Dkt. No. EDU 1370-98 (Dec. 16, 1998), adopted, Comm'r of Ed. (Mar. 22, 1999). The semantic twists suggested above notwithstanding, I **CONCLUDE** that the petitioner is successful as to A.B. and its motion to that effect is hereby **GRANTED** and the Department is successful as to T.J. and its motion to that effect is **GRANTED**.

Words should be given their ordinary meanings unless the context clearly indicates otherwise. In this case, not only are the words used in their ordinary senses, but the cited regulation also defines "present district of residence" and "district of residence." The regulation does not reach outside the boundaries created by *N.J.S.A.* 18A:7B-12. The context of the entire statute supports this interpretation.

In accord with the above, it is **ORDERED** that the summary motion of the Lower Camden County Regional High School District is **GRANTED** and it is hereby **DETERMINED** that the State shall assume fiscal responsibility for the tuition of A.B. In accord with the above, it is **ORDERED** that the summary motion of the State Department of Education is **GRANTED** and it is hereby **DETERMINED** that the Lower Camden County Regional High School District shall assume fiscal responsibility for the tuition of T.J.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is

otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 28, 1999
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

6-28-99
DATE

Debbie Antamasio/bp
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 30 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

ml

OAL DKT. NOS. EDU 8578-98 and EDU 8579-98 (Consolidated)
AGENCY DKT. NOS. 369-8/98 and 370-8/98

BOARD OF EDUCATION OF LOWER CAMDEN COUNTY REGIONAL SCHOOL DISTRICT NO. 1,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, DIVISION OF SCHOOL FINANCE,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision issued by the Office of Administrative Law have been reviewed. Respondent's exceptions were timely filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4, as was petitioner's reply thereto.

Respondent's exceptions urge that the Administrative Law Judge (ALJ) correctly found that the Department acted appropriately in assigning petitioner financial responsibility for T.J.'s education because it provided no evidence proving where his mother resided on October 15, 1997. Consequently, respondent asserts, the ALJ properly relied on the second prong of *N.J.A.C.* 6:20-5.3 (where the custodial parent resided at the time of the initial placement) to reach a determination regarding T.J. Petitioner's reply exceptions urge reversal of the ALJ's determination insofar as T.J. is concerned, maintaining, *inter alia,* that it has come forward with credible evidence to dispute respondent's determination to assign it fiscal responsibility for T.J.'s tuition and incorporates by reference those arguments set forth in

Petitioner's Memorandum in Support of Motion to Grant Petitioner's Appeal and its Reply Brief, which were considered by the ALJ.

As to A.B., respondent urges reversal of the ALJ's determination, maintaining that the fundamental flaw in the ALJ's analysis is that he missed a step in the test for determining financial responsibility, *i.e.*, the initial decision ends at the first prong of the test for residency when it should have applied both prongs. Consequently, respondent argues that the Commissioner must reject the ALJ's finding that the State is responsible for A.B.'s tuition because his mother lived in Philadelphia, contending that the correct analysis should be the following:

> 1. In applying the first prong of the test, because the mother's residency was in Philadelphia, there is no New Jersey district of residence responsible for the child.
>
> 2. As the regulation states, when the New Jersey district of residence cannot be determined, it is necessary to go to the second prong of the test, or the New Jersey district of residence at the time of the initial placement. This is the missing step in the court's analysis.
>
> 3. The district in which the parent resided when [A.B.] was initially placed was petitioner, so it is responsible for A.B.'s tuition. (Respondent's Exceptions at p. 3)

Respondent also reiterates its position that a custodial parent living out-of-state does not terminate the analysis for determining district of residence, arguing that the State becomes the guarantor of tuition only if there is no New Jersey district of residence at the time of the initial placement.

Petitioner's reply exceptions regarding A.B. urge that it is respondent who is misreading the initial decision, contending that the State's characterization that the ALJ "missed a step" is incorrect. Petitioner further maintains that it is clear on pages 14-15 and page 19 of

the initial decision that the ALJ squarely dealt with the arguments presented in respondent's exceptions. It argues that the State is erroneously equating the finding of a residence outside the State of New Jersey to be a finding that "the present district of residence" of the parent cannot be determined. However, in the instant matter the ALJ correctly determined that the district of residence for A.B. was sufficiently identified as Philadelphia; thus, based on *N.J.S.A.* 18A:7B-12(d), the ALJ concluded that the State had responsibility for A.B.'s tuition. Petitioner further argues:

> Moreover, as noted in the Commissioner's decision in *Board of Education of the City of Wildwood, Cape May County v. New Jersey State Department of Education*, [decided December 30, 1996, appeal pending State Board], if the Petitioner (Wildwood) had been better able to establish the child's mother's residence in the State of Florida on October 15 [of the year in dispute], then the State would have been responsible for the educational costs of the child pursuant to *N.J.S.A.* 18A:7B-12(d). In the instant matter, based upon this section of the statute, the ALJ ruled that the State is to be responsible for the educational costs for A.B. As argued by Petitioner [herein] and as adopted by the ALJ in his opinion, "the Department's argument inappropriately chooses to insert the words New Jersey into the legislative directive." (Petitioner's Reply at pp. 2-3)

Upon review of the record, the Commissioner agrees with and adopts the ALJ's recommended decision granting summary decision to respondent as the controversy pertains to T.J. for the reasons set forth in the initial decision. As to A.B., the Commissioner determines, notwithstanding respondent's arguments otherwise, that the ALJ appropriately found *N.J.S.A.* 18A:7B-12(d) to be controlling because the custodial parent for A.B. on October 15, 1997 was his mother, who resided in Philadelphia. Consequently, the ALJ was correct in determining that, under the circumstances set forth in this matter, the State has fiscal responsibility for A.B. *N.J.S.A.* 18A:7B-12 states in pertinent part:

> For school funding purposes, the Commissioner of Education shall determine district of residence as follows:
>
> ***
>
> b. The district of residence for children who are in residential State facilities*** shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency.
>
> If this cannot be determined, the district of residence shall be the district in which the child resided prior to such admission or placement.
>
> ***
>
> d. If the district of residence cannot be determined according to the criteria contained herein, *or if the criteria contained herein identify a district of residence outside of the State, the State shall assume fiscal responsibility for the tuition of the child.*** (emphasis supplied)

As correctly stated by the ALJ on page 20 of the initial decision, "[w]ords should be given their ordinary meanings unless the context clearly indicates otherwise." Upon review of the pertinent statutes and regulations, the Commissioner finds and concludes that the wording of *N.J.S.A.* 18A:7B-12 is plain in its meaning that the State has fiscal responsibility for the tuition of a student placed in a State Facility when the district of residence is identified to be outside of New Jersey. Respondent's arguments to the contrary are deemed unpersuasive. Moreover, petitioner's reliance on *Wildwood*, *supra,* to bolster its position in the instant matter has merit. Although the factual circumstances in the *Wildwood* matter differ from those herein, the holding of the Commissioner in that matter is consistent with the findings and conclusions of the ALJ and the Commissioner in the instant matter. The decision in *Wildwood* states:

> [T]he Commissioner cannot confidently rely on the record as it stands to determine, with any degree of certainty, that V.M. resided in Florida on October 15, 1993, so as to absolve the Board***

from responsibility for tuition payments in this matter. (Slip Opinion at p.11)

Accordingly, the initial decision which orders that financial responsibility rests with petitioner for T.J. and with the State for A.B., is adopted for the reasons set forth therein.*

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

August 13, 1999
Date of Mailing, August 13, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

267-99

M.N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DUMONT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner filed a petition inquiring: (1) whether the school is under a duty to notify the parents/guardians or include them in a meeting regarding the questioning of students; (2) whether the school and/or guidance counselor is under a duty to disclose to the parents discussions between the school counselor and the student regarding potentially dangerous situations; and (3) whether a school is allowed to destroy student files without parents' consent.

At the OAL the respondent Board moved for summary decision and dismissal. After concluding that circumstances warranted relaxation of the 90-day rule for filing a petition, the ALJ determined that the decision of the building administrator to question E.N. outside the presence of his parents was not unreasonable or an abuse of his discretion. In addition, the ALJ concluded that the school counselor who met with E.N. had a duty to inform petitioner that E.N. was or may have been contemplating suicide. Finally, the ALJ found that the Board destroyed E.N.'s school records in violation of *N.J.A.C.* 6:3-6.8(c)2.

The Commissioner modified the initial decision as follows. The Commissioner concurred with the ALJ's decision to relax the 90-day filing limitation and conclusion that there is no general requirement in either statute or regulation which obligates a local administrator to notify the parent or guardian of a student prior to questioning that student regarding a disciplinary incident. The Commissioner held that a local board may *not* destroy, without parents' consent, mandated pupil records during the time of the student's enrollment, or any pupil records existing at the time of the student's graduation or permanent departure from the district. He noted, however, that the board *may* destroy, with no prior notice, permitted records during the time of the pupil's enrollment consistent with the requirements of N.J.A.C. 6:3-6.2(i). The Commissioner further concluded that the factual record of the instant matter did not permit a determination of whether E.N.'s records were destroyed subsequent to his permanent departure from school or not, but that determination is unnecessary to provide the declaration sought by petitioner. Finally, notwithstanding the ALJ's analysis, the Commissioner determined that he is without the legal authority to render a determination as to a counselor's duty of care.

August 13, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION AND
ORDER ON SUMMARY DECISION
OAL DKT. NO. EDU 11658-98
AGENCY DKT. NO. 467-10/98

M.N.,

Petitioner,

v.

BOARD OF EDUCATION OF THE
BOROUGH OF DUMONT, BERGEN COUNTY,

Respondent.

M.N., *pro se*

Sidney A. Sayovitz, for respondent (Schenck, Price, Smith and King, attorneys)

Record Closed: June 23, 1999 Decided: June 23, 1999

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

Petitioner, M.N., filed a petition before the Commissioner of Education seeking a declaratory ruling. Specifically, petitioner seeks the Commissioner's ruling on the following issues: whether the school is under a duty to notify the parents/guardians or include them in a meeting regarding the questioning of the student; whether the school and/or the guidance counselor is under a duty to

disclose to the parents discussions between the school counselor and the student regarding the student's suicidal tendencies; and whether the Board acted appropriately when it destroyed the pupil records of petitioner's son, E.N.

On December 17, 1998, the matter was transmitted to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. Respondent moved for summary decision and dismissal.

UNDISPUTED FACTS

The Board has accepted as true for purposes of its Motion for Summary Decision petitioner's factual allegations. (Respondent's Motion at 1-2). Therefore, based on the petition and moving papers including the uncontroverted facts I **FIND** as **FACT**:

On June 4, 1997, Mr. Konigsberg, vice principal of Dumont High School, questioned petitioner's 16 year-old son, E.N., about money missing from school vending machines.[1] Konigsberg informed E.N. that if a satisfactory explanation was not forthcoming the police would be called to investigate the matter.[2] After the meeting, E.N. attended his last class, but he left the class early to search for his friend, N.H., who was in another class. E.N. found N.H. and told him what had transpired earlier in Konigsberg's office. Also, E.N. told N.H. "that he would rather throw himself in front of the train than face the shame." Petition at 1. Then, E.N. left the school. N.H. reported E.N.'s threat to Konigsberg, who called E.N.'s house at approximately 3:15 p.m. Konigsberg reached petitioner at her

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[1] E.N. "was accused, without proofs, of stealing money from the soda machines that he was filling." Petition at 1.

[2] "Mr. Konigsberg gave [E.N.] until three o'clock to admit it, or else the police will be called." *Ibid.*

place of employment, and he "stressed that [E.N.] had stolen money and should be punished." *Ibid.* Konigsberg did not inform petitioner of E.N.'s "state of mind" or the discussions between N.H. and Konigsberg. Soon after leaving the school that day, E.N. carried out his threat and threw himself in front of a train, which resulted in his death.

After E.N.'s death, petitioner discovered that E.N. had had several conversations with the high school guidance counselor. He had been provided with brochures dealing with suicide and cards containing telephone numbers. However, the counselor had not contacted E.N.'s parents or reported the problem to other school officials. Also, petitioner learned that about two weeks prior to E.N.'s suicide, he and other classmates had watched a movie in their health class "dealing with suicide on the railroad tracks."

Approximately one year after E.N.'s death, petitioner wrote a letter to the school counselor to obtain information pertaining to E.N. In particular, petitioner asked the counselor to release all of E.N.'s records to her and to explain why she had not been contacted or informed of his problems. The superintendent of Dumont Public Schools responded by instructing petitioner to forward all inquiries to the legal department of the school's insurance carrier because of the Notice of Tort Claim that had been received by the Board. Further, petitioner requested E.N.'s file from the school and was provided with his grades and SAT results. She was informed that all other documents had been destroyed in accordance with the school's standard procedure.

Petitioner describes the relief sought:

> Mr. Commissioner, I would like you to determine if the school is allowed to question minors without parents' consent and force them to admit their mistakes, if the school is allowed to destroy students' files without parents' consent, if the school counselor is allowed to keep from parents a potentially dangerous situation

> and a minor's state of mind. I would like to make sure that nothing like what happened to my son would happen to anyone.
>
> [Petition at 2.]

DISCUSSION

Summary Decision

Pursuant to *N.J.A.C.* 1:1-12.5(b), summary decision is appropriate

> if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.

Summary decision in administrative proceedings parallels summary judgment in the courts. Summary judgment is

> designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at a trial.
>
> [*Judson v. Peoples Bank and Trust Company of Westfield*, 17 *N.J.* 67, 74 (1954).]

In administrative proceedings, as in the courts, it is "the movant's burden to exclude any reasonable doubt as to the existence of any genuine issue of material fact." *Id.* at 74. Thus, "[a]ll inferences of doubt are drawn against the movant in favor of the opponent of the motion. The papers supporting the motion are closely scrutinized and the opposing papers indulgently treated." *Id.* at 75.

The New Jersey Supreme Court in *Brill v. Guardian Life Insurance Co.*, 142 *N.J.* 520, 539-40 (1995), applied the summary judgment standard employed

by the federal courts. Under *Brill*, once the movant has presented competent evidence tending to show the absence of any genuine issue for trial, the nonmovant must do more than simply create some doubts as to the material facts. Moreover, the nonmoving party cannot rely on disputed issues of fact that are insubstantial. Rather, *Brill* requires the nonmovant to raise a factual issue substantial enough to sustain a reasonable conclusion in the nonmovant's favor if a hearing were held. If the evidence, along with reasonable inferences, could sustain a judgment in favor of the nonmovant the motion must be denied.

Since the underlying facts are not in dispute, I **CONCLUDE** that this matter is ripe for summary decision.

Declaratory Ruling

The Administrative Procedure Act permits an agency to make a declaratory ruling. *N.J.S.A.* 52:14B-8. Specifically, *N.J.A.C.* 6:24-2.1 provides:

> Pursuant to N.J.S.A. 52:14B-8, any interested person(s) may petition the Commissioner for a declaratory ruling with respect to the applicability to any person, property or state of facts of any statute or regulation enforced or administered by the Commissioner. The determination to entertain such petitions for declaratory judgments shall be within the sole discretion of the Commissioner. If upon receipt and review of the answer such request is granted, the matter shall proceed in accordance with these regulations as they pertain to petitions. A declaratory judgment shall be binding upon the Commissioner and all parties to the proceedings on the specific statement of facts set forth therein.

The regulation explicitly grants the Commissioner of Education authority to render declaratory rulings. The Office of Administrative Law, an administrative agency designated to hear disputes transmitted from other agencies, derives its jurisdiction from the transmitting agency. *N.J.A.C.* 1:1-14.6(h). Therefore, the Commissioner's jurisdiction to make declaratory rulings is transferred to the administrative law judge (ALJ). *Ibid.*

Whether to issue a declaratory ruling is a matter of judicial discretion. *Utility Blade & Razor Co. v. Donovan*, 33 *N.J. Super.* 566 (App. Div. 1955). In *Ridgewood Education Association v. Board of Education of the Village of Ridgewood*, 94 *N.J.A.R.*2d (EDU) 137, *reversed on other grounds*, 284 *N.J. Super.* 427 (App. Div. 1995), the ALJ determined that a declaratory ruling was appropriate under the circumstances of the case. To warrant a declaratory ruling, a justiciable controversy between adverse parties must exist. *Bress v. L. F. Dommerich & Co., Inc.*, 94 *N.J. Super.* 282 (App. Div. 1967); *Unsatisfied Claim and Judgment Fund Bd. v. Concord Ins. Co.*, 110 *N.J. Super.* 191 (Law Div. 1970); 37 *New Jersey Practice*, *Administrative Law and Practice* § 83 (Steven L. Lefelt) (1988). The controversy must be real, not a hypothetical or speculative controversy. *Unsatisfied Claim and Judgment Fund Bd., supra*, 110 *N.J. Super.* at 196. The declaration sought should serve a tranquilizing function to help terminate the controversy between the parties. *Id.* at 196-97.

I **CONCLUDE** that the issues presented in this matter pose a true controversy; they are not hypothetical or speculative. Petitioner raises factual allegations regarding the impropriety of the Board's conduct. In opposition, the Board avers that it acted appropriately. The parties are adversaries. A controversy exists where a tribunal is asked to consider the propriety of a school board's action when such action or inaction may have caused injury to a party. Further, a declaratory ruling would terminate the controversy between petitioner and the Board.

Accordingly, I **CONCLUDE** that it is an appropriate exercise of judicial discretion to render a declaratory ruling in this matter.

The 90-Day Rule

The Board avers that petitioner's action should be dismissed because it was filed beyond the period established for filing actions arising under the school laws. (Respondent's Motion at 2.) This provision, commonly referred to as the "90-day rule," *N.J.A.C.* 6:24-1.2(c), provides that:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

I have considered the timeline of events and the facts to determine if petitioner timely filed the petition under *N.J.A.C.* 6:24-1.2(c). I reject petitioner's position that the notice requirement, *N.J.A.C.* 6:24-1.2(c), was satisfied because she filed a Notice of Claim upon the Board within 90 days of E.N.'s death and that her original petition was sent within 90 days of her receipt of a letter which she believed was a Notice of Final Order. Petitioner relies on a letter dated June 24, 1998, from Thomas W. Roberts, the superintendent of schools. The letter acknowledges petitioner's request for records and instructs her to submit future inquiries to the legal department of the insurance carrier. Petitioner asserts that this letter was the Notice of Final Order. Thus, she avers that the original petition, sent to the Commissioner on September 15, 1998, satisfied the 90-day rule.

The transmittal file reflects that on September 22, 1998, the Commissioner acknowledged a letter from petitioner dated September 15, 1998. Further, the Commissioner advised petitioner that "in order to appeal a local school board's decision before the Commissioner of Education, an interested party may file a Petition of Appeal in accordance with *N.J.A.C.* 6:24-1.2 and 6:24-1.3."

Based on the evidence, I **CONCLUDE** that the petition was filed on October 19, 1998, after the expiration of the 90-day period.

I have considered carefully whether the circumstances warrant a relaxation of the 90-day rule. The Commissioner is authorized to relax the 90-day rule. *N.J.A.C.* 6:24-1.15 provides as follows:

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

Although the statute of limitations set forth in *N.J.A.C.* 6:24-1.2(c) is to be strictly applied, the 90-day rule may be relaxed under exceptional circumstances or if there is a "compelling" reason. The authority to relax or waive the 90-day rule is invoked only where strict adherence would be inappropriate, unnecessary or where injustice would occur. *DeMaio v. Board of Educ. of New Providence*, 96 *N.J.A.R.*2d (EDU) 449, 453, citing *Gordon v. Passaic Board of Educ.*, 1985 *S.L.D.* 1929, 1931-32; *see also Shokey v. Board of Educ. of Cinnaminson*, 1978 *S.L.D.* 919 (Commissioner held that dismissing a petition for untimeliness would result in injustice inasmuch as it would place form over substance). Further, the 90-day rule may be relaxed "where a matter of significant public interest is involved." *Bey v. Board of Educ. of Newark*, 93 *N.J.A.R.*2d (EDU) 288, 294; see *Bogart v. East Orange Bd. of Educ.*, OAL Dkt. No. EDU 6245-82 (January 26, 1983), *adopted*, Comm'r of Educ. (March 14, 1983). Indeed, in *Bey*, the Commissioner adopted an ALJ's conclusion that because the issue involved the possible mishandling of public school funds, it was of sufficient public interest to relax the 90-day rule. 93 *N.J.A.R.*2d (EDU) at 294.

I **CONCLUDE** that the issues involved in this matter are of significant public interest. The propriety of a school board's actions when confronted with students who suffer from emotional and mental problems and have sensitive states of mind is of utmost concern not only to the students' parents, but to society in general. Petitioner attempted to obtain answers to her questions regarding E.N.'s suicide immediately following his death. She communicated verbally and in writing with local and state school officials. When her questions were unanswered, she wrote a letter to the Governor of New Jersey. Petitioner did not sleep on her rights. To dismiss her petition as untimely would result in an injustice. Further, the public policy considerations behind the 90-day rule are unaffected because petitioner is not seeking a monetary award. Petitoner merely seeks whether "the school counselor is allowed to keep from parents a potentially dangerous situation and a minor's state of mind. I would like to make sure that nothing like what happened to my son would happen to anyone". Petition at 2. *See Kaprow v. Board of Educ. of Berkeley*, 131 *N.J.* 572, 582 (1993) ("The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days. Moreover, because local school boards operate on a cash basis, claims must be filed promptly so that the local board can anticipate any back-pay requirements.")

I **CONCLUDE** that the circumstances warrant relaxation of the 90-day rule under *N.J.A.C.* 6:24-1.15.

Pupil Questioning

Petitioner asserts that E.N. was questioned by the vice principal regarding missing funds from school vending machines. She challenges the propriety of such action since she was not notified about the questioning or present when it occurred.

The Board asserts that in the routine administration of school affairs, students may be questioned without first seeking the consent of the parents. The Board submits that the building administrator performed his job responsibly and exercised reasonable discretion when he questioned E.N. about the missing funds and advised him that the police would be called if a satisfactory explanation was not forthcoming.

I agree with the Board. School authorities were not required to inform petitioner that E.N. was going to be questioned regarding the missing money. School administrators maintain wide discretion in ascertaining whether a particular situation warrants the presence of a pupil's parent. Such discretion, however, is not unbounded. When questioning students about matters that could result in serious disciplinary measures being imposed against them, school administrators must exercise sound judgment in deciding whether to call the parents. Once the determination has been made to sanction a pupil, notification to the parents is premised on the severity of the discipline sought to be imposed.

For example, *N.J.S.A.* 18A:37-2 to -12 expressly provides the right to a hearing for a student removed from the school system on a charge of assault on a teacher, administrator or other school employee, or because the student is adjudicated delinquent for possession of a firearm or charged with knowingly possessing a firearm on school property. Moreover, the courts have held that a student facing expulsion or suspension from school for other disciplinary reasons is entitled to due process requirements pursuant to the United States Constitution, *i.e.*, notice of the charges against him and a fair opportunity to be heard. *Goss v. Lopez*, 419 *U.S.* 565, 95 *S. Ct.* 729, 42 *L. Ed.* 2d 725 (1975); *see St. John Dixon v. Alabama State Bd. of Educ.*, 294 *F.*2d 150 (5th Cir.), *cert. denied*, 368 *U.S.* 930, 82 *S. Ct.* 368, 7 *L. Ed.* 2d 193 (1961); *R.R. v. Board of*

Educ. of the Shore Regional High Sch. Dist., 109 *N.J. Super.* 337 (Ch. Div. 1970); *G.F. v. Board of Educ. of Washington Township*, 1 *N.J.A.R.* 55 (Department of Education 1979); *Scher v. Board of Educ. of the Borough of West Orange*, 1968 *S.L.D.* 92; *see also C.F. v. Board of Educ. of the City of Wildwood*, 96 *N.J.A.R.*2d (EDU) 619 (order to reinstate a student who was suspended without being noticed of the charges against her or a timely hearing).

In the routine administration of schools, officials may question students regarding academic and non-academic school-related occurrences. To require school administrators to question students exclusively in the presence of their parents would impose an onerous burden upon school personnel. For example, in *F.H. v. North Warren Regional High School District*, 93 *N.J.A.R.*2d (EDU) 580, a student, G.H., was questioned outside the presence of his parents by the vice principal regarding charges of endangering the safety and welfare of other students and of hitting a teacher. Thereafter, the vice principal called the parents and informed them that G.H. would be subject to discipline and asked them to meet him the next day for a conference. School officials then disciplined G.H. by suspending him for nine days. The parents appealed the suspension, alleging that G.H.'s due process rights were violated. The ALJ concluded that "the entire school matter was properly handled by school administration and that G.H. was fully accorded his due process rights to be given notice of charges against him, to know evidence of involvement and to have opportunity to explain it." 93 *N.J.A.R.*2d (EDU) at 584. The Commissioner adopted the Initial Decision of the ALJ.

Similarly, E.N. was questioned by the vice principal about a serious matter outside the presence of his parents. Thereafter, the vice principal called petitioner and informed her of the charges against E.N. I **CONCLUDE** that E.N.'s due process rights were not violated because he was provided the opportunity to present his version of the story and deny the charges against him.

I have also considered whether the vice principal should have notified E.N.'s parents before questioning him about the missing money. There was no obligation to first call the parent. However, given the severity of the charges against E.N., *e.g.*, theft of school property, the decision was within the discretion of the building administrator. The scope of review is whether the preponderance of the evidence establishes that the Board exercised its discretion unreasonably, arbitrarily, capriciously, or in bad faith. There is no evidence that the building administrator was aware of E.N.'s state of mind or his suicidal tendencies. Thus, there was no reason to treat the situation as anything other than the routine questioning of a pupil regarding a school matter. Indeed, the Board pointedly argues:

> During the course of every school day, pupils are questioned about various matters. . . . It would be an administrative nightmare to require that a board of education or school administrator first call a parent before a question is asked of a minor pupil. In the present circumstances, an administrator allegedly questioned a student about funds missing from vending machines. . . .
>
> When a school official has reason to believe that a student has engaged in activities which may be inappropriate or that a student has information about other students, a school official has the right and obligation to inquire of a student. It is simply impractical to require that a school administrator first call the parent before speaking to students. To impose special obligations upon school officials, whether *Miranda* type warnings or otherwise, puts officials in the position of being second-guessed, at any time, and of being hesitant to do their job.
>
> [Respondent's Motion at 3-4.]

Based on the whole of the evidence, I **CONCLUDE** that the decision of the building administrator to question E.N. outside the presence of his parents was not unreasonable or an abuse of his discretion.

School Counselor's Duty to Disclose Suicidal Tendencies of the Student

The crux of petitioner's claim is that school officials improperly failed to inform her of E.N.'s suicidal tendencies. Petitioner asserts that the omission resulted in her inability to obtain and provide E.N. with appropriate counseling for his mental problems.

Based on the foregoing conclusions, I reject the Board's argument that a declaratory ruling is inappropriate regarding the duty of school officials to notify parents of a minor's state of mind or a dangerous situation.

Guidance counselors advise students regarding choices relating to educational, vocational, social and personal planning. Moreover, school counselors identify students with social and emotional problems. *See Edison Township Educ. Ass'n v. Board of Educ. of the Township of Edison*, 94 *N.J.A.R.*2d (EDU) 301, 302, *aff'd*, 94 *N.J.A.R.*2d (EDU) 592, *aff'd*, 96 *N.J.A.R.*2d (EDU) 463. Guidance counselors can be the persuasive voice in a student's decisions about matters of importance. Thus, they are in a position to mold students' attitudes. Indeed, counselors hold positions of public trust. *See In re Tenure Hearing of Marrero*, 97 *N.J.A.R.*2d (EDU) 104, 108, *aff'd*, 97 *N.J.A.R.*2d (EDU) 319.

There is a recognized privilege between the substance-abuse guidance counselor and the student. *In re L.P.*, 250 *N.J. Super.* 103 (Ch. Div. 1991). Moreover, *N.J.A.C.* 6:29-6.3(b)(2) requires that schools comply with federal guidelines of confidentiality requirements. *Ibid.* Further, a psychologist-patient privilege is recognized in *N.J.S.A.* 45:14B-28. *Kinsella v. Kinsella*, 150 *N.J.* 276 (1997). However, the court will pierce the psychologist-patient privilege under a "best-interest-of-the-child" analysis. *Fitzgibbon v. Fitzgibbon*, 197 *N.J. Super.* 63

(Ch. Div. 1984). In *Fitzgibbon*, the court noted that the paramount concern is the preservation and protection of a child's welfare. *Id.* at 67-68.

Similarly, confidential communications between a school counselor and a pupil will be disclosed if disclosure is in the best interest of the student. Indeed, the Dumont Public Schools policy manual provides as follows:

> [T]he counselors enter into professional relationships with three segments of the school community; students, school personnel, and parents or guardians. . . . [T]he counseling relationship is, in most instances, confidential, . . . it may have to be violated in the best interests of the student.
>
> [Petitioner's Brief at 3.]

Under its own policy, Dumont acknowledges that the safety of children may require counselors to disclose their confidential communications with students if disclosure is in the students' best interest.

Based on the evidence presented, I **CONCLUDE** that the school counselor who met with E.N. had a duty to inform petitioner that E.N. was or may have been contemplating suicide. I **CONCLUDE** that the omission was improper even if prompted by confidentiality considerations. Although there is no recognized guidance counselor-student privilege, where a privilege does exist, the breach of confidentiality is permitted when done in the best interest of the student.

Pupil Records

Petitioner seeks a ruling on whether a school board may destroy pupil records without obtaining parental approval. Petitioner maintains that the Board destroyed E.N.'s school records absent her knowledge or consent.

Since the Board has accepted petitioner's factual allegations for purposes of its motion, it concedes that the Board destroyed E.N.'s files. However, the Board argues that its action was appropriate pursuant to *N.J.A.C.* 6:3-6.2(i). (Respondent's Motion at 4-5.) The regulation provides that certified school personnel will perform an annual review of pupil records to determine the educational relevance of the materials and will delete information that no longer describes the pupil or the educational situation. Prior notice must be given for classified students. *N.J.A.C.* 6:28.[3] Thus, the Board submits that because E.N. was not a classified student, it was not required to provide notice to his parents of its intent to destroy his school records. (Respondent's Motion at 5.)

Petitioner counters that *N.J.A.C.* 6:3-6.8(c)(2) controls, not *N.J.A.C.* 6:3-6.2(i). *N.J.A.C.* 6:3-6.8(c)2 provides:

> (c) Upon graduation or permanent departure of a pupil from the school system: . . .
>
> 2. Information in pupil records, other than that described in (e) below, may be destroyed but only in accordance with the Destruction of Public Records Law, N.J.S.A. 47:3-15 et seq. Such destruction shall be accomplished only after written parental or adult pupil notification and written parental or adult pupil permission has been granted, or after reasonable attempts at such notification and reasonable attempts to secure parental or adult pupil permission have been unsuccessful.

Petitioner correctly invokes the controlling regulation. *N.J.A.C.* 6:3-6.2(i), on which the Board relies, authorizes the deletion of materials that are deemed irrelevant for the education purposes of *currently enrolled pupils*. *N.J.A.C.* 6:3-6.8(c)(2) authorizes the destruction of pupil records upon *permanent departure of a pupil from the school system*. E.N. was no longer enrolled in the Dumont public high school at the time his records were destroyed; he had permanently departed from the school system.

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[3] Chapter 28, Special Education, was repealed by *R.*1998, *d.*334, effective July 6, 1998. The rule was changed to *N.J.A.C.* 6A:14.

I **CONCLUDE** that *N.J.A.C.* 6:3-6.8(c)(2) applies. The destruction of E.N.'s records should have been performed only after the Board notified petitioner in writing and after her permission was obtained in writing. The Board failed to abide by these requirements. Thus, I **CONCLUDE** that the Board improperly destroyed E.N.'s records and violated *N.J.A.C.* 6:3-6.8(c)(2).

CONCLUSIONS

I **CONCLUDE** that this matter is ripe for summary decision since issues of material fact do not exist.

I **CONCLUDE** that a declaratory ruling may be issued pursuant to *N.J.A.C.* 6:24-2.1.

I **CONCLUDE** that the decision of the vice principal to not call petitioner prior to questioning E.N. about the missing funds did not violate statutes or regulations and did not constitute an abuse of his discretion.

I **CONCLUDE** that school administrators/personnel had a duty to disclose E.N.'s mental state and his suicidal tendencies to petitioner.

I **CONCLUDE** that E.N.'s school records were destroyed in violation of *N.J.A.C.* 6:3-6.8(c)(2).

ORDER

It is **ORDERED** that the motion for summary decision filed by the Board of Education of the Borough of Dumont on the issue of pupil questioning is **GRANTED**.

It is further **ORDERED** that the motion for summary decision filed by the Board of Education of the Borough of Dumont on the remaining issues is **DENIED**.

The foregoing conclusions and orders have terminated the controversy between the parties. Therefore, it is hereby **ORDERED** that the petiton be **DISMISSED**.

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

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

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

June 23, 1999
DATE

Mumtaz Bari Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

6-30-99
DATE

Debbie Antanaitis/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 1 1999
DATE
LAW

Barbara A Hannah
OFFICE OF ADMINISTRATIVE

OAL DKT. NO. EDU 11658-98
AGENCY DKT. NO. 476-10/98

M.N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DUMONT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. The Board's exceptions and petitioner's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4.

The Board in its exceptions contends that: (1) the Administrative Law Judge (ALJ) erroneously concluded that relaxation of the 90-day time limit for filing a petition was warranted; (2) the ALJ failed to address the issue of whether the Commissioner has the subject matter jurisdiction to adjudicate petitioner's claim of negligence; (3) the ALJ improperly ruled on the merits of the issue that the Board failed to disclose to the parents that E.N. was, or may have been, contemplating suicide, since the Board did not admit these facts, did not move for summary decision on this issue, and received no hearing with respect to petitioner's allegations; and (4) the ALJ erroneously concluded that *N.J.A.C.* 6:3-6.8(c)2 applies to the circumstances of this case.

In reply, petitioner affirms that her petition should not be deemed untimely, since she filed her notice of tort claim within the requisite 90-day period and was also "denied access to the NJ School codes" by the Board, thereby, presumably, thwarting her attempts to determine her rights and duties. (Petitioner's Reply at p. 2) Moreover, petitioner claims that the Board had the opportunity, contrary to its assertion, to develop an evidentiary record in connection with the issue pertaining to a counselor's duties. In this regard, petitioner maintains that she knew E.N.'s record contained information about his meetings with his middle school counselor. "I assumed," petitioner continues, "that the High School counselor would pick up where Mrs. Bowan left off. Even if these informations [sic] were not descriptive of [E.'s] educational situation, they were descriptive of his mental state and should not have been destroyed at any time." (*Id.* at p. 3)

Upon careful and independent review of the record in this matter, the Commissioner determines to modify the initial decision of the ALJ, for the reasons set forth below. Preliminarily, although the Commissioner concurs with the ALJ that the petition herein is untimely, he determines to relax the 90-day filing limitation because he finds the within circumstances to be sufficiently compelling and extraordinary.[1] *N.J.A.C.* 6:24-1.15.

For the reasons set forth in the initial decision, the Commissioner first affirms there is no general requirement in either statute or regulation which would obligate a local administrator to notify the parent or guardian of a student prior to questioning that student regarding a disciplinary incident.

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[1] In so determining, the Commissioner notes that there is no indication on the record before him what contact, if any, petitioner may have had with "state school officials" *prior* to her letter to the Governor. (Initial Decision at p. 9) However, once she communicated with Governor Whitman, petitioner's (undated) letter was transmitted to the Department of Education for review and response. The Assistant Commissioner of the Division of Executive Services responded to petitioner by letter dated August 5, 1998. Petitioner's second letter, dated August 26, 1998, was addressed directly to the Assistant Commissioner, which letter was answered by him on September 1, 1998. Finally, petitioner wrote a third time, by letter dated September 15, 1998 addressed to the Commissioner, which letter specifically referenced a dispute with her local board and was, therefore, answered by the Director of the

Next, the Commissioner concurs with the ALJ that, *at the time of a student's graduation or permanent departure from a local district,* a board is obligated to notify, in writing, the student's parents, or the adult pupil, *and* obtain written parental or adult pupil permission *before* pupil records, other than those required to be kept by the district in perpetuity, may be destroyed, *N.J.A.C.* 6:3-6.8(c)2. *However*, as also recognized by the ALJ, this does not prevent a board from destroying pupil records prior to that time in accordance with *N.J.A.C.* 6:3-6.2(i) and N.J.A.C. 6:3-6.8(b). The former provides that mandated records may be destroyed once they are no longer educationally necessary, but only after parental consent has been obtained or reasonably attempted; the latter provides that, without prior notice except in the case of classified students, "the chief school administrator or his designee shall require all permitted pupil records of currently enrolled pupils to be reviewed annually by certified school personnel" and that records deemed no longer relevant shall be destroyed and not recorded elsewhere. The factual record in the instant matter does not enable the Commissioner to conclude, as did the ALJ, that the documents sought by M.N., assuming *arguendo* that they did, in fact, constitute permitted pupil records (clearly, they were not *mandatory* records), were destroyed subsequent to E.N.'s permanent departure from the district, rather than prior to it. However, that determination is unnecessary to provide the declaration sought by petitioner, i.e., an answer to the question of whether a district may destroy a student's file without parental consent.

Finally, notwithstanding the ALJ's analysis, the Commissioner finds and declares that petitioner's request for a determination as to whether "the school counselor is allowed to keep from parents a potentially dangerous situation and a minor's state of mind" (Petition of Appeal at p. 2) calls for an analysis of duties in relation to a body of law which is not within his

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Bureau of Controversies and Disputes, by letter dated September 22, 1998, with instructions on how to file a Petition of Appeal, to the extent petitioner presented a case which was justiciable before the Commissioner of Education.

jurisdiction, since it is "the Commissioner's 'primary responsibility*** to make certain that the terms and policies of the School Laws are being faithfully effectuated ***.'" (*Jenkins, et al. v. Tp. of Morris School Dist. and Bd. of Ed.*, 58 *N.J.* 483, 494 (1971) (citations omitted). *See also Picogna v. Board of Educ.*, 249 *N.J. Super.* 332, 335 (App. Div. 1991), *citing Board of Ed., E. Brunswick Tp. v. Township Council, E. Brunswick*, 48 *N.J.* 94, 102 (1966) for the proposition that "[w]here the controversy does not arise under school laws, it is outside the Commissioner's jurisdiction even though it may pertain to school personnel.") The Commissioner so finds, notwithstanding that the Board appears to have adopted a policy contemplating that it may be necessary for a counselor to set aside confidentiality considerations when it is in the best interest of a student.

Accordingly, in summary, the Commissioner declares in response to petitioner's inquiry that: (1) a school administrator may question minor students without parents' consent; (2) a local board may *not* destroy, without parents' consent, mandated pupil records during the time of the student's enrollment, or any pupil records existing at the time of the student's graduation or permanent departure from the district, but *may* destroy, with no prior notice, permitted records during the time of the pupil's enrollment consistent with the requirements of N.J.A.C. 6:3-6.2(i); and (3) the legal authority to render a determination as to a counselor's duty of care does not rest with the Commissioner of Education.[2]

ACTING COMMISSIONER OF EDUCATION

August 13, 1999
Date of Mailing, August 16, 1999

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

268-99

MILLSTONE TOWNSHIP EDUCATION ASSOCIATION AND IRENE PEARSON,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MILLSTONE TOWNSHIP, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

August 18, 1999

OAL DKT. NO. EDU 10755-98
AGENCY DKT. NO. 526-11/98

MILLSTONE TOWNSHIP EDUCATION ASSOCIATION AND IRENE PEARSON,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MILLSTONE TOWNSHIP, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

March 12, 1999

269-99

S.M., on behalf of minor children, J.M. and J.M.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

August 18, 1999

OAL DKT. NO. EDU 8660-98
AGENCY DKT. NO. 418-9/98

S.M., on behalf of minor children, J.M. and J.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

270-99

PATRICIA MASTERSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

August 18, 1999

OAL DKT. NO. EDU 8831-98
AGENCY DKT. NO. 376-8/98

PATRICIA MASTERSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

August 18, 1999
Date of Mailing, August 18, 1999

WESLEY M. SMITH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAZLET, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

August 18, 1999

OAL DKT. NO. EDU 53-99
AGENCY DKT. NO. 553-12/98

WESLEY M. SMITH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAZLET, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

August 18, 1999
Date of Mailing, August 18, 1999

IN THE MATTER OF THE TENURE	:	
HEARING OF ANTHONY WILLIAMS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
ATLANTIC CITY, ATLANTIC COUNTY.	:	
_____	:	

August 19,1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

FAILURE TO APPEAR

OAL DKT. NO. EDU 4793-98

AGENCY DKT. NO. 102-4/98

IN THE MATTER OF THE TENURE HEARING OF ANTHONY WILLIAMS, BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY.

George G. Frino, Esq., for petitioner, Board of Education of the City of Atlantic City

Ned P. Rogovoy, Esq., for respondent (Waltman, Reilly & Rogovoy, attorneys)

Record Closed: July 1, 1999 Decided: July 8, 1999

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter the Board of Education of the City of Atlantic City brought charges against a tenured custodian for misuse of school funds and official misconduct. The matter was transmitted to the Office of Administrative Law (OAL) on June 17, 1998, for hearing as a contested case. The matter was assigned to the undersigned Administrative Law Judge (ALJ) on July 2, 1998, and was scheduled for a telephone prehearing conference on August 26, 1998. The

telephone prehearing conference was adjourned because of the availability of the attorney for petitioner, and was rescheduled for September 9, 1998. The matter was then scheduled for hearing on June 30 and July 1, 1999.

By letter dated February 5, 1999, attorney for petitioner notified the undersigned ALJ that respondent had resigned his position and his resignation was accepted by the Board of Education, and it was indicated that there was no need for a hearing. However, attorney for petitioner was advised that it was necessary that a formal written withdrawal be submitted by the parties.

By letter dated June 28, 1999, attorney for respondent advised that unknown to him, respondent had tendered his resignation as an employee of the Atlantic City Board of Education and that he has been unable to reach respondent but indicated that his resignation made the tenure charges moot. However, in the absence of a formal withdrawal of the hearing request, the ALJ declined to adjourn the hearing.

On the first scheduled hearing date, June 30, 1999, respondent failed to appear. More than 24 hours have passed since the scheduled hearing date. During that period, the respondent has not contacted the OAL to offer any explanation for the nonappearance. Under these circumstances I **FIND** that respondent has abandoned and withdrawn his defense to the tenure charges in this matter, and it is **ORDERED** that the Clerk shall return the matter to the Department of Education as the transmitting agency for appropriate disposition.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 8, 1999
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

7/13/99
DATE

Debbie Antanaitis/sge
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 14 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 4793-98
AGENCY DKT. NO. 102-4/98

IN THE MATTER OF THE TENURE	:	
HEARING OF ANTHONY WILLIAMS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
ATLANTIC CITY, ATLANTIC COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions.

Upon careful and independent review of the record in this matter, the Commissioner determines to adopt the initial decision of the ALJ, noting that respondent has resigned his position as a custodian for the Atlantic City School District and has, therefore, abandoned his tenure acquired with the Board, which had charged him with improper use and/or theft of school funds and official misconduct.[1]

Accordingly, in that respondent has unilaterally resigned prior to conclusion of tenure proceedings, the Commissioner adopts the recommendation of the ALJ that this matter be dismissed.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] The Board alleges that respondent "issued two (2) checks from the account of 'Uptown Summer Basketball', made them payable to himself in the amount of $100.00 each and forged Ms. Rosetta L. Johnson's name to them. He then endorsed the back of the checks ***. The Respondent then cashed these checks at the Parthenon Grocery Store located across the street from the school. ***" (Board's Statement of Charges at p. 1)

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

August 19, 1999
Date of Mailing, August 19, 1999

273-99

EAGLE ROCK BUS COMPANY, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION,	:	DECISION
RESPONDENT.	:	

August 19, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1528-99
AGENCY DKT. NO. 162-6/98

EAGLE ROCK BUS COMPANY,
Petitioner,
v.
BOARD OF EDUCATION OF THE ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION,
Respondent.

Michael F. Martino, Esq., for petitioner
(Stein, Bliablias, McGuire, Pantages & Gigl, attorneys)

John H. Watson, Jr., Esq., for respondent

Record Closed: July 19, 1999 Decided: July 20, 1999

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

This matter was transmitted to the Office of Administrative Law on January 29, 1999 for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached letters indicating the terms of settlement.

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

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

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

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

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 20, 1999
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

1/23/99
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 27 1999
DATE

Barbara A Harnett
OFFICE OF ADMINISTRATIVE LAW

al

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CYNTHIA A. STEIN** (R)

*MEMBER NJ & NY BARS
**MEMBER NJ & PA BARS
◊CERTIFIED CIVIL TRIAL ATTORNEY

July 6, 1999

6281.0000
FILE NO.

Honorable Ken R. Springer
Administrative Law Judge
185 Washington Street
Newark, New Jersey 07102

Re: Essex County Educational Services/Eagle Rock Bus Company

Dear Judge Springer:

This letter shall serve to confirm the representations that Mr. Watson and I placed on the record on the afternoon of July 1, 1999, in your Honor's court room regarding the settlement reached between Eagle Rock Bus Company and the Essex County Educational Services Commission.

As Mr. Watson and I indicated at that time, respondent is waiving all penalties previously assessed against Eagle Rock. Accordingly, the sum of $35,422.40 will be returned to petitioner in the form of a check payable to Eagle Rock Bus Company in that amount. The check shall be delivered to my office within ten working days of the above date. I will hold that check in escrow pending the Commissioner's approval to the settlement.

This letter shall also confirm that Mr. Watson represented that although an executive meeting of respondent was not held, that the appropriate personnel consented to this settlement and provided Mr. Watson with the authority to represent that settlement to your Honor and myself.

Upon receipt of the aforementioned check payable to Eagle Rock Bus Company, Inc., I shall advise Mr. Watson that I have, in fact, received same and I am holding the check in escrow pending the Commissioner's approval of the settlement. Thereafter, I shall forward the check to my client.

This correspondence shall also confirm that the only issue raised in this administrative proceeding related to the appropriateness of the imposition of certain fines against petitioner Eagle Rock. The resolution of this matter does not, to any degree, affect the rights and liabilities of either Eagle Rock or the Essex County Educational Services Commission with regard to any other matter outside the scope of this proceeding.

Once again, I wish to thank your Honor for allowing us sufficient time to resolve this matter without the necessity of proceeding through a full hearing. I also wish to thank Mr. Watson for his professionalism and courtesy.

Respectfully yours,

STEIN, BLIABLIAS, McGUIRE, PANTAGES & GIGL

MICHAEL F. MARTINO

MFM/lm
cc: John Watson, Esq.
Mr. Jeffrey Martucci

(Member N.J. & D.C. Bars)

JOHN H. WATSON JR.
COUNSELLOR AT LAW

SUITE 200
63 WASHINGTON STREET
EAST ORANGE, NEW JERSEY 07017

(973) 674-8717
Fax (973) 674-0021

July 16, 1999

HONORABLE KEN R. SPRINGER
ADMINISTRATIVE LAW JUDGE
185 WASHINGTON STREET
NEWARK, NEW JERSEY 07102

RE: EAGLE ROCK BUS COMPANY V. ESSEX COUNTY ED. SERVICES COMMISSION
OAL DOCKET NUMBER EDU 7608-97

Dear Judge Springer:

I am in receipt of a copy of the letter dated July 6, 1999 setting forth the settlement placed on the record in the above matter. I am in agreement with the terms set forth in the letter sent by counsel with the exception of one item. I cannot agree that this settlement does not effect the rights and liabilities of either Eagle Rock or the Essex County Educational Services with regard to any other matter outside the scope of this proceeding. I believe that it is an issue of an issue of law as to whether or not this settlement affects other proceeding outside of the scope of this proceeding. I do agree, however, that the only issued raised in this proceeding was that of the imposition of the fines imposed upon Eagle Rock.

Very truly yours,

John H. Watson, Jr.

cc: Stein, Bliablias, Mcguire, Pantaages & Gigl, Llp

OAL DKT. NO. EDU 1528-99
AGENCY DKT. NO. 162-6/98

EAGLE ROCK BUS COMPANY, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION,	:	DECISION
RESPONDENT.	:	

The record, including the parties' letters with respect to settlement of the matter, and the initial decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. However, in so doing, the Commissioner does not make any judgment as to whether or not this settlement affects the parties' rights and liabilities with regard to any other matter outside the scope of the instant proceedings, given the parties' apparent lack of agreement on this point as indicated in the letters of settlement.

Accordingly, the matter is hereby dismissed, subject to compliance with the terms of the settlement.*

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

August 19, 1999
Date of Mailing, August 19, 1999

275-99

D.K.S. AND K.S.S., on behalf of minor child, H.I.L.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners challenged Board's residency determination.

The ALJ concluded that petitioners satisfied the residency requirements pursuant to *N.J.S.A.* 18A:38-1(b)1 because they are domiciled within the district and supporting H.I.L. *gratis*, the parents are presently not capable of supporting him due to family hardship, and H.I.L. is not residing with petitioners solely for the purpose of receiving a free public education in the district.

The Commissioner adopted the decision of the ALJ for the reasons expressed therein and ordered the Board to continue to admit H.I.L. into its public school system, free of charge, so long as there is no change in circumstances that would alter H.I.L.'s entitlement.

August 25, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3341-99

AGENCY DKT. NO. 43-3/99

D.K.S. AND K.S.S. ON BEHALF OF MINOR CHILD, H.I.L.,

Petitioner,

v.

BOARD OF EDUCATION OF FORT LEE, BERGEN COUNTY,

Respondent.

Michael Song, Esq., appearing for petitioner

Robert Tessaro, Esq., appearing for respondent

Record Closed: May 18, 1999 Decided: July 8, 1999

BEFORE **MARGARET M. HAYDEN**, ALJ:

STATEMENT OF THE CASE

Petitioners contest respondent's determination that minor child, H.I.L., was not entitled to a free public education in the Fort Lee School District (District). Petitioners claimed that the minor child was entitled to a free public education pursuant to *N.J.S.A.*

18A:38-1(b)1, as he was living in the home of a person domiciled within the school district and was supported by that person. Respondent claimed that H.I.L. was living in petitioners' home for the sole purpose of attending school in the District. Respondent District filed a counterclaim for payment of tuition.

On or about February 9, 1999, the District informed the petitioners that the Board of Education had reviewed the evidence submitted for H.I.L. to support his application to attend middle school in the District and rejected that application. On or about March 6, 1999, the petitioners filed a request for a hearing. On March 24, 1999, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) for a hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The hearing was held on May 18, 1999.

FACTUAL DISCUSSION

The following facts are essentially undisputed on the record and I **FIND** them **FACTS** in this case.

Petitioners resided in Fort Lee and have been supporting H.I.L. since January 1999 as if he was their own child with no contribution from his parents. The child, born December 18, 1985, will live with the petitioners two or three years, not merely through the school term.

The petitioners belonged to the same church as H.I.L.'s parents, who were now missionaries for that church in Uzbekistan in Central Asia. For the first few years of the missionary work H.I.L, as well as his younger sister, had lived in Uzbekistan with their parents. When the family came back for a brief vacation in 1998, H.I.L. had made it known how unhappy he was in Uzbekistan, which resulted in an offer by the petitioners to keep the child in their home.

According to the parents of H.I.L., the social and political situation in Uzbekistan was so unstable that it had reached the level of frequent threats to foreigners such as the parents. Every since Uzbekistan became an independent nation the country has suffered from chronic corruption. One place the widespread corruption manifested was in the schools where the teachers were not paid unless bribed by parents in order to allow the children in school. Additionally, as Uzbekistan was an Islamic nation, the country as a whole was hostile to Christians. The family was a constant target of religious and physical persecution including threats. In addition they were subjected to racial discrimination against minorities such as the parents. Both H.I.L. and his sister had been targets of physical danger. The parents felt, especially since H.I.L. had become a teenager, he needed stability in a nurturing environment which was nonexistence in Uzbekistan. The parents felt that the harsh reality of Uzbekistan was exceedingly difficult for the children to overcome. Additionally as missionaries the parents were required to travel constantly and had to leave the children unattended in the home. Various solutions to better the circumstances in Uzbekistan were tried and failed. During their 1998 visit the parents came to feel that because H.I.L. was overwhelmed physically and emotionally, he should remain the United States. They were also looking for guardians for their daughter but have not found one yet.

The petitioners also supplied to the District the report by the United States Department of State on human rights practices in Uzbekistan for 1998. That report corroborates much of the parents' claim concerning the instability in Uzbekistan. The report specified that the government had often harassed Christian groups who openly tried to convert Muslims to Christianity, which was the parents' goal as missionaries.

When the District considered the application it did not contest that the petitioners were residents of the District and that they were keeping the child in their home and had assumed all personal obligations for the child. However, the District turned down the application because it determined that there was no evidence of a hardship that prevented the parents from caring for the child.

DISCUSSION AND CONCLUSION OF LAW

The applicable statute, *N.J.S.A.* 18A:38-1(b)1, reads in pertinent part:

> Any person who is kept in the home of another person domiciled within the school district and is supported by such other person *gratis* as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the District, if so required by the board, a sworn statement that he is domiciled in the District and is supporting the child *gratis* and will assume all personal obligation for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parents or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economical hardship and that the child is not residing with the resident of the District solely for the purposes of receiving a free public education in the District. The statement shall be accompanied by documentation to support the validity of the sworn statement, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child. If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child.

Thus, the proofs in this matter must show that: 1) petitioners are domiciled within the District; 2) petitioners are supporting H.I.L. *gratis*; 3) H.I.L.'s parents are not capable of supporting or caring for him due to family or economic hardship; and 4) H.I.L. is not residing with petitioners solely for the purpose of receiving a free public education in the District.

Here the claims of the parents were uncontradicted that as a result of the instability in Uzbekistan the children had been subjected to physical and emotional

harassment. It was out of concern for H.I.L.'s emotional and physical well-being, which included but was certainly not limited to educational well-being, that the parents agreed to have the petitioners care for their son. The petitioners point out that in their culture it was very unusual for children to live apart from their parents and it was only being done in this instance because of the difficulties faced by the child under the extreme circumstances of the parents' missionary work. Based on the evidence I **FIND** that a family hardship has been demonstrated which made it difficult for the parents to properly provide care and stability for the child.

It is important to note that hardship under *N.J.S.A.* 18A:38-1(b)1 need not be merely financial. For example, family discord has been found to constitute hardship entitling the student to public education under the statute. *R.H. v. Ocean Co. Bd. Of Ed.,* 96 *N.J.A.R.* 2d (EDU) 628. It follows that the unique and compelling circumstances in this case rise to at least the same level of family hardship as did the circumstances in *R.H.* and thus meets the standard of the statute. "To hold otherwise harms a party the Legislature never meant to penalize . . . and overlooks the substantial State interest in ensuring the education of all its children . . . ." *Gundersen v. Bd. Of Ed. of the City of Brigantine, Atlantic Co.,* 95 *N.J.A.R.* 2d (EDU) 39, 42. In finding compelling circumstances that rise to the level of family hardship in a child's reaction to serious marital and parental conflict, the Commissioner, overruling the ALJ, quoted his previous decision with approval:

> In interpreting a statute, the Commissioner must look to the fundamental purpose for which the legislation was enacted, and where a literal reading will not accord with that purpose, the spirit of the law will control over its letter . . . . Moreover, the meaning of a statute is to be gathered from the mischief sought to be eliminated as well as the proposed remedy . . . .
>
> The amendments to *N.J.S.A.* 18A:38-1 . . . were intended to ease the burden on local boards of education attempting to remove illegally enrolled students, specifically those living with a parent or guardian who claims to be, but is not, domiciled within the district, and those living with a person other than the

> parent or guardian in order to obtain the benefit of a free public education in a district other than that of their entitlement by parental domicile . . . .
>
> The intent of the "affidavit student" law is not now, and never has been, to deny an education to a child whose living arrangements may not be as contemplated by the statutory scheme. . . .

R.H. v. Ocean Co. Bd. of Ed. at 632, citing *Gundersen, supra.*

I **FIND** that the evidence demonstrates that the petitioners generously took H.I.L. into their home to provide him the nurturing and stability his parents were unable to give him due to their difficult missionary assignment. I further **FIND** no evidence that this arrangement was entered into fraudulently to obtain a free public education in the District.

Based on the above, I **CONCLUDE** that petitioners satisfied the residency requirements pursuant to *N.J.S.A.* 18A:38-1(b)1 in that the petitioners are domiciled within the District, the petitioners are supporting H.I.L. *gratis*, the parents are presently not capable of supporting him due to family hardship, and H.I.L. is not residing with petitioner solely for the purpose of receiving a free public education in the District. Consistent with the above, I **CONCLUDE** that petitioners are not liable for tuition to the Board during the period of time that H.I.L. attended school in the District.

ORDER

I **ORDER** that the petitioners' petition to allow H.I.L. to attend school in the District is hereby **GRANTED**. I **ORDER** that the District's counterclaim for payment of tuition is hereby **DISMISSED WITH PREJUDICE**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 8, 1999
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

7/14/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 15 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

EXHIBITS

Petitioners:

P-1 Affirmation in Support of Petition

Respondent:

R-1 Affidavit of Applicant/Guardian Fort Lee Resident

R-2 District denial letter, February 9, 1999

OAL DKT. NO. EDU 3341-99
AGENCY DKT. NO. 43-3/99

D.K.S. AND K.S.S., on behalf of minor child, H.I.L.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon careful and independent review of the record in this matter, the Commissioner concurs that petitioners have demonstrated that the minor child, H.I.L., is entitled to attend school in the Board's district, free of charge, pursuant to *N.J.S.A.* 18A:38-1b(1). Accordingly, the initial decision of the OAL is adopted for the reasons expressed therein. The Board is hereby ordered to continue to admit H.I.L. into its public school system, free of charge, so long as there is no change in circumstances that would alter H.I.L.'s entitlement.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

August 25, 1999
Date of Mailing, August 25, 1999

276-99

ELIZABETH BLAZAKIS AND MARGARET SULLIVAN,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning teachers alleged the District improperly withheld their salary increments for the 1996-97 school year.

The ALJ concluded that Petitioner Sullivan (Petitioner Blazakis having withdrawn her petition) did not demonstrate by a preponderance of the credible evidence that the withholding of her salary increment was arbitrary, capricious or otherwise contrary to law and dismissed the petition. The Commissioner agreed with and adopted the recommended decision of the ALJ dismissing the petition for the reasons set forth in the initial decision.

August 25, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11128-96
AGENCY DKT. NO. 415-9/96

ELIZABETH BLAZAKIS AND
MARGARET SULLIVAN,
Petitioners,
v.
STATE-OPERATED SCHOOL
DISTRICT OF THE CITY OF JERSEY
CITY, HUDSON COUNTY,
Respondent.

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

Ken Iwama Esq., Assistant General Counsel, State-Operated School District of Jersey City
(Charlotte Kitler, General Counsel, attorney)

Record Closed: November 20, 1998 Decided: June 28, 1999*

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

PROCEDURAL HISTORY

This case comes by way of verified petition filed with the Department of Education on September 16, 1996. An answer was filed on October 2, 1996 and on October 21, 1996 the matter was transmitted to the Office of Administrative Law (OAL)

for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A prehearing conference was held in the matter on October 7, 1997 and hearing dates were scheduled for January 26, 27 and 28, 1998. The hearing dates were adjourned at the request of petitioner's counsel with the consent of respondent. New dates were given however prior to the hearing petitioner Blazakis withdrew her action by way of letter dated May 18, 1998. As a result the hearing itself deals only with the case of petitioner Margaret Sullivan.

*The hearings took place on October 6 and 7, 1998 at which time the record remained open for submission of copies of an exhibit used by petitioner until November 20, 1998. The time for filing an Initial Decision in this matter was extended by Order issued for good cause until July 6, 1999 due to the ilness of the undersigned.

ISSUE

This matter comes by way of a petition filed challenging an increment witholding to the salary of the petitioner who was a tenured teacher with respondent district at the time.

BURDEN OF PROOF

In this case the burden of proof remained with petitioner to be proved by a preponderance of the credible evidence that the decision to withhold the increment was arbitrary, capricious or otherwise contrary to law.

Although the burden of proof remained with the petitioner at all times the burden of going forward with the evidence rested with the respondent.

TESTIMONY

The respondent Board presented the testimony of Anna Maria Mistral who was an employee of the Board for twenty five years and had been supervisor of instruction – bilingual ESL since 1980. She holds elementary, ESL, Supervisor and principal certificates and was working on her superintendent certificate at the time of her testimony.

She testified that as a supervisor she was required to go to schools and evaluate teachers routinely numbering from 50-60. In 1995 she evaluated petitioner by observing her teaching senior Spanish at Snyder High School. On December 15, 1995 she observed the petitioner and filled out an Instructional Observation report. (R-1) She observed a 45 minute instructional period. She rated each of the five performance factors as follows:

1) Demonstrates proficiency in subject matter. Satisfactory.
2) Assesses needs and evaluates progress of pupils. Unsatisfactory.
3) Employs effective organization and planning. Unsatisfactory.
4) Utilizes effective instructional techniques. Unsatisfactory.
5) Addresses affective domain. Needs improvement.

Additionally the witness reviewed petitioner's roll book. (R-2) She observed that several students did not have test grades or scores. There was also no average computed. In some cases the witness computed the scores reflected and came up with discrepancies. There was also no indication as to whether absences were excused or not excused. It is necessary to make the distinction to determine if the student gets credit. She also found no tests or quizzes given between November 15, 1995 and December 5, 1995. According to the witness this is a problem in teaching language because you must keep up with where the students are performing. The witness also

observed that October 11, 1995 was listed as a quiz but there were no grades posted. Also no numerical grades were ever posted and are necessary because to compute a final grade of a student 70% would be average. For an October 16 test there was only one numerical grade listed. A November 16 test did not have test scores for all students and students numbers 9, 13, and 33 were listed as absent but did have test scores. Student number nine also had listed an 80 and a 73 but had a grade of B reflected. This would be incorrect as they would average to a C. The witness also photocopied other classes to see if these were rare occurrences or fairly regular. She found this to be fairly regular.

The witness also found that petitioner did not have the required lesson plans and of the eleven weeks she found incomplete planning for five weeks and no plans for four weeks. (R-3) There was no plan listed for the week of the observation or the week after. Plan books are mandated by the district and each box is to be filled in with "SWAT" or "students will be able to". These have been required since the witness began at the district in 1971 and are important. She pointed out each week where the plan was incomplete or not listed at all. According to the witness this was absolutely unacceptable.

The witness also explained that she gave petitioner an unsatisfactory for utilizing effective instructional technique because expectations were higher and the students should have been actively participating but were not. Both she and petitioner signed the evaluation. She also prepared a planning overview/pacing for the petitioner. (R-4) This was so that her students would be able to pass the test.

The witness She stated that she was unaware that the letter v meant late in petitioner's book. She also stated that she was aware that the petitioner had been absent the week before the evaluation. She stated that during the lesson petitioner sat on her desk and wrote two words on the board, There was no interaction with the students.

She also acknowledged that she recommended that petitioner teach a special class for native speakers of Spanish. In that class the point was literature and not communication. Since petitioner had excellent command of the Spanish language she thought that petitioner would be able to teach that course. The witness did not have any active part in the present increment withholding.

James J. Burke also testified. He had been employed by the district for twenty eight years and had been serving as a vice principal since 1986 with a two year hiatus when he served as school business administrator. He is vice principal and supervises instruction, oversees student curriculum and evaluates teachers. In the 1995-1996 school year he evaluated about thirty seven teachers. Petitioner was one of the teachers he evaluated while she was teaching Spanish. This took place on February 12, 1996 between 11:20 and 12:00. Of the five proficiencies he rated her as follows:

1) Demonstrates proficiency in subject matter. Needs Improvement.
2) Assess needs and evaluates progress of pupils. Unsatisfactory.
3) Employs effective organization and planning. Unsatisfactory.
4) Utilizes effective instructional techniques. Unsatisfactory.
5) Addresses affective domain. Needs improvement.

With respect to number 1 he stated that she was a veteran teacher but claimed she had no knowledge of the district mandated guidelines. He indicated that all teachers received the guidelines when they began. At no time had petitioner come to her regarding these proficiencies.

He also stated that proficiency number two dealt mostly with record keeping and hers was lacking and at times inaccurate. This was the second semester and only one grade was reflected and no numerical grades were listed. Proficiency number three was also record keeping in nature. This included lesson plans and attendance records. Upon review there were days when no plan was listed at all.

The witness also testified that her attendance records were inadequate. Only four of thirteen students were present and there was no indication of which absences were excused and which were not. He also stated that three latenesses would equal one unexcused absence.

The witness went over the evaluation with petitioner on March 7, 1996 and she signed it. This witness also observed petitioner on October 13, 1995 and a professional Improvement Plan was developed and rated her on the basis of both observations.

The witness acknowledged that this was petitioner's first year at Snyder High School. The witness provides orientation to all teachers and the code and documents are also placed in the teachers' individual mailboxes. He indicated that one of the major problems is with her record keeping regarding students grades and absences. According to the Code of conduct teachers must differentiate between excused and unexcused absences. There were also no pupil progress indicators. He indicated that the markings in her book did not differentiate and there was no key in her book to assist him. It was not enough that she knew what she meant but it must be easily understood by the building administrator. The lack of any code or key to assist in markings which might be individual to petitioner made the book unacceptable. Also if a student is out it is up to the teacher to check the absent student list. He indicated there is also a nurse's list and a suspension list.

On May 22, 1996 the principal sent petitioner a letter indicating that it was recommended that her 1996-1997 increment be withheld. In June she received notification that it was withheld.

Petitioner testified as of the 1995-1996 school year she had already been with the district for 9 years. She had also had a four year leave. Prior to being at Snyder High School she was at Lincoln School and prior to that the Ferris School. She has a certificate in Spanish as well as ESL. She has always taught Spanish.

On the first day of school for the teachers she was given one student textbook and assigned five Spanish 1 classes. She identified her role book and states that this is the way she kept hers in the other schools. She testified that A is absent without excuse while "A" with a circle around it was excused absence. Markings, which appear to be "V" or a check mark, are, in fact, "L" for late. A small dot signifies present. She states that her role book was never discussed with her prior to October 13, 1995By either Burke or Mistral. She indicates that prior to October 13, 1995 she had not been notified of any deficiencies. She states that since she was teaching five classes of Spanish 1 she had only one plan since each class was the same. She says she had no materials at the beginning and she brought her own materials and copied them and it was only later in the year that she received the necessary materials.

On the December 5, 1995 evaluation day she was back for the second day after an illness. At that time she was collecting the students' work and going over it. There were approximately six students in and they were not on the same level. She indicated that one was very bright, two were average and the others never responded.

With respect to her planning book she testified that she only planned a few days in advance as to the specifics. On occasions were there was nothing written they were continuing the prior lesson. By way of example she stated that on September 11 the students did not have books yet. On September 12 she had written activity but they were still working on what had been for September 11. As a result she wrote nothing for September 13, 14 and 15. (R-3) The week of October 2, she also wrote nothing on any of the days plan. She admitted that she probably should have written "something" but that she knew what she was carrying over. She states that she did plan except for the week of November 13, 1995 when she was ill. From that date until December 8, 1995 there were no plans listed although there were several notations on the remark column.

On cross examination she stated that her plan for September 11 and 12 carried over through September 18 thereby having a two day plan take six class days. She stated that her plan book was never meant to be used by anyone but her although she conceded that she is mandated to keep the book. She also acknowledged that she had been reviewed in the past and her book had been reviewed. According to her she has no idea why a supervisor would review a plan book, did not know why Burke wrote incomplete on the pages and feels he doesn't know how to read a plan book. She also acknowledged that the word "carryover" was not anywhere in her plan book. When questioned about what she did on specific days where nothing was written she could only say it was a carryover. She also says that in November the days with nothing listed were carry over days making three planned days carry over an extra ten days. She also acknowledged that she had no idea what the substitute did when she was out because she only had one day's emergency plan. She felt that she overestimated the students and they required more time.

The witness testified that she did not recall ever being criticized for her plan book before however when confronted with a 1988 evaluation (R-11) and one from 1990 (R-12) she acknowledged her signature on each and that each criticized her planning. She left the district in 1991 on maternity leave and at that time she was aware that there were supervisors who felt her planning was inadequate. She also acknowledged that by the time she had met with Burke on October 13, 1995 she was aware that he felt her planning was inadequate. She conceded that she continued, even after October 13, to keep her plan book in the same manner making no changes. With respect to the roll book she felt it was clear to her.

FINDINGS OF FACT

Having heard the testimony of the witnesses, and having assessed their credibility as well as having reviewed the documentary evidence I **FIND** the following to be fact:

1. During the 1995-96 school year petitioner, an experienced school teacher, began teaching Spanish 1 at Snyder High School.
2. She taught five classes of Spanish 1.
3. On October 13, 1995 she had an evaluation by James Burke who indicated to her that her plan book was inadequate.
4. On December 5, 1995 Petitioner was evaluated by Anna Maria Mistral who, in the instructional observation report (R-1), at length explained the deficiencies in petitioner's roll book, plan book, recording of grades and other factors.
5. Prior to this school year petitioner was on notice by two adverse evaluations, one in 1998 and the other in 1990, that supervisors had a concern about her lack of planning.
6. After the October 13, 1995 evaluation petitioner did not change the manner in which she kept her plan book or roll book.
7. After her December 5, 1995 evaluation, even with its detailed criticism of planning and roll book, petitioner did nothing to change her manner of record keeping.
8. It is insufficient that petitioner know what her entries mean. Her entries must be easily discernible by the building supervisor. This could have easily been done by merely providing a key in the front of the book. Even after the evaluations no steps were made to come in line with the input of the evaluators.
9. The roll book revealed inconsistencies in grades and attendance.
10. The lack of adequate lesson plans also continued through the February 12, 1996 evaluation by Burke. Once again the same problems were noted. Nothing was done by the petitioner to resolve these issues.

LEGAL DISCUSSION

The only issue in this case is whether or not the petitioner has proved, by a preponderance of the credible evidence, that the withholding of her annual teaching salary increment was arbitrary, capricious or otherwise contrary to law. In this case the proof fail to show any suggestion that the withholding was arbitrary, capricious or otherwise contrary to law. Here petitioner was on notice as early as 1988 that her lack of planning and discrepancies in record keeping were found not to be acceptable. In 1990 once again she was made aware. On the October 13, 1995 evaluation by Burke she was made aware that her planning and record keeping were unacceptable. By the time of the evaluation of December 5, 1995 by Mistral her plan book was nearly devoid of entries for the month of November and the week of the evaluation. At the time of this evaluation a detailed list of deficiencies was provided to her and she met with Mistral.

Even after the December evaluation and all of the input regarding what was considered deficient she did not make changes in the manner in which she kept her records and planned. This went on through the February evaluation and on to the final evaluation of the year.

What is particularly striking is that petitioner testified that she felt that there was nothing incorrect in the way she had been doing things and it was the evaluators fault for not being able to read her roll book or understanding that the long gaps in her lesson plans was due to carrying over prior lessons. At no time did she seem to come to a realization that her manner of doing things required changing. As a result she made no effort to comply with the recommendations of the evaluators. Those changes were not overly burdensome. The problem of the roll book would need only a key in the beginning for the evaluator's benefit and for the benefit of the building superintendent if it was really as clear as she claimed. Nothing was ever done about keeping numerical grades so they could be reconciled with final grades. Lesson plans never changed character or indicated multiple days for carry over or any different pace from class to class.

Petitioner was given every chance to improve and did not do so. The withholding of the teaching salary increment was entirely appropriate. There was absolutely nothing arbitrary, capricious or otherwise contrary to law that has been shown by petitioner.

CONCLUSION

Based upon the foregoing I hereby **CONCLUDE** that petitioner has not met the burden of proof applicable here, that of a preponderance of the credible evidence, that the withholding of her salary increment was arbitrary, capricious or otherwise contrary to law.

ORDER

It is hereby **ORDERED** that petitioner's claim be and hereby is **DISMISSED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER**

OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

6/28/99
DATE

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

7/16/99
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 19 1999
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

(FV)mxl

APPENDIX

Witnesses

For petitioner:

Anna Maria Mistral
James Burke

For respondent:

Margaret Sullivan

Evidence

P-1 Plan Book

R-1 Instructional Observation Report 12/5/95

R-2 Copy of roll book

R-3 Copy of Plan Book

R-4 Planning overview/Pacing

R-5 Instructional Observational Report 2/12/96

R-7 Handwritten Memo to Margaret Sullivan 12/13/95

R-8 Instructional Annual Written Performance Report dated June 5, 1996

R-9 Memorandum from Margaret Oliver 5/22/96

R-10 (id only) Letter Sullivan to Granick July 1, 1997

R-11 Instructional Observational report 3/17/88

R-12 Evaluation by Santiago 1990

R-13 Evaluation by Russomagno

OAL DKT. NO. EDU 11128-96
AGENCY DKT. NO. 415-9/96

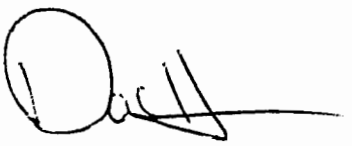
ELIZABETH BLAZAKIS AND MARGARET SULLIVAN,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review of the record, the Commissioner agrees with and adopts the recommended decision of the Administrative Law Judge dismissing the petition for the reasons set forth in the initial decision.

Accordingly, the Petition of Appeal is hereby dismissed.*

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

August 25, 1999
Date of Mailing, August 25, 1999

278-99SEC

IN THE MATTER OF SYLVESTER	:	
RICHARDSON, CAMDEN'S PROMISE	:	COMMISSIONER OF EDUCATION
CHARTER SCHOOL, CAMDEN	:	DECISION
COUNTY.	:	
_____	:	

August 27, 1999

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**DOCKET NO. R04-99**
SYLVESTER RICHARDSON	:	
Camden's Promise Charter School	:	
Camden County	:	**RESOLUTION**
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-25 requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement for the School Ethics Commission;

WHEREAS, Sylvester Richardson is a member of the Camden's Promise Charter School's Board of Trustees and thus a "school official" under N.J.A.C. 6A:11-3.1; and

WHEREAS, the deadline to file these disclosure statements was April 30, 1999 for school officials in office since January 30, 1999 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission did not take action against school officials who failed to file disclosure statements until July 27, 1999; and

WHEREAS, the Commission issued an Order on June 21, 1999, directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the disclosure statements; and

WHEREAS, this school official failed to reply to the Order to Show Cause although the return receipt indicates that the board secretary received the Order on June 29, 1999, directing him or her to deliver it to you; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that the Commission would discuss this matter at its July 27, 1999 meeting, that he had the right to attend, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that his failure to file a disclosure statement constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official has been given the opportunity to provide the disclosure statements, but has declined; and

WHEREAS, the appropriate penalty for the violation is removal from the board, especially in light of the failure to respond to the Commission's correspondence;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Sylvester Richardson violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of removal from the board.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: July 27, 1999

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

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AGENCY DKT. NO. 222-8/99

IN THE MATTER OF SYLVESTER	:	
RICHARDSON, CAMDEN'S PROMISE	:	COMMISSIONER OF EDUCATION
CHARTER SCHOOL, CAMDEN	:	DECISION
COUNTY.	:	
_____	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25 and/or an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26; and

Whereas, the deadline to file these disclosure statements was April 30, 1999 for school officials in office since January 30, 1999, or 30 days from swearing in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission, upon being advised by the County Superintendent that this school official did not file a disclosure statement with his school district, as required by the Act; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on June 21, 1999, the Commission issued an Order to Show Cause directing this school official to demonstrate why he should not be found in violation of the Act for failing to file the necessary statement(s); and

Whereas, the above-named school official apparently failed to reply to the Order to Show Cause; and

Whereas, the Commission voted on July 27, 1999, to recommend removal of the above-named school official for failure to file a disclosure statement in violation of State statute, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated August 5, 1999 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, the within record shows that, after the commencement of the meeting conducted by the Commission on July 27, 1999, the County Office, having at an earlier date received from the above-named official the required disclosure statement, transmitted said statement to the Commission office via facsimile on that date, but the Commission did not receive the statement in time to consider it before rendering its decision; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and, having done so, recognizes that the Commission's recommendation for removal of Mr. Richardson from office was based solely on its finding that he was in violation of the requirement for filing a disclosure statement, which requirement was, in fact, met without the Commission's knowledge; now therefore

IT IS ORDERED that the Commission's recommendation for removal of Mr. Richardson is accordingly declined.*

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

Agust 27,1999
Date of Mailing, August 27,1999

279-99SEC

IN THE MATTER OF HERMAN	:	
WHITE, BOARD OF EDUCATION	:	COMMISSIONER OF EDUCATION
OF MONTCLAIR, ESSEX COUNTY.	:	DECISION
	:	

August 27, 1999

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**DOCKET NO. R05-99**
HERMAN WHITE	:	
Montclair Board of Education	:	
Essex County	:	**RESOLUTION**
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-25 requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement for the School Ethics Commission;

WHEREAS, Herman White is a member of the Montclair Board of Edicatopm and thus a "school official" under the Act; and

WHEREAS, the deadline to file these disclosure statements was April 30, 1999 for school officials in office since January 30, 1999 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission did not take action against school officials who failed to file disclosure statements until July 27, 1999; and

WHEREAS, the Commission issued an Order on June 21, 1999, directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the disclosure statements; and

WHEREAS, this school official failed to reply to the Order to Show Cause although the return receipt indicates that the board secretary received the Order on June 29, 1999, directing him or her to deliver it to you; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that the Commission would discuss this matter at its July 27, 1999 meeting, that he had the right to attend, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that his failure to file a disclosure statement constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official has been given the opportunity to provide the disclosure statements, but has declined; and

WHEREAS, the appropriate penalty for the violation is removal from the board, especially in light of the failure to respond to the Commission's correspondence;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Herman White violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of removal from the board.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: July 27, 1999

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

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IN THE MATTER OF HERMAN	:	
WHITE, BOARD OF EDUCATION	:	COMMISSIONER OF EDUCATION
OF MONTCLAIR, ESSEX COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25 and/or an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26; and

Whereas, the deadline to file these disclosure statements was April 30, 1999 for school officials in office since January 30, 1999, or 30 days from swearing in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission, upon being advised by the County Superintendent that this school official did not file a disclosure statement with his/her school district, as required by the Act; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on June 21, 1999, the Commission issued an Order to Show Cause directing this school official to demonstrate why he/she should not be found in violation of the Act for failing to file the necessary statement(s); and

Whereas, the above-named school official apparently failed to reply to the Order to Show Cause; and

Whereas, the Commission voted on July 27, 1999, to recommend removal of the above-named school official for failure to file a disclosure statement in violation of State statute,

memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated August 5, 1999 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, on August 12, 1999, Mr. White submitted to the Commissioner a response to the Commission's resolution in which he averred that he faxed to the Commission a copy of his disclosure statement on July 13, 1999 and also provided a copy of said fax; and

Whereas, Mr. White further informed the Commissioner that he had resigned his position as a member of the Montclair Board of Education effective June, 1999; and

Whereas, upon contact with the Montclair Board, Mr. White's resignation was verified by the district superintendent of schools as being effective June 30, 1999; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and, having done so, recognizes that the Commission's recommendation for removal of Herman White from office was based solely on its finding that he was in violation of the requirement for filing a disclosure statement, which requirement was, apparently, met without the Commission's knowledge; and

Whereas, Mr. White has resigned as a Board member effective June 30, 1999; now therefore

IT IS ORDERED that the Commission's recommendation for removal of Herman White is accordingly declined as moot.*

COMMISSIONER OF EDUCATION

---

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

August 27, 1999
Date of Mailing, August 27, 1999

280-99SEC

IN THE MATTER OF HENRY	:	
LUDWIGSEN, CAMDEN'S PROMISE	:	COMMISSIONER OF EDUCATION
CHARTER SCHOOL, CAMDEN	:	DECISION
COUNTY.	:	
_____	:	

August 27, 1999

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**DOCKET NO. R02-99**
HENRY LUDWIGSEN	:	
Camden's Promise Charter School	:	
Camden County	:	**RESOLUTION**

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-25 requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement for the School Ethics Commission;

WHEREAS, Henry Ludwigsen is a member of the Camden's Promise Charter School's Board of Trustees and thus a "school official" under N.J.A.C. 6A:11-3.1; and

WHEREAS, the deadline to file these disclosure statements was April 30, 1999 for school officials in office since January 30, 1999 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission did not take action against school officials who failed to file disclosure statements until July 27, 1999; and

WHEREAS, the Commission issued an Order on June 21, 1999, directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the disclosure statements; and

WHEREAS, this school official failed to reply to the Order to Show Cause although the return receipt indicates that the board secretary received the Order on June 29, 1999, directing him or her to deliver it to you; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that the Commission would discuss this matter at its July 27, 1999 meeting, that he had the right to attend, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that his failure to file a disclosure statement constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official has been given the opportunity to provide the disclosure statements, but has declined; and

WHEREAS, the appropriate penalty for the violation is removal from the board, especially in light of the failure to respond to the Commission's correspondence;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Henry Ludwigsen violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of removal from the board.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: July 27, 1999

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

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AGENCY DKT. NO. 229-8/99

IN THE MATTER OF HENRY	:	
LUDWIGSEN, CAMDEN'S PROMISE	:	COMMISSIONER OF EDUCATION
CHARTER SCHOOL, CAMDEN	:	DECISION
COUNTY.	:	
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25 and/or an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26; and

Whereas, the deadline to file these disclosure statements was April 30, 1999 for school officials in office since January 30, 1999, or 30 days from swearing in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission, upon being advised by the County Superintendent that this school official did not file a disclosure statement with his school district, as required by the Act; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on June 21, 1999, the Commission issued an Order to Show Cause directing this school official to demonstrate why he should not be found in violation of the Act for failing to file the necessary statement(s); and

Whereas, the above-named school official apparently failed to reply to the Order to Show Cause; and

Whereas, the Commission voted on July 27, 1999, to recommend removal of the above-named school official for failure to file a disclosure statement in violation of State statute, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated August 5, 1999 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, the within record shows that, after the commencement of the meeting conducted by the Commission on July 27, 1999, the County Office, having at an earlier date received from the above-named official the required disclosure statement, transmitted said statement to the Commission office via facsimile on that date, but the Commission did not receive the statement in time to consider it before rendering its decision; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and, having done so, recognizes that the Commission's recommendation for removal of Mr. Ludwigsen from office was based solely on its finding that he was in violation of the requirement for filing a disclosure statement, which requirement was, in fact, met without the Commission's knowledge; now therefore

IT IS ORDERED that the Commission's recommendation for removal of Mr. Ludwigsen is accordingly declined.*

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

August 27, 1999
Date of Mailing, August 27, 1999

281-99SEC

IN THE MATTER OF KEN FAIGENBAUM,	:	
BOARD OF EDUCATION OF SPRINGFIELD	:	COMMISSIONER OF EDUCATION
TOWNSHIP, UNION COUNTY.	:	DECISION
	:	

August 27, 1999

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**DOCKET NO. R08-99**
KEN FAIGENBAUM	:	
Springfield Twp. Board of Education	:	
Union County	:	**RESOLUTION**
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-25 requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement for the School Ethics Commission;

WHEREAS, Ken Faigenbaum is a member of the Springfield Township Board of Education and thus a "school official" under the Act; and

WHEREAS, the deadline to file these disclosure statements was April 30, 1999 for school officials in office since January 30, 1999 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission did not take action against school officials who failed to file disclosure statements until July 27, 1999; and

WHEREAS, the Commission issued an Order on June 21, 1999, directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the disclosure statements; and

WHEREAS, this school official failed to reply to the Order to Show Cause although the return receipt indicates that the board secretary received the Order on June 30, 1999, directing him or her to deliver it to you; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that the Commission would discuss this matter at its July 27, 1999 meeting, that he had the right to attend, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that him failure to file a disclosure statement constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official has been given the opportunity to provide the disclosure statements, but has declined; and

WHEREAS, the appropriate penalty for the violation is removal from the board, especially in light of the failure to respond to the Commission's correspondence;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Ken Faigenbaum violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of removal from the board.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: July 27, 1999

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

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IN THE MATTER OF KEN FAIGENBAUM, :

BOARD OF EDUCATION OF SPRINGFIELD : COMMISSIONER OF EDUCATION

TOWNSHIP, UNION COUNTY. : DECISION

:

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25 and/or an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26; and

Whereas, the deadline to file these disclosure statements was April 30, 1999 for school officials in office since January 30, 1999, or 30 days from swearing in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission, upon being advised by the County Superintendent that this school official did not file a disclosure statement with his school district, as required by the Act; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on June 21, 1999, the Commission issued an Order to Show Cause directing this school official to demonstrate why he should not be found in violation of the Act for failing to file the necessary statement(s); and

Whereas, the above-named school official apparently failed to reply to the Order to Show Cause; and

Whereas, the Commission voted on July 27, 1999, to recommend removal of the above-named school official for failure to file a disclosure statement in violation of State statute, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated August 5, 1999 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, the within record shows that, after the commencement of the meeting conducted by the Commission on July 27, 1999, the County Office, having at an earlier date received from the above-named official the required disclosure statement, transmitted said statement to the Commission office via facsimile on that date, but the Commission did not receive the statement in time to consider it before rendering its decision; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and, having done so, recognizes that the Commission's recommendation for removal of Mr. Faigenbaum from office was based solely on its finding that he was in violation of the requirement for filing a disclosure statement, which requirement was, in fact, met without the Commission's knowledge; now therefore

IT IS ORDERED that the Commission's recommendation for removal of Mr. Faigenbaum is accordingly declined.*

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

August 27, 1999
Date of Mailing, August 27, 1999

282-99SEC

IN THE MATTER OF JOSEPH MOORE, :
CAMDEN'S PROMISE CHARTER :
SCHOOL, CAMDEN COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

August 27, 1999

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**DOCKET NO. R03-99**
JOSEPH MOORE	:	
Camden's Promise Charter School	:	
Camden County	:	**RESOLUTION**
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-25 requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement for the School Ethics Commission;

WHEREAS, Joseph Moore is a member of the Camden's Promise Charter School's Board of Trustees and thus a "school official" under N.J.A.C. 6A:11-3.1; and

WHEREAS, the deadline to file these disclosure statements was April 30, 1999 for school officials in office since January 30, 1999 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission did not take action against school officials who failed to file disclosure statements until July 27, 1999; and

WHEREAS, the Commission issued an Order on June 21, 1999, directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the disclosure statements; and

WHEREAS, this school official failed to reply to the Order to Show Cause although the return receipt indicates that the board secretary received the Order on June 29, 1999, directing him or her to deliver it to you; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that the Commission would discuss this matter at its July 27, 1999 meeting, that he had the right to attend, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that his failure to file a disclosure statement constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official has been given the opportunity to provide the disclosure statements, but has declined; and

WHEREAS, the appropriate penalty for the violation is removal from the board, especially in light of the failure to respond to the Commission's correspondence;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Joseph Moore violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of removal from the board.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: July 27, 1999

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

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AGENCY DKT. NO. 223-8/99

IN THE MATTER OF JOSEPH MOORE, :
CAMDEN'S PROMISE CHARTER :
SCHOOL, CAMDEN COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25 and/or an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26; and

Whereas, the deadline to file these disclosure statements was April 30, 1999 for school officials in office since January 30, 1999, or 30 days from swearing in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission, upon being advised by the County Superintendent that this school official did not file a disclosure statement with his school district, as required by the Act; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on June 21, 1999, the Commission issued an Order to Show Cause directing this school official to demonstrate why he should not be found in violation of the Act for failing to file the necessary statement(s); and

Whereas, the above-named school official apparently failed to reply to the Order to Show Cause; and

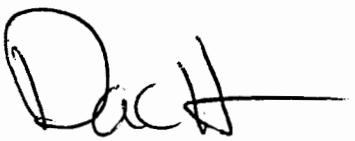
Whereas, the Commission voted on July 27, 1999, to recommend removal of the above-named school official for failure to file a disclosure statement in violation of State statute, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated August 5, 1999 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, the within record shows that, after the commencement of the meeting conducted by the Commission on July 27, 1999, the County Office, having at an earlier date received from the above-named official the required disclosure statement, transmitted said statement to the Commission office via facsimile on that date, but the Commission did not receive the statement in time to consider it before rendering its decision; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and, having done so, recognizes that the Commission's recommendation for removal of Mr. Moore from office was based solely on its finding that he was in violation of the requirement for filing a disclosure statement, which requirement was, in fact, met without the Commission's knowledge; now therefore

IT IS ORDERED that the Commission's recommendation for removal of Mr. Moore is accordingly declined.*



COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

August 27, 1999
Date of Mailing, August 27,1999

283-99

FRANK CARNEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF UNION CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a tenured custodian, sought to overturn the respondent Board's attempt to consider his employment forfeited due to his having been found guilty of harassment, *N.J.S.A.* 2C:33-4C, a petty disorderly persons offense. The details of the offense involved verbal remarks, solicitations and physical gestures of a sexual or sexually suggestive nature directed by petitioner to a fellow employee at the work site.

At the OAL the respondent Board moved for summary decision. The ALJ dismissed the Board's motion and granted summary decision to petitioner, noting that, because the municipal court judge declined at sentencing to rule on the issue of forfeiture since he believed that the matter was not properly before him, *N.J.S.A.* 2C:51-2 mandates that the Board seek removal of petitioner through the tenure removal procedure of *N.J.S.A.* 18A:6-10.

The Commissioner determined that the ALJ correctly concluded that if a court declines to order forfeiture of public employment, then the only means for a Board to seek removal of an individual from its employ is through the certification of tenure charges pursuant to *N.J.S.A.* 18A:6-10 *et seq.* The Commissioner did not adopt that portion of the ALJ's order directing payment by the Board within 15 days of any monies and benefits owed to petitioner. The Commissioner ordered payment by the Board within a reasonable period of time, noting that petitioner may invoke the regulations for payment of post-hearing interest, *N.J.A.C.* 6:24-1.16 should the Board fail to satisfy the award within 60 days.

August 30,1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 09122-97N
AGENCY DKT. NO. 287-8/97

FRANK CARNEY,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF UNION CITY, HUDSON COUNTY,
Respondent.

Nancy I. Oxfeld, Esq., for petitioner (Balk, Oxfeld, Mandell & Cohen, attorneys)

Joan M. Damora, Esq., for respondent (Murray, Murray & Corrigan, attorneys)

Record Closed: June 1, 1999 Decided: July 14, 1999

BEFORE **JEFF S. MASIN**, ALJ:

Petitioner Frank Carney, a tenured custodian who was employed by the respondent Board of Education ("Board"), petitioned the Commissioner of Education, seeking to overturn the Board's attempt to consider his employment position forfeited. The petition was filed on August 8, 1997. The Board filed an answer on August 26, 1997. The matter was transferred to the Office of Administrative law as a contested case on September 10, 1997. After completion of discovery, the Board filed a motion for summary decision on September 23, 1998. Mr. Carney filed a brief in opposition to the motion on October 7, 1998, and at the same time cross-moved for summary decision. The Board replied to the motion and to the opposition to its own motion by

letter of October 16, 1998. On October 19, counsel for Carney replied to the Board's response and subsequently on December 31, the Board filed a short letter supplementing its position[1]

In his petition, Mr. Carney asserts that while employed as a tenured custodian for the Board, he received a letter from the Board Secretary dated July 2, 1997, which notified him that effective July 1, 1997, the Board deemed him to have forfeited his job due to his having been found guilty of an offense which touched upon his employment. In fact, the record does establish without dispute that Mr. Carney was found guilty on June 11, 1997, of harassment, *N.J.S.A.* 2C:33-4C, a petty disorderly persons offense, after a trial held before Weehawken Municipal Court Judge Emil A. Del Baglivo. (Venue had been changed from the Union City Municipal Court). He was sentenced on July 1, 1997. An appeal of the conviction to the Superior Court was denied by Superior Court Judge Camille M. Kenny on February 18, 1998. The allegations of harassment which Judge Del Baglivo sustained were made by an employee of a food service working at the same school where Mr. Carney was employed. The events which were the subject of her allegations occurred within the Robert Waters School, in which both she and Carney were employed during the 1995-96 school year.

Mr. Carney asserts in his petition that the Board acted in violation of his tenure rights when it deemed him removed from his tenured position by virtue of a supposed forfeiture. He based his claim upon the refusal of the sentencing judge to impose the penalty of forfeiture. In his view, the refusal of the judge to order forfeiture leaves the Board no alternative but to file tenure charges if it wishes to seek Carney's removal based upon the incidents between he and the complaining fellow employee.

The Board's motion for summary decision argues that the undisputed facts demonstrate that the petitioner was convicted of an offense which touches and concerns his employment and

[1] The procedural history of this case within the OAL is unfortunately quite complicated and has resulted in considerable delay in the processing of the matter. The matter was originally assigned to a judge who departed for the Superior Court prior to discovery being completed and the file was then reassigned. A substitution of counsel for the Board was filed in June of 1998. The assignment judge then reassigned the file to another judge who was not able to reach a decision in the matter before she unexpectedly became ill and, after a period of uncertainty as to her status, she eventually resigned. As a result the case was again reassigned to this judge and counsel were advised of the reassignment on June 1, 1999. A considerable rush of emergency and other hearings and other pending decisions has unfortunately delayed this decision to this date.

therefore, pursuant to *N.J.S.A.* 2C:51-2, as a matter of law Mr. Carney forfeited his position. The Commissioner of Education is without jurisdiction to decide matters arising under this statute and therefore the petition must be dismissed.

In response to the Board's motion and in support of his cross-motion, Mr. Carney points out that at one time the language of *N.J.S.A.* 2C:51-2 did provide that a person convicted of an offense which touched his employment forfeited his position upon conviction. However, a rather recent amendment of the statute has significantly altered the process which results in a forfeiture. As a result of that change and the Municipal Court Judge's negative response to the Board's attempt to obtain an order of forfeiture, no forfeiture has occurred. Since, in the absence of forfeiture, the sole means available to the Board to effectuate Mr. Carney's removal for his conduct in relation to the fellow employee is a tenure charge brought pursuant to *N.J.S.A.* 18A:6-10, and since the Board has not even pursued such a charge, he is entitled to be reinstated to his position with full recovery of salary and benefits lost. Therefore, the Board's motion must be denied and his motion granted.

N.J.S.A. 2C:51-2 is at the heart of this matter. In its current form it reads in pertinent part

> a. A person holding any public office, position, or employment, elective or appointive, under the government of this State or any agency or political subdivision thereof, who is convicted of an offense shall forfeit such office or position if:
>
> (1) He is convicted under the laws of this State of an offense involving dishonesty or a crime of the third degree or above . . .
>
> (2) He is convicted of an offense involving or touching such office, position or employment; or
>
> (3) The Constitution or a statute other than the code so provides.
>
> b. A court of this State shall enter an order of forfeiture pursuant to subsection a.
>
> (1) Immediately upon a finding of guilt by the trier of fact or a plea of guilty entered in any court of this State unless the court, for good cause shown, orders a stay of such forfeiture pending a hearing on the merits at the time of sentencing; . . .

. . .

> e. Any forfeiture . . . which is based upon a conviction of a disorderly persons or petty disorderly persons offense may be waived by the court upon application of the county prosecutor or the Attorney General and for good cause shown.
>
> . . .
>
> g. In any case in which the issue of forfeiture is not raised in a court of this State at the time of a finding of guilt, entry of guilty plea or sentencing, a forfeiture of public office, position or employment required by this section may be ordered by a court of this State upon application of the county prosecutor or the Attorney General or upon application of the public officer or public entity having authority to remove the person convicted from his public office, position or employment. The fact that a court has declined to order forfeiture shall not preclude the public officer or public entity having authority to remove the person convicted from seeking to remove or suspend the person from his office, position or employment on the ground that the conduct giving rise to the conviction demonstrates that the person is unfit to hold the office, position or employment.

Subsection g. was added to the statute in 1995, *L.* 1995, c.250, §1, eff. Sept. 12, 1995. In addition, that amendment added that portion of subsection b. which requires the entry of an order of forfeiture. Previously, section b. had provided that

> b. The forfeiture set forth in subsection a. shall take effect
>
> (1) Upon finding of guilt by the trier of fact or a plea of guilty . . . .

The record demonstrates that the issue of forfeiture was in fact raised at Mr. Carney's sentencing on July 1, 1997. The transcript of the discussion between Mr. Carney's defense counsel John D. Lynch and the Judge discloses that the Court had been notified about the forfeiture question prior to the sentencing proceeding, apparently during closing remarks at trial and in correspondence. When Mr. Lynch rose to address the issue, the Judge said

> The Court: You may address that issue. We did note it in the closing argument and some other papers that we received. But, before we rule on that very issue, we'll hear you. We might say in advance that that issue is not properly before this Court.

> Mr. Lynch: Well, Judge, that was my point.
>
> The Court: No one has the right to ask the Court to forfeit somebody's job. That is not a - - not only - - the Court has no authority to do that. Not statutory or not by case law. So, maybe that dispels your argument.
>
> Mr. Lynch: It certainly does, Judge.
>
> The Court: All right. You can ask the Court to fly you to the moon but that doesn't mean we're going to put you there.
>
> Mr. Lynch: That's fine, Judge.
>
> The Court: We have no such authority and I think that was an improper request to be made in the first place. Whatever happens, of course, is not within the province of this Court but certainly it is not this Court's authority to do that. All right.
>
> Mr. Lynch: Then, I'm not going to belabor the issue, your Honor.
>
> [*State of N.J. v. Frank Carney* Transcript of Sentencing, 7/1/97, Union City Municipal Court, Hudson Co., Dkt. No. S1996-002596-0910, pages 3-4]

Examination of the record establishes that Mr. Carney was convicted of an offense which involved harassing a fellow employee at the work site. As the Municipal Court Judge determined in his oral decision of June 11, 1997, the details of the offense involved verbal remarks, solicitations and physical gestures of a sexual or a sexually suggestive nature directed by Carney toward the victim "time and time again . . . frequently, periodically, as often as possible." There can be no reasonable dispute that the offense did touch his employment. That said, the question is whether the Board could legitimately determine that Mr. Carney no longer was an employee of the District even though it had not filed and successfully prosecuted a tenure charge against him.

The difficulty with the Board's position lies in the details of the current version of *N.J.S.A.* 2C:51-2. As noted above, prior to 1995, the statute provided that where an offense touched upon the perpetrator's employment, he forfeited his position when convicted of the offense. Further, it stated that the forfeiture took effect "upon finding of guilt . . . unless the court, for good cause shown, orders a stay of such forfeiture . . . ." There was no requirement in the statute that a court

enter an order for the forfeiture to become effective. The amendment added this procedural step to the process which results in an effective forfeiture. As the statute now reads, without the order being issued the mere conviction for an offense touching employment is not sufficient to effectively forfeit the employment.

The statute does permit a court to stay a forfeiture for good cause pending a hearing on the merits. The law also permits a waiver of a forfeiture where the conviction is for a disorderly or petty disorderly offense, as here. In Mr. Carney's case, no stay was entered of the forfeiture. Additionally, no waiver of the forfeiture was issued. However, no order of forfeiture was entered which had then to be stayed.

Subsection g. addresses situations where forfeiture is either not raised in the court at the time of the finding of guilt or the sentencing, or where it is raised and the court declines to forfeit. In the Carney matter, the issue of forfeiture was clearly raised and addressed, albeit in a curious way. As the judge noted, he was aware that the prosecution might seek forfeiture because of reference to that subject in a letter between attorneys which reached the court, perhaps inadvertently, but in a manner he apparently felt improper. Nevertheless, when it came time for sentencing, the Judge took the definitive position that the issue of forfeiture was not one properly before him. Strangely, given the wording of *N.J.S.A.* 2C:51-2, which specifically calls for an order from the court, he espoused the view that "[N]o one has the right to ask the Court to forfeit somebody's job." Here was a case in which it seems abundantly clear that the forfeiture was mandated by the fact that the offense surely touched upon Carney's employment, yet the judge did not even believe that the subject of forfeiture was a fit one to raise and that he was without authority to forfeit the position. It is entirely unclear why he took this position, nevertheless, he did. Perhaps he thought that the reference in the statute to a "court" did not refer to a municipal court, but only to the Superior Court. Thus, the determination of these motions must be made knowing that this is not a situation where the issue was not raised, but is instead a case where, as subsection g. anticipates, a court has declined to order forfeiture, even though he clearly had the authority to issue the required order, or if he was convinced to do so, to stay a forfeiture and hold a hearing on whether forfeiture was warranted under the terms of the statute and the facts of the case.

It is exceedingly unfortunate that the issue of the entry of an order of forfeiture of Mr. Carney's position, which on its face seems to be a matter which the record before the municipal court would have made an almost ministerial act given the clear connection of the offense to the employment milieu, was not decided on the merits by the judge. However, since he did have the issue before him and did "decline" to order forfeiture, albeit apparently upon a mistaken belief that he had no authority to do so, the now amended 2C:51-2 mandates that the Board, as a public entity having authority to remove (albeit actually only to seek removal from the Commissioner), seek removal by establishing Mr. Carney's misconduct through the tenure removal procedure of *N.J.S.A.* 18A:6-10. As the municipal court findings would likely serve to estop any dispute over the facts of the harassment and serve to support an application for summary decision, the tenure removal process before the OAL and Commissioner may not be lengthy. However, it is unfortunately necessary if the Board intends to remove this miscreant.

The Board's motion for summary decision is **DISMISSED**. The petitioner's motion for summary decision is **GRANTED**. As there has been no indictment of Mr. Carney, and he has not been suspended pending the resolution of tenure charges certified to the Commissioner, he is entitled to receive back pay and benefits for such period as he has not been paid, less any amounts actually earned during that period. The Board shall pay him all moneys due within 15 days of the issuance of the final decision of the Commissioner of Education, unless a stay is granted.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 14, 1999
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

7/16/99
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 19 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETITIONER:

Exhibit A — Order dated 2/18/98, issued by Judge Camille M. Kenny, JSC, dismissing appeal of a conviction

FOR THE RESPONDENT:

Exhibit A — Transcript of Decision issued by Judge Emil A. Del Baglivo, JMC, on 6/11/97, in *State of N.J. v. Frank Carney*, Dkt. No. S1996-002596-0910

Exhibit B — Transcript of Sentencing issued by Judge Emil A. Del Baglivo, JMC, on 7/1/97, in *State of N.J. v. Frank Carney*, Dkt. No. S1996-002596-0910

Exhibit C — Letter dated 6/3/97 to Thomas Kobin, Esq., from Louis C. Rosen, Esq., Re: State v. Carney; Secaucus Mun. Court.

Exhibit D — Certified letter of suspension dated 6/16/97 to Francis Carney from Carl Johnson

Exhibit E — Certified letter of termination dated 7/2/97 to Frank Carney from Carl Johnson

OAL DKT. NO. EDU 9122-97
AGENCY DKT. NO. 287-8/97

FRANK CARNEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF UNION CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision issued by the Office of Administrative Law have been reviewed. Respondent's exceptions, which, pursuant to *N.J.A.C.* 1:1-18.4, were due to be filed with the Commissioner no later than August 2, 1999, were erroneously filed with the Director of the Office of Administrative Law. The exceptions were accepted for consideration by the Commissioner on August 12, 1999 so that the Board would not be prejudiced by the erroneous filing. *See* State Board of Education decision, *Arthur Krupp v. Board of Education of Union County Regional High School District No. 1, Union County*, 1991 *S.L.D.* 2568. Petitioner's reply exceptions were filed in accordance with the requirements of *N.J.A.C.* 1:1-18.4.

Respondent's exceptions aver that the Administrative Law Judge (ALJ) erred in concluding that "[a]s the [public forfeiture] statute now reads, without the order being issued the mere conviction for an offense touching employment is not sufficient to effectively forfeit the employment." (Initial Decision at p. 6) The Board argues that this interpretation ignores the

clear language of the forfeiture statute, *N.J.S.A.* 2C:51-2 *et seq.*, that the court was mandated to order forfeiture and reiterates its legal position that the Commissioner has the authority and responsibility to correct the municipal court judge's refusal and/or failure to order petitioner's forfeiture. In support thereof, respondent cites a number of decisions issued by other State agencies, such as the Department of Human Services and the Department of Corrections, which, respondent avers, continue to litigate issues of public forfeiture.

Respondent also excepts to the ALJ's conclusion on page seven of the initial decision that "[The tenure process] is unfortunately necessary if the Board intends to remove this miscreant," maintaining that this conclusion of law ignores the inherent authority of the Commissioner to terminate employment of a tenured employee found guilty of a forfeitable offense. With respect to the aforementioned, respondent contends, *inter alia,* that to require tenure removal proceedings in this matter would be nothing more than a waste of public funds, with the subsequent cost being borne by educational programs. It states:

> Although [the] tenure law (*N.J.S.A.* 18A:6-10 *et seq.*) demands an administrative hearing prior to a tenured employee's termination, the criminal statute (*N.J.S.A.* 2C:51-2 *et seq.*) does not. The filing of tenure charges to effectuate the obvious conclusion that Carney committed a forfeitable offense is legally unnecessary and burdensome. The only purpose to be served by requiring a tenure hearing under the circumstances of this case would be to impose a two year back pay burden on the school system. (Respondent's Exceptions at p. 7)

Petitioner's reply exceptions, which incorporate those arguments previously set forth in the original brief to the ALJ in this matter, aver, *inter alia,* that respondent appears to be arguing that "common sense" requires that forfeiture be automatic, notwithstanding the specific language of *N.J.S.A.* 2C:51-2(g), enacted in 1995, which states:

> The fact that a court has declined to order forfeiture shall not preclude the public officer or public entity having authority to

> remove the person convicted from seeking to remove or suspend the person from office, position or employment on the ground that the conduct giving rise to the conviction demonstrates that the person is unfit to hold the office, position or employment.
>
> (Reply Exceptions at pp. 1-2)

Of this, petitioner states "[b]y the theory argued by Respondent, even in a situation such as that herein, where a prosecutor seeks a ruling that an individual convicted of a violation has forfeited his public employment, and the court declines to issue such a ruling, employment is forfeited regardless, rendering the amendment to *N.J.S.A.* 2C:51-2 in Subsection (g) meaningless." (Reply Exceptions at p. 2)

Upon review of the record and pleadings of the parties, including the exceptions filed by the parties, the Commissioner concurs with and adopts the recommended decision of the ALJ granting petitioner's motion for summary decision, with the exception of one modification indicated below. In affirming the grant of summary decision to petitioner, the Commissioner notes for the record that the ALJ's conclusions of law are consistent with the holdings of the Commissioner in prior cases such as *In the Matter of the Tenure Hearing of Robert Morton, School District of the City of Camden, Camden County*, decided July 30, 1999; *In the Matter of the Tenure Hearing of Alan P. Tighe, School District of the Township of Old Bridge, Middlesex County*, decided May 3, 1999; *In the Matter of the Tenure Hearing of Neal Ercolano, School District of the Township of Branchburg, Somerset County*, decided June 25, 1998; *In the Matter of the Tenure Hearing of Robert R. Vitacco, School District of the Borough of Lincoln Park, Morris County*, 97 *N.J.A.R.*2d (EDU) 449, appeal pending State Board; *In the Matter of the Tenure Hearing of Leonard J. Marano, School District of the Borough of Lincoln Park, Morris County*, decided February 13, 1997, appeal pending State Board, and others, all of which determined that the Commissioner does not have jurisdiction under *N.J.S.A.* 2C:51-2 to enter

orders for forfeiture of public employment. Notwithstanding respondent's vigorous legal arguments otherwise, the Commissioner finds and determines that the ALJ correctly concluded that if a court declines to act to order forfeiture of public employment, then the only means for a board to seek removal of that individual from its employ is through the certifying of tenure charges pursuant to *N.J.S.A.* 18A:6-10 *et seq.* To hold otherwise would be contrary to the express statutory language of *N.J.S.A.* 2C:51-2(g).

The Commissioner does not, however, adopt that portion of the ALJ's order which directs that any monies and benefits owed to petitioner be paid within 15 days of the issuance of the Commissioner's final decision. Certainly, any back pay and benefits which may be owed to petitioner must be paid by the Board in a reasonable period of time; however, to place a requirement that such payment be made by the Board within 15 days is simply too restrictive. Once the precise amount of the award is determined, petitioner may invoke the regulations for payment of post-hearing interest, *N.J.A.C.* 6:24-1.16, should the Board fail to satisfy the award within 60 days.

Accordingly, summary judgment is granted to petitioner, except as modified herein relative to the time frame for payment of back pay and benefits.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

*This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

August 30, 1999
Date of Mailing, August 30, 1999

A.W., on behalf of minor child, H.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MULLICA, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent challenged Board's residency determination.

The ALJ concluded that petitioner met her burden of proof that during the relevant time she and the minor child, H.D., have been domiciled in respondent's District.

The Commissioner concurred with and adopted the recommended decision of the ALJ for the reasons set forth in the initial decision and determined that H.D., having been found to be domiciled in Mullica Township, is entitled, pursuant to *N.J.S.A.* 18A:38-1, to attend school in respondent's District free of charge.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4213-99

AGENCY DKT. NO. 74-4/99

A.W. & H.D.,

Petitioners,

v.

MULLICA TOWNSHIP

BOARD OF EDUCATION,

Respondent.

A.W., mother of H.D., for petitioners

William S. Cappuccio, Esq., for respondent

Record Closed: July 2, 1999 Decided: July 13, 1999

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

This case involves whether petitioners A.W. and H.D., her daughter, have been "domiciled" in the district served by the respondent Board of Education of the Township of Mullica (BOE) as that word is used in N.J.S.A. 18A:38-1.

PROCEDURAL HISTORY

Consistent with N.J.S.A. 18A:38-1, on March 22, 1999, the BOE held a hearing during which it considered whether petitioners were domiciled in the district; petitioners were afforded an opportunity to be heard, etc.; and the BOE determined that petitioners were not so domiciled. The BOE notified petitioners of its determination and that it would exclude H.D. from its schools and petitioners appealed to the Commissioner of the Department of Education, staying the BOE's action. N.J.S.A. 18A:38-1(b)(2). The BOE's answer was filed with the Department of Education and the Department transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on June 2, 1999. N.J.S.A. 18A:6-9; N.J.S.A. 52:14B-2(b). On June 23, 1999, the case was assigned to me, and on July 2, 1999, the case was heard in the OAL, Atlantic City Civil Courthouse.

FINDINGS OF FACT

A.W. and her witness Praxeves Samson were credible witnesses, and based on their testimony, I find the following facts:

A.W. was born on October 16, 1972, and raised in Ocean City, New Jersey. On November 26, 1991, she and M.D., to whom she was not married, became parents of H.D. and they resided together in Ocean City. In 1993, A.W. and M.D. separated and A.W. rented an apartment in Egg Harbor City, where she resided with H.D. (but not with M.D.).

Beginning in 1994, A.W. rented a house in Wharton Park, a development in Mullica Township, where she resided with H.D. Since 1994, A.W.'s official records, e.g., her driver's license, voter registration card, etc., have shown Mullica Township as her address and she has received mail by way of post offices, e.g., "Elwood," in Mullica Township. See, e.g., P-1; P-2.

During the 1996-97 school year, H.D. began school, entering the BOE's preschool, and, since that time, H.D. has been a student in the BOE's school system.

During the summer of 1998, because A.W. could not afford the Wharton Park house, she and H.D. began to reside in The Homestead at 317 Weymouth Road in Mullica Township. The Homestead, owned by Ms. Samson, is a home for the elderly. A.W., a certified nurse's aide (CNA), was employed there 40 hours per week, providing care for the elderly residents, cooking and cleaning. A.W. received an apartment relative to her employment because she was regularly required to be available at The Homestead overnight in case a resident needed assistance. In the apartment A.W. kept all their personalty, e.g., clothing, pictures, a television, etc. When A.W. has a visitor, e.g., her father, he visits A.W. and H.D. at The Homestead. Ms. Samson testified credibly that The Homestead obtained an extension for preparation and filing of tax records, including those related to A.W.'s employment, but that those records will show petitioners' address as Mullica Township, i.e., The Homestead.

In an effort to earn additional income, when not required to work at The Homestead, A.W. has had private patients. For example, A.W. provided occasional private care for D.F. at his home in Egg Harbor City. Because he required someone to be available at his home overnight in case he needed assistance, A.W. and H.D. sometimes packed a bag and stayed overnight in the bedroom in D.F.'s home used by CNAs for that purpose. In the morning, when she was relieved by another CNA, A.W. then drove H.D. to school (in the BOE's system). For this reason, on the mornings of February 2, 3, 9, 10, 11 and 12, 1999, Catherine Guischard, the BOE's attendance officer, observed A.W. and H.D. traveling from Egg Harbor City to the BOE's school, where A.W. dropped off H.D.

CONCLUSIONS OF LAW

The State, by way of local school districts, provides "for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all children in the State between the ages of five and eighteen years." N.J. Const. art. VIII, § 4, ¶ 1.

N.J.S.A. 18A:38-1 states, in pertinent part:

> Public schools shall be free to the following persons over five and under 20 years of age:

a. Any person who is domiciled within the school district;

b. . . . .

(2) If the superintendent . . . of a school district finds that the parent or guardian of a child who is attending the schools of the district is not domiciled within the district and the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, the superintendent or administrative principal may apply to the board of education for the removal of the child. The parent or guardian shall be entitled to a hearing before the board and if in the judgment of the board the parent or guardian is not domiciled within the district or the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, the board may order the transfer or removal of the child from school. The parent or guardian may contest the board's decision before the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. The board of education shall, at the time of its decision, notify the parent or guardian in writing of his right to contest the decision within 21 days. No child shall be removed from school during the 21-day period in which the parent may contest the board's decision or during the pendency of the proceedings before the commissioner. If in the judgment of the commissioner the evidence does not support the claim of the parent or guardian, the commissioner shall assess the parent or guardian tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced. Nothing shall preclude a board from collecting tuition from the parent or guardian for a student's period of ineligible attendance in the schools of the district where the issue is not appealed to the commissioner.

[Emphasis added.]

"Domicile" is defined as "**1.** A residence; a home. **2.** One's legal residence." American Heritage Dictionary 550 (3d ed. 1996). Domicile has been described as "the place of [a person's]

abode where he has the present intention of remaining and to which, if absent, he intends to return." Mercadante v. City of Paterson, 111 N.J. Super. 35, 39 (Ch. Div. 1970) (citation omitted), aff'd, 58 N.J. 112 (1971). "A person may have several residences or places of abode. However, he can only have one domicile at one time." Collins v. Yancey, 55 N.J. Super. 514, 520 (Law Div. 1959). Between residences, factors used to identify the domicile include: (1) the physical characteristics of each residence, (2) the time spent and things done in each residence, (3) other persons found in each residence, (4) the person's mental attitude about each residence, and (5) whether, when absent, the person has an intention to return. Mercadante, supra, 111 N.J. Super. at 39-40. Acts, statements and documents may be relevant in determining domicile.

Consistent with N.J.S.A. 18A:38-1, and consistent with the usual presumption that public entities act lawfully, reasonably and in good faith, in these circumstances, petitioners bear the burden of proof by a preponderance (the greater weight) of the competent and credible evidence that the BOE's determination was incorrect and that they were domiciled in the district.

Consistent with my "Findings of Fact," petitioners have met their burden of proof and have proven that, during relevant times, they have been "domiciled" in the district. Therefore, petitioners are not liable for tuition.

ORDERS

(1) The petitioners' claim is **GRANTED**. H.D. may continue to attend the BOE's school without liability for tuition.

(2) The BOE's counterclaim for tuition is **DISMISSED WITH PREJUDICE**.

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

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

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

July 13, 1999
DATE

John R Tassini
JOHN R. TASSINI, ALJ

Receipt Acknowledged:

7/20/99
DATE

Deke Antanaitis/TB
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 21 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

For Petitioners:

P-1EV A.W.'s driver's license

P-2EV A.W.'s Voter Registration Card

For Respondent:

None

WITNESSES

For Petitioners:

A.W., petitioner

Praxeves Samson

For Respondent:

None

OAL DKT. NO. EDU 4213-99
AGENCY DKT. NO. 74-4/99

A.W., on behalf of minor child, H.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MULLICA, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review of the record and factual circumstances of this matter, the Commissioner concurs with and adopts the recommended decision of the Administrative Law Judge for the reasons set forth in the initial decision.

Accordingly, the Commissioner finds and determines that H.D., having been found to be domiciled in Mullica Township, is entitled, pursuant to *N.J.S.A.* 18A:38-1, to attend school in respondent's District free of charge.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

August 30,1999
Date of Mailing, August 30, 1999

285-99 SEC

IN THE MATTER OF ANN SEKELSKY	:	
SUSSEX COUNTY EDUCATIONAL	:	COMMISSIONER OF EDUCATION
SERVICES COMMISSION.	:	DECISION
	:	
	:	

August 31, 1999

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**DOCKET NO. R07-99**
ANN SEKELSKY	:	
Sussex Co. Educ. Services Commission	:	
Sussex County	:	**RESOLUTION**
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-25 requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement for the School Ethics Commission;

WHEREAS, Ann Sekelsky is a member of the Sussex County Education Services Commission Board of Education and thus a "school official" under the Act; and

WHEREAS, the deadline to file these disclosure statements was April 30, 1999 for school officials in office since January 30, 1999 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission did not take action against school officials who failed to file disclosure statements until July 27, 1999; and

WHEREAS, the Commission issued an Order on June 21, 1999, directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the disclosure statements; and

WHEREAS, this school official failed to reply to the Order to Show Cause although the return receipt indicates that the board secretary received the Order on June 29, 1999, directing him or her to deliver it to you; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that the Commission would discuss this matter at its July 27, 1999 meeting, that she had the right to attend, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that her failure to file a disclosure statement constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official has been given the opportunity to provide the disclosure statements, but has declined; and

WHEREAS, the appropriate penalty for the violation is removal from the board, especially in light of the failure to respond to the Commission's correspondence;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Ann Sekelsky violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of removal from the board.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: July 27, 1999

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

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AGENCY DKT. NO. 224-8/99

IN THE MATTER OF ANN SEKELSKY	:	
SUSSEX COUNTY EDUCATIONAL	:	COMMISSIONER OF EDUCATION
SERVICES COMMISSION.	:	DECISION
	:	
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25 and/or an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26; and

Whereas, the deadline to file these disclosure statements was April 30, 1999 for school officials in office since January 30, 1999, or 30 days from swearing in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission, upon being advised by the County Superintendent that this school official did not file a disclosure statement with her school district, as required by the Act; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on June 21, 1999, the Commission issued an Order to Show Cause directing this school official to demonstrate why she should not be found in violation of the Act for failing to file the necessary statement(s); and

Whereas, the above-named school official failed to reply to the Order to Show Cause; and

Whereas, the Commission voted on July 27, 1999, to recommend removal of the above-named school official for failure to file a disclosure statement in violation of State statute, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated August 5, 1999 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, no response was submitted by the above-named school official; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as his own the recommendations of the Commission, and further admonishes the school official for her failure to file the requisite statement, in that such inactivity has caused an inordinate amount of administrative and adjudicative time to be wasted by local, county and state education officials; now therefore

IT IS ORDERED that the above-named school official is removed from office as of the date of this decision.*

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

August 31, 1999
Date of Mailing, August 31, 1999

286-99SEC

IN THE MATTER OF JANET CORNWALL,	:	
LEAP ACADEMY CHARTER SCHOOL,	:	COMMISSIONER OF EDUCATION
CAMDEN COUNTY.	:	DECISION
	:	

August 31, 1999

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**DOCKET NO. R01-99**
JANET CORNWELL	:	
LEAP Academy Charter School	:	
Camden County	:	**RESOLUTION**

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-25 requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement for the School Ethics Commission;

WHEREAS, Janet Cornwell is a member of the LEAP Academy Charter School Board of Trustees and thus a "school official" under N.J.A.C. 6A:11-3.1; and

WHEREAS, the deadline to file these disclosure statements was April 30, 1999 for school officials in office since January 30, 1999 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission did not take action against school officials who failed to file disclosure statements until July 27, 1999; and

WHEREAS, the Commission issued an Order on June 21, 1999, directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the disclosure statements; and

WHEREAS, this school official failed to reply to the Order to Show Cause although the return receipt indicates that the board secretary received the Order on June 29, 1999, directing him or her to deliver it to you; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that the Commission would discuss this matter at its July 27, 1999 meeting, that she had the right to attend, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that her failure to file a disclosure statement constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official has been given the opportunity to provide the disclosure statements, but has declined; and

WHEREAS, the appropriate penalty for the violation is removal from the board, especially in light of the failure to respond to the Commission's correspondence;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Janet Cornwell violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of removal from the board.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: July 27, 1999

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

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AGENCY DKT. NO. 230-8/99

IN THE MATTER OF JANET CORNWALL, :

LEAP ACADEMY CHARTER SCHOOL, : COMMISSIONER OF EDUCATION

CAMDEN COUNTY. : DECISION

:

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25 and/or an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26; and

Whereas, the deadline to file these disclosure statements was April 30, 1999 for school officials in office since January 30, 1999, or 30 days from swearing in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission, upon being advised by the County Superintendent that this school official did not file a disclosure statement with her school district, as required by the Act; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on June 21, 1999, the Commission issued an Order to Show Cause directing this school official to demonstrate why she should not be found in violation of the Act for failing to file the necessary statement(s); and

Whereas, the above-named school official failed to reply to the Order to Show Cause; and

Whereas, the Commission voted on July 27, 1999, to recommend removal of the above-named school official for failure to file a disclosure statement in violation of State statute, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated August 5, 1999 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, no response was submitted by the above-named school official; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as his own the recommendations of the Commission, and further admonishes the school official for her failure to file the requisite statement, in that such inactivity has caused an inordinate amount of administrative and adjudicative time to be wasted by local, county and state education officials; now therefore

IT IS ORDERED that the above-named school official is removed from office as of the date of this decision.*

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.
August 31, 1999
Date of Mailing, August 31, 1999

IN THE MATTER OF BRUCE SMITH,	:	
HACKETTSTOWN BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, WARREN COUNTY.	:	DECISION
	:	

August 31, 1999

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**DOCKET NO. R09-99**
BRUCE SMITH	:	
Hackettstown Board of Education	:	
Warren County	:	**RESOLUTION**
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-25 requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement for the School Ethics Commission;

WHEREAS, Bruce Smith is a member of the Hackettstown Board of Education and thus a "school official" under the Act; and

WHEREAS, the deadline to file these disclosure statements was April 30, 1999 for school officials in office since January 30, 1999 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission did not take action against school officials who failed to file disclosure statements until July 27, 1999; and

WHEREAS, the Commission issued an Order on June 21, 1999, directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the disclosure statements; and

WHEREAS, this school official failed to reply to the Order to Show Cause although the return receipt indicates that the board secretary received the Order on June 28, 1999, directing him or her to deliver it to you; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that the Commission would discuss this matter at its July 27, 1999 meeting, that he had the right to attend, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that him failure to file a disclosure statement constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official has been given the opportunity to provide the disclosure statements, but has declined; and

WHEREAS, the appropriate penalty for the violation is removal from the board, especially in light of the failure to respond to the Commission's correspondence;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Bruce Smith violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of removal from the board.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: July 27, 1999

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

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IN THE MATTER OF BRUCE SMITH,	:	
HACKETTSTOWN BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, WARREN COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25 and/or an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26; and

Whereas, the deadline to file these disclosure statements was April 30, 1999 for school officials in office since January 30, 1999, or 30 days from swearing in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission, upon being advised by the County Superintendent that this school official did not file a disclosure statement with his school district, as required by the Act; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on June 21, 1999, the Commission issued an Order to Show Cause directing this school official to demonstrate why he should not be found in violation of the Act for failing to file the necessary statement(s); and

Whereas, the above-named school official failed to reply to the Order to Show Cause; and

Whereas, the Commission voted on July 27, 1999, to recommend removal of the above-named school official for failure to file a disclosure statement in violation of State statute, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated August 5, 1999 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, no response was submitted by the above-named school official; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as his own the recommendations of the Commission, and further admonishes the school official for his failure to file the requisite statement, in that such inactivity has caused an inordinate amount of administrative and adjudicative time to be wasted by local, county and state education officials; now therefore

IT IS ORDERED that the above-named school official is removed from office as of the date of this decision.*

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

August 31, 1999
Date of Mailing, August 31, 1999

288-99SEC

IN THE MATTER OF EDITH ADDISON,	:	
BOARD OF EDUCATION OF THE CITY	:	COMMISSIONER OF EDUCATION
OF TRENTON, MERCER COUNTY.	:	DECISION
	:	
	:	

August 31, 1999

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**DOCKET NO. R06-99**
EDITH ADDISON	:	
Trenton Board of Education	:	
Mercer County	:	**RESOLUTION**

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-25 requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement for the School Ethics Commission;

WHEREAS, Edith Addison is a member of the Trenton Board of Education and thus a "school official" under the Act; and

WHEREAS, the deadline to file these disclosure statements was April 30, 1999 for school officials in office since January 30, 1999 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission did not take action against school officials who failed to file disclosure statements until July 27, 1999; and

WHEREAS, the Commission issued an Order on June 21, 1999, directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the disclosure statements; and

WHEREAS, this school official failed to reply to the Order to Show Cause although the return receipt indicates that the board secretary received the Order on July 2, 1999, directing him or her to deliver it to you; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that the Commission would discuss this matter at its July 27, 1999 meeting, that she had the right to attend, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that her failure to file a disclosure statement constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official has been given the opportunity to provide the disclosure statements, but has declined; and

WHEREAS, the appropriate penalty for the violation is removal from the board, especially in light of the failure to respond to the Commission's correspondence;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Edith Addison violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of removal from the board.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: July 27, 1999

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

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AGENCY DKT. NO. 225-8/99

IN THE MATTER OF EDITH ADDISON, :

BOARD OF EDUCATION OF THE CITY : COMMISSIONER OF EDUCATION

OF TRENTON, MERCER COUNTY. : DECISION

:

_____:

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25 and/or an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26; and

Whereas, the deadline to file these disclosure statements was April 30, 1999 for school officials in office since January 30, 1999, or 30 days from swearing in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission, upon being advised by the County Superintendent that this school official did not file a disclosure statement with her school district, as required by the Act; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on June 21, 1999, the Commission issued an Order to Show Cause directing this school official to demonstrate why she should not be found in violation of the Act for failing to file the necessary statement(s); and

Whereas, the above-named school official failed to reply to the Order to Show Cause; and

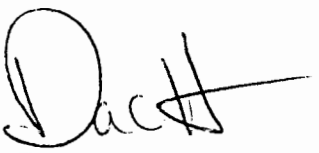
Whereas, the Commission voted on July 27, 1999, to recommend removal of the above-named school official for failure to file a disclosure statement in violation of State statute, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated August 5, 1999 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, no response was submitted by the above-named school official; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as his own the recommendations of the Commission, and further admonishes the school official for her failure to file the requisite statement, in that such inactivity has caused an inordinate amount of administrative and adjudicative time to be wasted by local, county and state education officials; now therefore

IT IS ORDERED that the above-named school official is removed from office as of the date of this decision.*



COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

August 31, 1999

Date of Mailing, August 31,1999

289-99E

DONALD BEATTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE TOWNSHIP OF CHESTER, MORRIS COUNTY,	:	
RESPONDENT.	:	

August 31, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE

ORDER

DENYING EMERGENT RELIEF

OAL DKT. NO. EDU 9333-99
and 9334-99

Agency Dkt. No. 255-8/99 and 191-7/99

CONSOLIDATED

DONALD BEATTY

Petitioner,

v.

BOARD OF EDUCATION OF THE
TOWNSHIP OF CHESTER, MORRIS COUNTY

Respondent.

Martin R. Pachman, Esq., for petitioner

Joseph R. Morano, Esq., for respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

On August 18, 1999, petitioner, Donald Beatty, moved before the Commissioner of Education for an Order that respondent, Board of Education of the Township of Chester (Board), "grant him access to the application materials for non-employee candidates and the relevant personnel file data for the employee/applicants, sufficiently in advance of the August 24 meeting to make the review meaningful," and to provide such other relief as the Commissioner deems appropriate.

OAL DKT. NO. EDU 9333-99

On August 20, 1999, the matter was transmitted to the Office of Administrative Law (OAL). Additionally, petitioner's prior motion for emergent relief was transmitted. The matters were consolidated and scheduled for hearing on August 24, 1999 at 1:30 p.m. Prior to the hearing, the parties discussed settlement and at approximately 3:00 p.m, the parties announced that they could not resolve the matter.

Based upon a careful consideration of petitioner's request for emergent relief, the prior petition filed in July 1999, and the position of the parties, I denied petitioner's request for emergent relief.

Thereafter, the parties agreed to file stipulation of facts and cross-motions for summary decision. Further, a hearing was scheduled for September 22, 1999 to permit testimony and cross-examination on any disputed facts.

In his July 8, 1999 petition, petitioner sought in part an Order:

- providing a correct interpretation of *Honner v. Bd. of Kingsway Regional H.S., 1990 S.L.D.* wherein Board members are permitted to review all applications for a position of employment and to review employee records of those subject to employment action requiring a vote of the Board.
- directing the Chester Township Board of Education to delay the action proposed for the Special Board of Education meeting scheduled for July 13, 1999, during which the Board of Education is scheduled to vote on the recommendations for hiring and/or transferring of school personnel and other school personnel matters. Said special meeting was approved at the Regular Board meeting of June 29, 1999.
- directing the Superintendent of the Chester Township School District to make available immediately all of the applications and resumes of any and all persons who seek employment within the Chester Township School District and whose employment is subject to the vote of the Chester Township Board of Education.
- directing the Superintendent of the Chester Township School District to continue the past procedure of allowing all Board Members to review all applications and resumes of all persons applying for employment within the Chester Township School District until all aspects of the challenge to the interpretation by the Attorney for the Chester Township Board of Education of *Horner v. Kingsway* are resolved.

Although the Board has denied petitioner full access to all information, it stated that petitioner could review the resumes/application material of every candidate that was considered by the personnel committee, including those recommended for employment by the Superintendent.

On July 13, 1999, Douglas B. Groff, Acting Commissioner of Education, denied petitioner's motion for emergent relief and stated:

> Petitioner asks that I enjoin the Board from taking any personnel actions at its meeting scheduled for this evening, and that I enter an order directing the Board and Superintendent immediately to return to their purported past practice with regard to Board member review of applications for employment and personnel records.
>
> In order to warrant the extraordinary remedy of emergent relief, an applicant must meet each of the standards of *Crowe v. Degioia*, 90 *N.J.* 126 (1982). In reviewing Petitioner's application, I find that he has not met such standards. Initially, petitioner and the Board appear to be making substantially conflicting representations as to what action the Board will, in fact, be taking at the meeting in question and what the Board's policies and procedures actually are with regard to access to employment information. Therefore, I cannot conclude that irreparable harm will result if the meeting is not enjoined and an immediate order is not granted regarding the Board's policies, nor can I conclude that petitioner has demonstrated a likelihood of prevailing on the merits of his claim. Moreover, the balance of equities in this matter with respect to injunctive action clearly lies with the Board, whose need for the ongoing operation of the district outweighs any request for extraordinary restraints in the absence of a specific showing of harm. Finally, to the extent that petitioner seeks an emergency declaration with respect to the meaning of a prior Commissioner's decision, no such declaration may be fairly made in the absence of a clearly defined state of facts to which to apply the decision.

The purpose of emergent relief is to preserve the status quo pending the outcome of a full hearing on the merits. *N.J.A.C.* 1:1-12.6 (a) provides that "where authorized by law and where irreparable harm will result without an expedited decision granting or prohibiting some action or relief connected with a contested case, emergency relief pending a final decision on the whole contested case may be ordered upon the application of a party". In *Crowe v DeGioia*, 90 *N.J.* 126 (1982), the court was guided by "certain fundamental principals" to determine whether emergent relief should be granted. Emergent relief will be granted upon proof that (1) the movant will suffer

irreparable harm, (2) the movant has a reasonable probability of success, and (3) the balance of the equities weighs in favor of the movant.

Petitioner's current request for emergent relief is to review all personnel applications received by the district. The request is identical to his prior request which the Commissioner considered and denied. Moreover, the current request raises essentially the same issues and arguments as the prior motion for relief. Indeed, petitioner has not withdrawn his prior petition, agency docket number 255-8/99, in which he seeks an order that the Board "continue the past procedure of allowing all Board Members to review all applications and resumes of all persons applying for employment" within the District. Further, petitioner requested the Commissioner to provide a "correct interpretation of *Honner v. Bd. of Kingsway Regional H.S., 1990 S.L.D,*" and to grant a "delay the action proposed for...the meeting scheduled for July 13, 1999."

The consolidated petitions contain the same conflicting presentations between the parties regarding the identity of the Board's actions at its next meeting, the Board's past procedure regarding access to employment information, and the appropriateness of the Board's policies under the Commissioner's decision in *Honner.* The Commissioner denied the relief requested. Petitioner did not appeal. Instead, petitioner filed another request for emergent relief five days before the Board scheduled meeting on August 24, 1999.

Therefore, I **CONCLUDE** that petitioner has not demonstrated that irreparable harm will result if an immediate order is not granted. Further, I **CONCLUDE** that petitioner has not demonstrated a likelihood of prevailing on the merits of his claims.

Additionally, considering the timeliness of his motion, I **CONCLUDE** the equities do not weigh in petitioner's favor. An order that the Board provide petitioner all employment information, which is in the possession of different personnel, could be granted only after the close of the Board's business day and hours before the Board's

scheduled meeting. The likelihood that the Board could obtain all "the application materials for non-employee candidates and the relevant personal file data for the employee/applicants, sufficiently in advance of the August 24 meeting to make the review meaningful" is slim to non-existent. The consequence of granting petitioner's motion would delay the Board's meeting. The need for ongoing operations of the district outweighs the need of petitioner's request.

Therefore, it is **ORDERED** that petitioner's request for emergent relief is **DENIED**.

This order may be reviewed by the **Department of Education** either upon interlocutory review, pursuant to *N.J.A.C.* 1:1-14.10 or at the end of the contested case, pursuant to *N.J.A.C.* 1:1-18.6.

August 27, 1999
DATE

MUMTAZ BARI-BROWN, ALJ

cb

OAL DKT. NO. EDU 9333-99
AGENCY DKT. NO. 255-8/99 and 191-7/99 (CONSOLIDATED)

DONALD BEATTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE TOWNSHIP OF CHESTER, MORRIS COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the initial order of the ALJ on motion for emergent relief have been reviewed by the Assistant Commissioner, to whom this interim matter has been delegated pursuant to N.J.S.A. 18A:4-34, as have the parties' papers in response to the order.

Upon review, the Assistant Commissioner determines to set aside the decision of the ALJ and, instead, to order interim relief to the extent set forth below. Initially, the Assistant Commissioner notes that the instant application differs from petitioner's prior attempt to obtain emergent relief in two crucial ways. First, it is undisputed on this record that the Board's granting of Board member access to employment applications is, in fact, limited to the applications of candidates considered by the personnel committee. Second, the Board does not refute petitioner's contention that Board action to appoint at least some personnel is imminent, if not necessarily to occur on a particular date. Therefore, although petitioner's ultimate claim is the same as that of his prior application, the two most important bases for the prior denial of emergent relief are absent in the present application. Thus, a new analysis is warranted.

As stated in response to petitioner's prior application and recognized by the ALJ, in order to warrant the extraordinary remedy of emergent relief, an applicant must meet each of the standards of *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). In reviewing petitioner's present application in light of these standards, the Assistant Commissioner finds that the most compelling factor favoring petitioner's motion is his likelihood of success on the merits. The clear language of prior decisional law with respect to the central issue in this matter, the responsibility and authority of individual board members to cast informed votes with regard to accepting or rejecting the recommendations of the superintendent in filling district positions, creates a reasonable likelihood that petitioner will ultimately be found to be entitled to the fundamental relief he seeks. *Marilyn L. Horner v. Board of Education of the Kingsway Regional High School District, Gloucester County,* 1990 *S.L.D.* 752

The Assistant Commissioner further finds that, once lost, petitioner's opportunity to cast an informed vote cannot be recaptured or remedied, so that he would, indeed, sustain irreparable harm if interim relief were not accorded. Having thus demonstrated specific harm and a reasonable likelihood of success, the equities in this matter now *generally* rest with petitioner, given the Board's ability to prospectively ensure that Board member access to application materials submitted by *all* candidates for employment need not impede the ongoing operation of the district pending the outcome of the underlying dispute on the merits. In so holding, the Assistant Commissioner stresses that the Board has *full authority* to place reasonable limitations on the times and places for review of applicant materials by individual Board members, so that the orderly administrative operation of the district and the timely filling of vacancies will not be compromised by demands for access on the part of individual Board members.

However, to the extent that there are indications in the record that the Board may be taking action on the date of this decision, August 31, 1999, to fill vacancies for which petitioner has not had the opportunity to review applications other than those considered by the personnel committee, the Assistant Commissioner finds, as did the ALJ with reference to the meeting of August 24, 1999,[1] that the *specific* equities in this one instance lie with the Board so as to preclude relief for petitioner. As stated by the ALJ, it is extremely unlikely at this late point that petitioner could reasonably be provided with all application materials sufficiently in advance of the meeting to permit meaningful review consonant with the basis for the granting of emergent relief herein, and the Assistant Commissioner will not, on the basis of the present record, conclude that any appointments scheduled for consideration at this meeting should be delayed in deference to petitioner.

Accordingly, it is ORDERED that, except as specifically noted herein and subject to the policies of the Board with respect to time and place of access, the Board of Education shall, pending determination on the merits of this matter, accord petitioner access to application materials consistent with the Commissioner's holding in *Horner, supra*, notwithstanding that such applications are not considered by the Board's personnel committee.[2] The matter shall next proceed to hearing as recommended by the ALJ.

ASSISTANT COMMISSIONER OF EDUCATION

[1] Although the written order of the ALJ was prepared on August 27, 1999 and filed with the Commissioner, via facsimile, on August 30, 1999, the hearing on emergent relief was conducted on August 24, 1999.

[2] This decision, as the Commissioner's final determination in the emergent aspect of this matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

August 31, 1999
Faxed, August 31, 1999

290-99E

LYNN P. SHERMAN *ET AL.*,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BEACH HAVEN, OCEAN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

DENYING EMERGENT RELIEF

OAL DKT. NO. EDU 6647-99

AGENCY DKT. NO. 239 8/99

LYNN P. SHERMAN, et als.,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BEACH HAVEN,

Respondent.

John F. Rodgers, Jr., Esq., appearing for petitioners

Kim C. Belin, Esq., appearing for respondent (Capehart & Scatchard, P.A., attorneys)

Record Closed: August 26, 1999 Decided: August 27, 1999

BEFORE **ANTHONY T. BRUNO,** ALJ:

Petitioners having filed a Petition with the Commissioner of Education seeking to nullify respondent's resolution of June 21, 1999 "to eliminate two half-day Kindergarten programs in favor of a full day five year old Kindergarten program," and petitioners having moved for emergent relief pursuant to *N.J.A.C.* 6:24-1.5, and respondent having filed an answer and letter memorandum of facts and law in opposition to petitioners' motion, and a hearing on petitioners' motion for emergent relief having been conducted on August 26, 1999 at Mercerville, New

Jersey, during which hearing testimony under oath was presented on behalf of both parties, said testimony for petitioners being from Dr. Joseph Cino, Audrey P. Whitcraft-Webby, Nancie Samuelson, Mary Louise Freyberger-Bellingdri, Senise Ayers, Sharon Voisine, Audrey Ivancich, and Vanessa Kelly, and testimony for respondent being from Superintendent/Principal Eric Johansen, and Minutes of meetings of the Board of Education (Exhibits P-1 through P-4, R-1 through R-5), meeting agenda (Exhibit P-5), letters to parents (Exhibits P-6 and -7), 1999-2000 school year budget (Exhibit P-8), Superintendent's letter to Beach Haven Times (Exhibit P-9), and letter from Acting Commissioner of the Department of Education (Exhibit P-10) admitted into the hearing record, and the undersigned being satisfied that the petitioners did not demonstrate by the preponderance of the competent and credible evidence that the children affected by the decision of the Board of Education will suffer irreparable harm if emergent relief is not granted, and having concluded that petitioners have not met the standard for granting interim relief set forth in *Crowe v. DeGioia*, 90 N.J. 126 (1982) and *N.J.A.C.* 1:1-12.6(a),

It is **ORDERED** that petitioners' application for emergent relief is **DENIED.**

It is further **ORDERED** that this matter be continued for plenary hearing to be held on Wednesday, October 20, 1999 at the Office of Administrative Law, Mercerville, New Jersey at 9:00 a.m.

This order may be reviewed by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** either upon interlocutory review pursuant to *N.J.A.C.* 1:1-14.10 or at the end of the contested case, pursuant to *N.J.A.C.* 1:1-18.6.

August 27, 1999
DATE

ANTHONY T. BRUNO, ALJ

tmp

OAL DKT. NO. EDU 6647-99
AGENCY DKT. NO. 239-8/99

LYNN P. SHERMAN *ET AL.*,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BEACH HAVEN, OCEAN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this emergent matter, including the audiotapes of the hearing conducted at the Office of Administrative Law on August 26, 1999, have been reviewed.

Upon such review, the Commissioner affirms the Order of the Administrative Law Judge (ALJ) denying emergent relief as he concurs that petitioners have not satisfied the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the within application for emergent relief is hereby denied. This matter shall move to hearing on its merits on Wednesday, October 20, 1999, as directed by the ALJ.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in this interim matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties

September 2, 1999
Faxed, September 2, 1999

291-99

J.S. AND L.S., on behalf of minor child, A.S.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parents sought an order compelling the respondent Board to admit their daughter as a non-resident tuition student.

The ALJ determined that, pursuant to *N.J.S.A.* 18A:38-3(a), a board of education may permit a nonresident to be admitted to a district's schools, but the statute does not require the board to allow this type of admission. Concluding that the respondent Board's discretionary authority to make determinations in this situation must be the overriding consideration, the ALJ dismissed the petition.

The Commissioner concurred with the findings and conclusions of the ALJ and agreed that petitioners failed to satisfy their burden of proving that the Board's decision to refuse to admit A.S. was arbitrary, capricious, unreasonable or otherwise made in bad faith. Commissioner also found that petitioners did not demonstrate entitlement to equitable estoppel of the Board's action. Petition was dismissed.

September 3, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7735-98
AGENCY DKT. NO. 390-8/98

J.S. AND L.S. ON BEHALF
OF MINOR CHILD A.S.,

Petitioners,

v.

MOUNTAIN LAKES BOARD
OF EDUCATION,

Respondent.

J.S. and L.S., *pro se*

David B. Rand, Esq., for respondent
(Rand, Algeier, Tosti & Woodruff, attorneys)

Record Closed: June 3, 1999 Decided: July 16, 1999

BEFORE **RICHARD McGILL,** ALJ:

J.S. and L.S. filed a petition with the Commissioner of Education seeking an order compelling the Mountain Lakes Board of Education (respondent) to admit their daughter, A.S., to the Wildwood School as a non-resident tuition student. Respondent opposes petitioners' request.

PROCEDURAL HISTORY

After an initial filing of a complaint in lieu of prerogative writ in Superior Court, the matter was transferred to the Commissioner of Education on August 25, 1998. The matter was then transmitted to the Office of Administrative Law on August 27, 1998, for determination as a contested case. The transmittal included an application for emergent relief.

The application for emergent relief was denied by Order dated September 4, 1998, and that denial was affirmed by the Commissioner of Education in a Decision on Motion dated October 7, 1998. The plenary hearing in this matter was held on May 24, 1999, at the Office of Administrative Law in Newark, New Jersey, and the record closed on June 3, 1999, upon receipt of briefs.

ISSUE

The issue in this proceeding is whether A.S. should be admitted to respondent's Wildwood School as a non-resident tuition student.

FACTS

Each party to this proceeding called one witness. L.S. testified for petitioners, and respondent's witness was John Sakala, its Superintendent of Schools. Both witnesses were credible, and their testimony is accepted as true. Based upon the evidence presented at the hearing, I **FIND** as follows.

J.S. and L.S. moved to Denville, New Jersey, in or about 1987. At that time, they contacted Briarcliff, which is respondent's middle school, and spoke with the principal, James Bagli, concerning attendance by their daughter, D.S., as a non-resident tuition student. J.S. and L.S. mentioned their second daughter, Am.S., and Mr. Bagli said that there was a policy not to separate siblings. J.S. and L.S. decided to enroll D.S. in the Briarcliff School with the

understanding that future siblings would be admitted to respondent's schools. D.S. graduated from respondent's high school in 1994.

Am.S. was admitted to the first grade at respondent's Wildwood School, which is a K to 4 school, in September 1992 as a non-resident tuition student. The principal of Wildwood School, Robert J. Reid, stated that Am.S. was admitted to avoid breaking up a family. Children without siblings in respondent's school system were not being admitted as non-resident tuition students at that time.

Respondent's written policy with respect to non-resident pupils directs the Superintendent to establish a procedure for admission of non-resident students within certain guidelines. Those written guidelines do not mention a policy in regard to siblings. Rather, this circumstance was a factor that was taken into consideration.

In or about 1997, respondent sought voter approval to construct major improvements to the Mountain Lakes schools. One of the major concerns was overcrowding especially at the elementary school. In October 1997, the voters approved a referendum allowing respondent to spend in excess of $7 million to construct additional facilities particularly at the Wildwood School, which had experienced a sixty percent increase in enrollment. In addition to the construction of new facilities to deal with the problem of overcrowding, respondent limited non-resident admission to the elementary school.

L.S. spoke with Superintendent Sakala in June 1997 concerning admission of A.S. to respondent's schools. Superintendent Sakala informed L.S. of the change in respondent's policy in regard to non-resident students, but he said that he would take the matter to the Board. Superintendent Sakala encouraged L.S. to wait until first grade before seeking to admit A.S. to respondent's schools. Following Superintendent Sakala's advice, J.S. and L.S. decided to send A.S. to a private kindergarten and seek admission of A.S. to respondent's schools for the first grade beginning in September 1998.

Superintendent Sakala made the suggestion to defer enrolling A.S. because the policy was to limit kindergarten class size to sixteen. With more than sixteen pupils, respondent hired an aide. However, in the first grade, respondent did not hire an aide unless there were more than twenty children in a class.

In early February 1998, L.S. called Superintendent Sakala concerning registration of A.S. for the first grade. Superintendent Sakala said that he was not sure that the District was accepting tuition students because of the referendum, but he said that he would take the matter to the Board members.

The question of non-resident tuition students was discussed at a Board meeting on February 2, 1998. Superintendent Sakala advised the Board that no tuition students had been accepted at Wildwood School in recent years, but he urged the Board to allow siblings of non-residents to attend school there. Nonetheless, the Board decided to maintain the policy of not accepting any additional tuition students at the elementary level.

Thereafter, Superintendent Sakala advised L.S. that A.S. would not be accepted for the first grade. At the same time, Superintendent Sakala advised L.S. to speak with individual Board members, and he agreed to bring the matter up for a specific vote. Superintendent Sakala advised L.S. that a vote of the Board would be necessary.

J.S. and L.S. sent a letter dated February 23, 1998, to Superintendent Sakala, expressing their disappointment with the decision not to accept A.S. as a tuition student. In the letter, J.S. and L.S. suggest that the Board members may not have been fully aware of all the circumstances. In essence, J.S. and L.S. state that respondent should honor the commitment to accept siblings of non-resident tuition students and not break up families.

Thereafter, Superintendent Sakala discussed A.S. with the Board during an executive session on February 24, 1998, and determined that five of the nine members would vote to admit A.S. to the first grade. Satisfied with the representations from the five Board members,

Superintendent Sakala sent a letter dated February 26, 1998, to J.S. and L.S. confirming that A.S. would be accepted as a tuition student in the first grade for the 1998-99 school year. In the same time frame, L.S. received a telephone call from Superintendent Sakala, who said that the approval was a mere formality.

In the meantime, J.S. and L.S. considered sending A.S. to a private school. They completed the application for the private school at which A.S. had attended kindergarten, and they initiated the process at another. After receiving Superintendent Sakala's letter dated February 26, 1998, they advised both schools that A.S. would not be attending but would instead be going to Mountain Lakes.

A meeting of the Board was held for March 16, 1998, and a motion was made to admit A.S. as a tuition student. Some Board members maintained that no non-resident tuition students should be admitted, while others thought that exceptions should be made based on individual circumstances. One Board member who was expected by Superintendent Sakala to vote in favor of the motion was absent. As a result, the motion was defeated by a four to four vote. Still believing that the fifth vote would be available at a later date to admit A.S., Superintendent Sakala advised personnel at the Wildwood School to proceed with the enrollment of A.S.

In March 1998, L.S. received a telephone call from the Wildwood School and was told to bring in A.S. and her health records for registration. A.S. was welcomed at Wildwood and toured the school. A.S. was told that they would see her in September.

Admission of A.S. as a non-resident tuition student was discussed again at a Board meeting on March 30, 1998. The motion to admit A.S. was held pending discussion of an additional first grade section. By creating a fifth section, the number of students per section would remain within the class size guidelines with seventeen to eighteen pupils. Without the fifth section, there would be approximately twenty-four pupils in each classroom. Superintendent Sakala thought that there might be room for a tuition student with the creation

of a fifth section. At a Board meeting on April 13, 1998, no action was taken in regard to A.S. or creation of a fifth first grade section. Superintendent Sakala thought that the vote would be against A.S. without a fifth section.

At a meeting on May 18, 1998, the Board approved a fifth first grade section. This action reduced the size of each section to eighteen pupils, and it also necessitated a relocation of a special education class to a smaller room. However, by this time, an election had been held, and one Board member who was expected to vote in favor of the admission of A.S. was no longer on the Board. The prevailing view was that it would be inconsistent to seek funding for an expansion of the schools while admitting non-resident tuition students. The new member of the Board was opposed to admission of non-resident tuition students.

In June 1998, the Wildwood School sent two letters to J.S. and L.S. as parents of a first grader entering in September 1998. During the entire period from February to June 1998, J.S. and L.S. were under the impression that A.S. would enter the Wildwood School in September 1998.

On June 17, 1998, L.S. received a telephone call from Superintendent Sakala, who advised her that the Board had decided not to admit A.S. L.S. contacted one of the private schools that were previously under consideration, but it no longer had any openings.

J.S. sent a letter dated June 19, 1998, to respondent. In the letter, J.S. emphasizes that it would be unfair to deny A.S. admission after she had already registered to enter the first grade. J.S. stated that class size was no longer an issue, that the Superintendent and the principals were in favor of the admission of A.S. and that other options that were previously under consideration were no longer available. In July 1998, J.S. and L.S. circulated a petition which was signed by forty other parents to admit A.S. to the first grade.

J.S. and L.S. appeared at a Board meeting on July 13, 1998, and requested that the Board make an exception to its policy in regard to non-resident tuition students at Wildwood

School and admit A.S. to the first grade. J.S. stated that two of his children had been accepted and that it was his understanding at the time that these children were enrolled that his youngest child would also be accepted. A Board member stated that the Board previously gave preference to siblings of tuition students over other non-resident tuition applicants. However, in 1992, because of increasing enrollment, the Board decided to discontinue the acceptance of non-resident students and staff member children in the lower grades. Another Board member said that many people wanted to send their children to Wildwood and that the only fair policy was to be totally consistent and not admit any tuition students. J.S. again requested that the Board reconsider its decision, and the Board members agreed to discuss the matter in closed session. In an executive session, the Board decided to continue its current policy not to admit additional non-resident students.

With the Board firm in its policy not to admit any non-resident tuition students in the early grades, the addition of a fifth first grade section did not make a difference. With the addition of the fifth section, each first grade class was not overcrowded, but the school was still overcrowded. The Board also had to consider the enrollment relative to other areas such as the gymnasium and the cafeteria as well as the growth pattern. In fact, the enrollment in the first grade grew by five pupils during the school year. With the addition of a fifth section, there was less room for special education students and one less opportunity to add an additional section in the future.

By letter dated August 12, 1998, Principal Robert J. Reid advised J.S. and L.S. that the Board had determined that no tuition students would be allowed to enter the Wildwood School. Principal Reid further stated that he was sorry that A.S. would not be attending the Wildwood School. When A.S. and Am. S. were told that A.S. would not be going to the Wildwood School, they both felt terrible and were crying. A.S. could not understand why she was not going to the Wildwood School after she had been welcomed there. A.S. actually attended first grade at the Riverview Elementary School in Denville.

J.S. and L.S. were under the impression that respondent had a policy to allow younger siblings of non-resident tuition students to enter its schools. If it were not for this policy, they would not have enrolled D.S. and certainly not Am.S. in respondent's schools.

In prior years, J.S. and L.S. received written contracts for D.S. and Am.S. However, the contracts were received as late as September.

LAW AND ANALYSIS

A board of education may permit a non-resident to be admitted to a district's schools. *N.J.S.A.* 18A:38-3(a). However, the statute does not require a board of education to permit this type of admission.

Petitioners present three main arguments in support of their position. First, respondent's representatives stated at the times that J.S. and L.S. decided to send D.S. and Am.S. to respondent's schools that younger siblings of non-resident tuition students would be allowed to attend and that those statements amounted to an agreement between petitioners and respondent. Second, petitioners maintain that there was no rational basis not to admit A.S. and that therefore the decision to deny admission was arbitrary and capricious. Third, petitioners contend that they relied to their detriment on the statements made at the time that they enrolled D.S. and Am.S. in respondent's schools and subsequently when they withdrew A.S.'s applications to various private schools. Additionally, petitioners contend for the first time in their brief that respondent violated the Sunshine Law in regard to an executive session following the regular meeting on February 24, 1998.

Petitioners' arguments in regard to the Sunshine Law are unpersuasive. Preliminary, petitioners raised this issue for the first time in their post-hearing brief. As a result, respondent did not have notice of this contention or the opportunity to present evidence or argument in regard to this issue, and in fact, respondent did not do so. Under the

circumstances, it would be unfair to respondent to find a violation of the Sunshine Law. Additionally, petitioners' argument does not appear to be meritorious.

The Open Public Meetings Act (the Act), *N.J.S.A.* 10:4-6 to -21, insures that citizens have adequate advance notice of and the right to attend all meetings of public bodies at which any business of the public is discussed or acted upon in any way, subject to exception only in those circumstances where the public interest would be endangered or the personal privacy rights of individuals or guaranteed rights of individuals would be in danger of unwarranted invasion. *N.J.S.A.* 10:4-7. The meeting must be open to the public in accordance with *N.J.S.A.* 10:4-12(a), unless the public is excluded pursuant to exceptions listed in *N.J.S.A.* 10:4-12(b). An action by a public body not in conformity with the Act may be voided pursuant to *N.J.S.A.* 10:4-15(a). However, there is no provision in the Act which would cause a discussion or informal vote which was not in conformity with the Act to become official action. Therefore, without consideration of the possibility that the Board's discussion fell within an exception set forth in *N.J.S.A.* 10:4-12(b) or the effect of subsequent Board action against admission of A.S., I **CONCLUDE** that the alleged violation of the Act, if found to have occurred, would not support admission of A.S. to respondent's schools as a non-resident tuition student.

Petitioners' next argument is that they were told when they enrolled D.S. and Am.S. that respondent had a policy to admit siblings of non-resident tuition students in order not to break up families. Petitioners contend that there was in effect an agreement and that respondent should honor its commitment. This argument is unpersuasive for several reasons. First, there was no written policy of the Board concerning siblings of non-resident tuition students. This circumstance was only a factor considered by the Board that was decisive in some instances. Moreover, petitioners' argument would be unconvincing even if there was such a policy. Policies by their nature represent choices within an entity's range of discretion. Policies may change with circumstances over a period of time. Finally, any such representation did not amount to an agreement between petitioners and respondent. Therefore, I **CONCLUDE** that this argument is without merit.

Also unpersuasive is petitioners' contention that the decision not to admit non-resident tuition students is unsupported by a valid reason and is therefore arbitrary and capricious. The facts as set forth above show that respondent had a reasonable concern about overcrowding in the Wildwood School in the context of a growth trend in the number of students. Therefore, I **CONCLUDE** that this argument is without merit.

Petitioners' next argument is that they relied to their detriment on representations by respondent's employees. There are two aspects to this argument. First, petitioners contend that they relied upon representations by respondent's employees to the effect that respondent had a policy to admit younger siblings of non-resident tuition students in making the decision to enroll D.S. and Am.S. in respondent's schools. Second, petitioners maintain that in February 1998, they were considering private schools for A.S. in addition to Wildwood. However, when they were advised in late February 1998 by respondent's Superintendent of Schools that A.S. would be admitted to the Wildwood School, they withdrew the other applications. By the time that petitioners were informed in June 1998 that A.S. would not be admitted to the Wildwood School, it was too late to enroll her in any of the private schools.

While petitioners do not identify any specific legal theory, but their argument is essentially equitable estoppel. In *Carlsen v. Masters, Mates & Pilots Pension Plan Trust*, 80 *N.J.* 334 (1979), the Court set forth the following definition of equitable estoppel:

> * * * the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed * * * as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse * * *. [*Id.*, at 339.].

Two elements of equitable estoppel are good faith reliance and change in position for the worse. Here, petitioners relied in good faith on representations by respondent's employees that there was a policy to admit younger siblings of non-resident tuition students to respondent's school. However, petitioners' claim that they really changed their position for

the worse by sending D.S. and Am.S. to respondent's schools is unconvincing. Petitioners also relied in good faith on the representation of the Superintendent of Schools that A.S. would be admitted to the Wildwood School, and they changed their position for the worse by withdrawing their applications to other schools.

It is noteworthy, however, that equitable estoppel is rarely invoked against a governmental entity, particularly when the estoppel would interfere with essential government functions. *O'Malley v. Department of Energy*, 109 *N.J.* 309, 316 (1987). However, equitable considerations are relevant in assessing governmental conduct and may be invoked to prevent manifest injustice. *Ibid.* Here, respondent made a judgment that in view of overcrowding in the schools and a growth trend in the number of pupils, no non-resident tuition students should be admitted to the elementary school This is the type of governmental function to which it is inappropriate to apply the doctrine of collateral estoppel. Further, the creation of a situation where A.S. had to attend school in her home district does not rise to the level of manifest injustice. Therefore, I **CONCLUDE** that the doctrine of equitable estoppel should not be applied in this situation.

While I recognize the disappointment which petitioners must experience as a result of the decision not to admit A.S. to the school which her sisters attended and while I sympathize with their situation, respondent's discretionary authority to make determinations in the best interests of the other students in the district must be the overriding consideration. Under the circumstances, I **CONCLUDE** that the petition in this matter must be dismissed.

Accordingly, it is **ORDERED** that the petition in this matter be dismissed.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 16, 1999
DATE

RICHARD McGILL, ALJ

Receipt Acknowledged:

7/20/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 22 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

cml

APPENDIX

WITNESS LIST

For petitioner:

L.S.

For respondent:

John Sakala

EXHIBIT LIST

P-1	Letter dated June 12, 1997, from John Sakala to L.S.	Evidence
P-2	Letter dated February 23, 1998, from J.S. and L.S. to John Sakala	Evidence
P-3	Letter dated February 26, 1998, from John Sakala to J.S. and L.S.	Evidence
P-4	Letter dated June, 1998, from Robert J. Reid	Evidence
P-5	Letter dated June 17, 1998, from Robert J. Reid	Evidence
P-6	Letter dated June 19, 1998, from J.S.	Evidence
P-7	Petition	Evidence
P-8	Letter dated August 12, 1998, from Robert J. Reid to J.S. and L.S.	Evidence
P-9	Minutes of meeting of Board of Education on June 15, 1992	Evidence
P-10	Minutes of meeting of Board of Education on [illegible], 1998	Evidence

P-11	Minutes of executive session of Board of Education on February 24, 1998	Evidence
P-12	Certification of John Sakala	Evidence
P-13	Memorandum dated March 12, 1997, from Finance Sub-Committee SFPC to Boonton Township Sub-Committee SFPC	Evidence
P-14	Minutes of meeting of Board of Education on May 18, 1992	Evidence
R-1	Minutes of meeting of Board of Education on February 2, 1998	Evidence
R-2	Minutes of meeting of Board of Education on March 30, 1998	Evidence
R-3	Excerpt from minutes of meeting of Board of Education on April 13, 1998	Evidence
R-4	Minutes of meeting of Board of Education on July 13, 1998	Evidence
R-5	Policy on Eligibility of Non-resident Pupils revised through August 8, 1996	Evidence
R-6	Policy on Eligibility of Non-resident Pupils revised through October 1, 1990	Evidence

OAL DKT. NO. EDU 7735-98
AGENCY DKT. NO. 390-8/98

J.S. AND L.S., on behalf of minor child, A.S.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioners' exceptions are duly noted, and were considered by the Commissioner in rendering the within decision.[1]

Upon careful and independent review of the record, the Commissioner concurs with the ALJ that petitioners have failed to satisfy their burden of proving that the Board's decision to refuse to admit A.S., a nonresident, to its schools, was arbitrary, capricious, unreasonable, or otherwise made in bad faith.[2] However, as the ALJ notes, that finding does not end the present inquiry. Petitioners additionally argue that, since they relied to their detriment on representations made by the Board's employees, the Board should be equitably estopped from

[1] The exceptions essentially reiterate arguments which were presented in papers previously considered by the Administrative Law Judge (ALJ).

[2] In so finding, the Commissioner notes, as did the ALJ, that petitioners alleged a violation of the Open Public Meetings Act for the first time in their post-hearing brief. This issue was *not* included in the ALJ's Pre-hearing Order, issued December 4, 1998 and petitioners, apparently, did not object to the exclusion of same in the Order. Accordingly, the Commissioner does not address this issue.

precluding A.S.'s attendance in the District notwithstanding the validity of the Board's underlying policy decision.[3]

In assessing this claim, the Commissioner recognizes that the burden of proving entitlement to equitable estoppel rests on the petitioners, as they seek the benefit of the estoppel. *Virginia Construction Corp. v. Fairman*, 39 *N.J.* 61, 72 (1962); *Newark v. Natural Resource Coun. Dept. Env. Prot.*, 82 *N.J.* 530, 545 (1980); *Miller v. Miller,* 97 *N.J.* 154, 163 (1984). The Court has held that, to establish a claim of equitable estoppel, the claimant must initially show a knowing and intentional misrepresentation by the party sought to be estopped under circumstances in which the misrepresentation would probably induce reliance. *O'Malley, supra*, at 317, *citing Horsemen's Benevolent & Protective Ass'n v. Atlantic City Racing Ass'n*, 98 *N.J.* 445 (1985). The Court has also recognized, however, that such representation may be made, if, not "intentionally," then "under circumstances where it was both natural and probable that it would induce action." *Miller, supra,* at 163. Additionally, the party seeking estoppel must have relied upon the act to his or her detriment. *O'Malley, supra,* at 317; *Miller, supra*, at 163. Petitioners, therefore, must show a [mis]representation, reliance and detriment. They must also show that their reliance was both *justified* and *reasonable. Palatine I v. Planning Bd.*, 133 *N.J.* 546, 563 (1993). Moreover, as the ALJ properly recognizes, equitable estoppel is rarely invoked against a governmental entity, where the estoppel would interfere with essential governmental functions. (Initial Decision at p. 11, *citing O'Malley, supra*)

[3] The Commissioner recognizes that a party may also assert the theory of promissory estoppel, requiring him/her to show "that (1) there was 'a clear and definite promise'; (2) the promise was 'made with the expectation that the promisee will rely on it' (3) 'the promisee must reasonably rely on the promise,' and (4) 'the promisee must incur a detriment in reliance thereon.'" *Peck v. Imedia*, Inc., 293 *N.J. Super.* 151, 165 (App. Div. 1996). An analysis under this standard would not differ in substance from the within analysis, and the outcome would be the same as that herein.

Here, there are two aspects to petitioners' claim. One is based on petitioners' understanding, at the times they enrolled their two older children in the District, that their third child, A.S., would also be allowed to attend when she reached the appropriate age; the other is based on the conduct of District staff in the months immediately following petitioners' attempt to enroll A.S. in the District's elementary program. With respect to the first aspect, to the extent that petitioners may have relied on their understanding and District practices as they existed at the times of their older children's enrollments in 1987 and 1992, respectively, such reliance cannot be considered reasonable. The Commissioner so finds, both for the reasons expressed by the ALJ, and because it is manifestly clear that a board of education always has the ability to change its past practices over time, during the course of fulfilling its responsibility to perform all acts and do all things, consistent with law and State Board rules, necessary for proper conduct, equipment and maintenance of the public schools. *N.J.S.A.* 18A:11-1.

With respect to the second aspect, working against petitioners' claim is the fact that petitioners knew from the start that their daughter, as a nonresident, had no statutory entitlement to attend school in the Board's District. Neither were they without knowledge that the Board might look unfavorably upon their request to admit her, notwithstanding her siblings' attendance in the schools of the District. Indeed, petitioners were informed by Superintendent Sakala as early as June of 1997 that the Board had changed its policy with respect to nonresident students (Initial Decision at p. 3) *and* they were aware that the Board had signaled as early as February 2, 1998 that it would *not* accept any additional tuition students at the elementary level. (*Id.* at p. 4)

On the other hand, the Board's administrators made representations to petitioners which clearly led them to act, reasonably and naturally, under the belief that A.S. was accepted as a nonresident student for the 1998-99 school year, notwithstanding Superintendent Sakala's

apparent knowledge that the Board's position *was not* completely or consistently aligned with his own. By letter dated February 26, 1998, Sakala informed petitioners that A.S. was accepted as a tuition student in the first grade for the 1998-99 school year. (Initial Decision at p. 5) Thereafter, L.S. was contacted by someone at the Wildwood School and told to bring in A.S., together with her health records, for registration. (*Id.*) In June of 1998, the Wildwood School sent two letters to petitioners indicating that A.S. would be attending the first grade in its District. (*Id.* at p. 6) Thus, petitioners appear to have met a central criterion for grant of equitable estoppel.

However, even granting that petitioners' reliance upon the administration's representations was justified and reasonable under the circumstances, in order to prevail in their claim, petitioners must also demonstrate that such reliance was to their detriment. Where a party reasonably relies upon the actions of another, changes his position in reliance, and incurs actual damages or harm as a result, equity will protect that party's interests. *Div. of Social Services v. C.R., 316 N.J. Super.* 600, 610 (Chan. Div. 1998), *citing Royal Assoc. v. Concannon*, 200 *N.J. Super.* 84, 490 (App. Div. 1985). Here, petitioners do not claim that A.S. will not have access to a thorough and efficient system of education if she is not admitted to the Board's schools. Rather, the detriment shown on the record is that, for the 1998-99 school year, petitioners' opportunity to send A.S. to the private school of their choosing was effectively thwarted by petitioners' reliance on the administration's actions. Additionally, petitioners allege that it is a "manifest injustice to a seven year old girl who cannot understand why she is not allowed to attend the school where her older sister goes." (Petitioners' Exceptions at p. 4) Recognizing that "[t]he doctrine of equitable estoppel is applied 'only in very compelling circumstances'***." *Palatine, supra*, at 560, *citing Timber Properties, Inc. v. Chester Township*, 205 *N.J. Super.* 273, 278 (Law Div. 1984) and *Gruber v. Mayor of Raritan Township*, 39 *N.J.* 1 (1962), the Commissioner cannot find that the loss of one year's opportunity to attend a preferred private school, or the inability of siblings to attend the same school, constitutes harm or "manifest

injustice" sufficient to warrant equitable remedy in light of the high standard to be met in invoking equitable estoppel against a governmental entity as set forth in *O'Malley, supra.*

Accordingly, the initial decision is affirmed for the reasons expressed therein and amplified above. The Petition of Appeal is hereby dismissed.[4]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

September 3, 1999
Date of Mailing, September 3, 1999

[4] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

291-99

EDU #7735-98
C # 291-99
SB # 41-99

J.S. AND L.S., on behalf of minor child, A.S.,

PETITIONERS-APPELLANTS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES, MORRIS COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, September 3, 1999

For the Petitioners-Appellants, J.S. and L.S., pro se

For the Respondent-Respondent, Rand, Algeier, Tosti & Woodruff (David B. Rand, Esq., of Counsel)

The State Board of Education affirms the decision of the Commissioner of Education for the reasons expressed therein. However, in so doing, we caution the Superintendent to be careful in the future when communicating his support to parents in similar situations.

January 5, 2000

Date of mailing JAN - 7 2000

292-99 E

J.C. AND C.C., on behalf of minor child, J.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOODBINE, CAPE MAY COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

September 3, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION ON EMERGENT RELIEF

OAL DKT. NO. EDU 6580-99

AGENCY REF. NO. 166-6/99

J.C. AND C.C. ON BEHALF OF
MINOR CHILD, J.C.

Petitioners,

v.

BOARD OF EDUCATION OF WOODBINE,
CAPE MAY COUNTY,

Respondent.

J.C. and C.C. parents of minor child, J.C., petitioner, *pro se*

Ronald Sahli, Esq., for respondent (Sahli & Padovani, attorneys)

Record Closed: August 25, 1999 Decided: August 26, 1999

BEFORE **EDGAR R. HOLMES,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The parents of J.C. a kindergartner, moved before the Commissioner of Education (Commissioner) for an Order reversing the decision of the Board of Education of Woodbine (Board) to promote their daughter to the first grade. The Board asserts that the child should be promoted to the first grade. The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The child, J.C., has been in the Woodbine Elementary School as both a pre-schooler and kindergartner. She was evaluated by the Child Study Team (CST) in May of 1998. It concluded that J.C. should be in "a mainstreamed kindergarten classroom with counseling for her behavioral issues." J.C. would scream in class and try to manipulate adults by crying. Her peers treated "her as a baby." J.C. is immature. She was born on September 25, 1993. She was barely five years old when she entered kindergarten. In the Woodcock Johnson Tests of Achievement - Preschool Battery, she scored age appropriate or near age appropriate in all subtests except Letter Word identification in which she was measured at three years, zero months. J.C.'s mother desires that J.C. be retained in kindergarten so that her motor skills can catch up with other kindergartners and because J.C. is age appropriate for kindergarten. She has several friends and playmates who will be in kindergarten at Woodbine this September. J.C.'s teacher also recommends that J.C. be retained in kindergarten.

J.C.'s pediatrician reports that she is undersized for her age. At her five year well child checkup she was only in the fifth percentile in height and weight. J.C. takes Melatonin for her insomnia which is now under control, and as a result, her crying and screaming episodes have been reduced.

The Board asserts that it is prepared to educate J.C. as a first grader and that J.C. is ready for first grade. The Board is one of the school districts which have voluntarily adopted the "whole school reform program." The Board explained that it has not adopted a "no retention" policy as claimed by the mother of J.C. However, it asserted that it did not believe in retention,

that most of the current literature did not favor retention and that it has not retained any students in three years. It also asserted that it does not favor social promotion.

The Association of California School Administrators' position paper concerning social promotion and retention recognizes the vast differences in the United States between these two responses. Some favor one response, some the other. The Association points out however, that neither policy: retention or social promotion, "requires a change in pedagogy, content and curriculum." R-1 tab 4.

The Board described the educational plan for the coming year's first grade. The children in the first grade will be divided by skill level into working groups. These groups will be fluid since children will be more or less capable in different subjects. J.C.'s Language Arts program will be comprised of five children and will be taught by J.C.'s kindergarten teacher who was also her pre-school teacher who is certified in both elementary education and special education.

In math class J.C. will be with 17/20 other students with two teachers. In J.C.'s other subjects there will be 17/20 students with one teacher.

Language Arts will consist of two 50 minute periods per day and will be conducted in the resource room.

There is no provision at this time for summer school or tutoring although they may be available to J.C. as it appears they are needed.

It is difficult to see how the Board can insist that it has not adopted a no retention policy. It has not retained a child in three years. It fears that retention at this time would indicate failure of the effective programs of the Woodbine Board of Education. This was asserted by the Board in its statement of response to the request to retain J.C.

J.C. is described by everyone as immature. Her classmates view her as a baby. She will still be five years old when she enters her next grade. If she is retained she will be age appropriate for kindergarten and among friends and playmates. Both J.C.'s mother and her teacher who has been J.C.'s teacher for two years, believe that retention is in the best interest of J.C. What this amounts to is a social retention.

While I am sure that the Board's whole school reform system is in good hands and will be successful for the vast majority of students entering its system, no system or program can be effective in every possible instance. This may be one such.

Because of J.C.'s age, her immaturity and the recommendation of her mother and teacher, those who know her best, I **REVERSE** the decision of the Board to promote J.C. to the first grade.

I **ORDER** the Board to retain J.C. in the kindergarten class for the school year beginning in September 1999.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF EDUCATION** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If **COMMISSIONER OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order **shall become a** final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

8/26/99
DATE

Edgar R Holmes
EDGAR R. HOLMES, ALJ

lmh

WITNESSES

For Petitioner:

Mrs. C.

For Respondent:

Dr. Bruce Kinter

Maureen Toy

DOCUMENTS IN EVIDENCE

For Petitioner:

None

For Respondent:

R-1 Letter to ALJ dated August 25, 1999, with attachments.

OAL DKT. NO. EDU 6580-99
AGENCY DKT. NO. 166-6/99

J.C. AND C.C., on behalf of minor child, J.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOODBINE, CAPE MAY COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

The record of this emergent matter and the recommended decision of the Office of Administrative Law (OAL) have been reviewed.

Upon his independent and careful review, the Commissioner determines to affirm the conclusion of the Administrative Law Judge (ALJ) granting emergent relief in this matter. Initially, in his consideration of this matter the Commissioner is fully cognizant that the granting of emergent relief is considered an extraordinary remedy which can only be awarded when the movant has satisfied the requisite standards for the granting of such relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), *i.e.*, the existence of irreparable harm absent the requested relief, settled legal principles governing the right to relief in the controversy, a reasonable probability of ultimate success on the merits, and a balancing of the relative hardships to the parties favoring the grant of temporary relief pending the outcome of a final hearing. The Commissioner's

review persuades him that, under the particular circumstances existing here, petitioners have satisfied their burden of establishing these required standards.

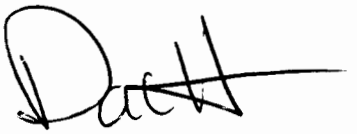
With respect to irreparable harm, the within record establishes that J.C. is a child who is significantly undersized for her age, immature, viewed as a baby by her peers, and who has a history of crying and screaming episodes in class. In that the within record strongly evidences that J.C. may not be emotionally or academically suited for first grade, promotion under these particular circumstances could prove seriously detrimental to her developmental progress. Such a conclusion is further buttressed by the fact that both J.C.'s mother and the teacher she has had for the past two years believe that it is in the child's best interest to be retained in kindergarten.

In considering petitioners' likelihood of success on the merits, the Commissioner finds that, although it is well-settled that a board determination of student advancement may not be upset unless it can be demonstrated that such a determination is arbitrary, capricious or unreasonable, (*see Kopera v. West Orange Bd. of Education*, 60 *N.J. Super.* 288 (App. Div. 1960)), under the circumstances existing in this matter, petitioners have advanced at least a *prima facie* showing of prevailing on the merits given the Board's assertion that it did not believe in retention (Initial Decision at p. 2), that it has not retained any students in three years, (*Id.* at p. 3) and that, the reason it apparently gave for denying the request to retain J.C. was that "[i]t fears that retention at this time would indicate failure of the effective programs of the Woodbine Board of Education." (*Id.*)

Finally, the Commissioner finds that the harm which might inure to J.C. by her advancement into first grade during the pendency of this matter outweighs any harm which may be experienced by the Board in allowing her retention in kindergarten during this interim period.

Accordingly, the recommendation of the ALJ that emergent relief be granted is hereby affirmed. This matter shall proceed at the OAL for a hearing on its merits.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

September 3, 1999
Mailed to Parties, September 3, 1999

293-99

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

September 7, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5698-98
AGENCY DKT. NO. 142-5/98

IN THE MATTER OF THE TENURE HEARING OF COREY YOUNGER, STATE OPERATED SCHOOL DISTRICT OF JERSEY CITY,

---

Charlotte Kitler, Esq., for petitioner, Jersey City School District

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

Record Closed: July 9, 1999 Decided: July 20, 1999

BEFORE **IRENE JONES**, ALJ:

The Jersey City School District (District), Hudson County certified charges of unbecoming conduct against the respondent, Corey Younger (Younger). Younger is a tenured teacher employed by the District. On May 14, 1998, the District found probable cause to certify the tenure charge of unbecoming conduct which, if true, would warrant Younger's termination. On May 4, 1998, the District filed the written charges with the Commissioner of Education.

The Department of Education transmitted the matter to the Office of Administrative Law on June 25, 1998 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to 15 and 52:14F-1 to 13. Hearings were held on May 13, 17 and June 16, 1999.

During the hearings, the parties agreed to settle this matter. A stipulation of settlement was filed on July 9, 1999 which is attached hereto. In accordance with the decision of the State Board of Education in *Cardonick v. Brookline Board of Education*, 1990 *S.L.D.* 842, the record of any proposed settlement must include:

> [T]he nature of the charges, circumstances justifying the settlement, consent or authorization by the board of education and the teacher to the proposed agreement, the Administrative Law Judge's findings that the teacher entered into the agreement with a full understanding of his rights and that the agreement is consistent with the public interest. See Cardonick at 850-51.

At the hearing, Younger was carefully examined by his attorney wherein he was advised that the settlement agreement was subject to the approval of the Commissioner of Education. *Cardonick v. Brookline Board of Education*, 1990 *S.L.D.* 842. Further, that the Commissioner could refer this matter to the State Board of Examiners for further action. Thereafter, Younger acknowledged that he fully understood the charges and the consequences of this settlement.

After a review of the entire record, I **FIND** that the proposed settlement is consistent with the public interest because it will save legal expenses and costs as well as time expended by administrative and witnesses. I further **FIND** that Younger had full opportunity to consult with legal counsel prior to entering into the agreement. He is aware that pursuant to *N.J.A.C.* 6:11-3.6, the Commissioner may refer this matter to the State Board of Examiners for any action which he may deem appropriate. Further, Younger was informed by counsel that notwithstanding the parties agreement to settle this matter, the Commissioner may not approve the settlement agreement. Thus, any

execution of the settlement prior to the approval by the Commissioner is done at the peril of the parties.

I **CONCLUDE** that the proposed settlement fully disposes of all issues and controversies. I further **CONCLUDE** that the terms of this settlement are in the public's interest.

It is therefore **ORDERED** that upon approval by the Commissioner that the parties comply with the settlement terms and that the proceedings are hereby **CONCLUDED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

7/20/99
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

7/23/99
DATE

DNH
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 27 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

CHARLOTTE KITLER
General Counsel
State-Operated School District
of Jersey City
346 Claremont Avenue
Jersey City, New Jersey 07305
(201) 915-6231

BEFORE THE COMMISSIONER OF
EDUCATION OF NEW JERSEY
OAL Docket No. EDUTH-05698-98
Agency Ref. No. 142-5/98

IN THE MATTER OF THE TENURE HEARING OF COREY YOUNGER STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY	STIPULATION OF SETTLEMENT

This Stipulation incorporates the terms of a Settlement Agreement reached by the parties and stated on the record of proceedings before Administrative Law Judge Irene Jones on June 16, 1999.

WHEREAS, the respondent Corey Younger has been employed as a full-time teacher of health and physical education with the Jersey City School District since September 16, 1991;

WHEREAS, the District filed charges with the Commissioner of Education on May 18, 1998, to terminate the employment of Mr. Younger for unbecoming conduct;

WHEREAS, the parties have agreed to resolve the matter without further litigation and without any payment of monies by the District to the respondent other than salary as required by statute, N.J.S.A. 18A:6-14, during the pendency of these proceedings; and

WHEREAS, the respondent Corey Younger testified under oath before the Administrative Law Judge on June 16, 1999, that he clearly understood the terms of the settlement agreement, that he entered into the settlement agreement voluntarily, and that he was advised and understood that the Commissioner of Education had to approve the settlement agreement and that the Commissioner could refer the matter to the State Board of Examiners for possible revocation of his teaching certificate; and

WHEREAS, the parties believe that it serves the public interest to end respondent's employment with the District in a amicable manner;

NOW, THEREFORE, the parties have agreed to the following terms of settlement:

1. The respondent Corey Younger agrees to resign from employment with the Jersey City School District, effective June 30, 1999.

2. The petitioner Jersey City School District agrees to accept the respondent's resignation, and agrees to withdraw tenure charges bearing the OAL Docket Number EDUTH-05698-98 and the Agency Reference Number 142-5/98.

FOR THE PETITIONER
JERSEY CITY SCHOOL DISTRICT

Charlotte Kitler
General Counsel
State-Operated School District
of Jersey City

DATED: 7/7/99

FOR THE RESPONDENT
COREY YOUNGER

COREY YOUNGER

Feintuch, Porwich & Feintuch
Attorneys for Respondent

DATED: July 1, 1999

OAL DKT. NO. EDU 5698-98
AGENCY DKT. NO. 142-5/98

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

The record, stipulation of settlement and initial decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon careful and independent review of the record, the Commissioner is unable to approve the settlement as it is currently structured since he is not satisfied by the present record that the proposed settlement meets the *Cardonick* standards for review of settlements in tenure matters. It is well established that, having once taken up the burden of tenure charges, the Board may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges need no longer be pursued or why it is now in the public interest not to pursue them. *In the Matter of the Tenure Hearing of Kenneth Smith, School District of Orange, Essex County*, decided by the Commissioner March 22, 1982, decision on remand June 16, 1983, *aff'd with modification* by the State Board of Education November 2, 1983, *aff'd* Superior Court January 30, 1986. This mandate is particularly true when, as in the instant matter, the tenure charges filed with the Commissioner allege very serious instances of unbecoming conduct involving students. Although the initial decision correctly

recites the *Cardonick* standards, the record itself is completely devoid of any explanation as to how the settlement in fact meets those standards *in light of the specific tenure charges filed against Mr. Younger.*

While the Commissioner does not preclude the possibility of settlement in this matter, he stresses that in order for him to meet his own obligation to the schools and children of New Jersey, he must be assured that any settlement is consistent with appropriate standards for setting aside tenure matters as expressed in *Cardonick, supra.* The mere fact that a respondent's resignation may be one of the terms incorporated into a proposed settlement does not in and of itself assure that the *Cardonick* standards have been met. *See In the Matter of the Tenure Hearing of Wende Stuart, Board of Education of the Township of Irvington, Essex County,* decided by the Commissioner March 26, 1998.

Accordingly, the proposed settlement is rejected for the reasons expressed herein. The Commissioner hereby remands this matter to the OAL for further explication of how this settlement is in accord with the *Cardonick* standards and the concerns expressed herein. If the parties are unwilling or unable to agree to a settlement consistent with the decision herein, the matter shall proceed to plenary hearing.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's interim determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

September 7, 1999
Date of Mailing, September 7, 1999

294-99

SALLY A. YAFFEE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning teacher contended that the Board wrongfully failed to pay her salary for time lost due to a work-related injury in violation of *N.J.S.A.* 18A:30-2.1.

At the OAL this matter was consolidated with two other matters involving the Board in which the identical issue was raised. All three matters were placed on the inactive list until such time as a workers' compensation judge rendered a decision on whether petitioners' injuries arose out of and in the course of their employment. Pending that decision, petitioner resolved her workers' compensation case with the Board and requested dismissal of this matter with prejudice. The ALJ determined that it is no longer appropriate to consolidate the three cases and ordered the cases severed. Additionally, the ALJ dismissed this matter with prejudice since the issue involving the education laws has been resolved as a result of the decision in the companion workers' compensation case.

The Commissioner adopted the recommendation of the ALJ severing the matter herein from several other matters with which it was previously consolidated and dismissing the instant matter with prejudice for the reasons set forth in the initial decision.

September 7, 1999

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION AND ORDER

OF SEVERANCE

OAL DKT. NO. EDU 2984-96S

AGENCY DKT. NO. 113-3/96

SALLY A. YAFFEE,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,

Respondent.

Kathleen A. Naprstek, Esq., for Petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Carl J. Palmisano, Esq., for Respondent (Palmisano & Goodman, attorneys)

Record Closed: July 6, 1999 Decided: July 21, 1999

BEFORE **BARBARA A. HARNED,** CALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law by the Department of Education for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. In her petition, Ms. Yaffee alleged that she had been disabled as a result of a work related injury and that she had filed a workers compensation claim. Petitioner further alleged that during the

period of her disability respondent Board did not pay her the statutory sick leave salary she is entitled to pursuant to *N.J.S.A.* 18A:30-2.1 and improperly charged her accumulated sick leave for absences caused by her injury.

On June 3, 1996, a conference call was conducted during which counsel for both parties requested that this matter be held in abeyance pursuant to the decision of the State Board of Education in *Jacques Verneret v. Board of Education of the City of Elizabeth, Union County,* 95 *N.J.A.R.* 2d (EDU) 134. In addition, counsel for petitioner advised that she was representing petitioners in two other matters involving the Board in which the identical issue was raised and requested that those two matters be consolidated with the instant case. On June 18, 1996, an Order was entered consolidating this case with the two other matters, *Betty Shereshewsky v. Board of Education of the Township of Woodbridge, Middlesex County,* OAL DKT. NO. EDU 803-96S and *Cynthia McDay v. Board of Education of the Township of Woodbridge, Middlesex County,* OAL DKT. NO EDU 2987-96S. That Order also placed all three matters on the inactive list until such time as a workers compensation judge rendered a decision on the issue of whether petitioners' injuries arose out of and in the course of their employment. All three matters remained inactive until July 6, 1999 when counsel for petitioner Yaffee advised the undersigned that Yaffee's workers compensation case had been resolved and that petitioner received compensation for the days which the Board had deducted from her sick leave account (P-1). Accordingly, counsel for petitioner requested that the pending OAL matter be dismissed with prejudice (P-1).

LEGAL DISCUSSION

In *Jacques Verneret v. Board of Education of the City of Elizabeth, Union County, supra,* the State Board of Education held that "[t]he question of whether an injury 'arose out of and in the course of employment' within the meaning of *N.J.S.A.* 18A:30-2.1 is controlled by the standards established under the Workers Compensation Act." 95 *N.J.A.R.* 2d at 134. In such cases, "the State Board has held that the Commissioner of Education should refrain from exercising his jurisdiction pending a determination of that issue by the Division of Workers Compensation." *Id.* at 135. While the Commissioner may decide to refrain from acting until a determination by the Division of Workers Compensation, a petitioner is nevertheless required to file his/her petition under the school law with

the Commissioner of Education within the 90-day filing period provided by *N.J.A.C.* 6:24-1.2. Accordingly, the State Board concluded that "the proper course for the Commissioner to follow when he confronts [such] a case . . . is to hold the matter in abeyance, rather than to dismiss the petition, while awaiting the determination by the Division of Workers' Compensation." *Ibid.*

Pursuant to *Verneret, supra,* the three consolidated cases were placed on the inactive list. However, two of the matters have now been resolved while the third matter remains pending. Accordingly, it is no longer appropriate to consolidate the three cases and they are hereby severed from each other. Additionally, since the issue in *Yaffee* involving the education laws has been resolved as a result of the decision in the companion workers compensation case, this matter will be dismissed with prejudice.

ORDER

For the above stated reasons, it is **ORDERED** that the consolidated cases of *Betty Shereshewsky, Sally Yafee and Cynthia McDay vs. Board of Education of the Township of Woodbridge, Middlesex County,* OAL DKT. NOS. EDU 803-96S; EDU 2984-96S and EDU 2987-96S are hereby severed. It is further **ORDERED** that the matter captioned *Sally A. Yaffee v. Board of Education of the Township of Woodbridge, Middlesex County,* OAL DKT. NO. EDU 2984-96S is hereby dismissed with prejudice.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

7/21/99
DATE

Barbara A Harned
BARBARA A. HARNED, ALJ

Receipt Acknowledged:

7/23/99
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 26 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

DOCUMENTS IN EVIDENCE

For Petitioner

P-1 Letter from Kathleen A. Naprstek, Esq. dated July 1, 1996

OAL DKT. NO. EDU 2984-96
AGENCY DKT. NO. 113-3/96

SALLY A. YAFFEE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon review of the record, the Commissioner adopts the recommendation of the Administrative Law Judge severing the matter herein from several other matters with which it was previously consolidated and dismissing the instant matter with prejudice for the reasons set forth in the initial decision.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.
September 7, 1999
Date of Mailing, September 7, 1999

295-99

BETTY SHERESHEWSKY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning teacher contended that the Board wrongfully failed to pay her salary for time lost due to a work-related injury in violation of *N.J.S.A.* 18A:30-2.1.

At the OAL this matter was consolidated with two other matters involving the Board in which the identical issue was raised. All three matters were placed on the inactive list until such time as a workers' compensation judge rendered a decision on whether petitioners' injuries arose out of and in the course of their employment. Pending that decision, petitioner resolved her workers' compensation case with the Board and requested dismissal of this matter with prejudice. The ALJ determined that it is no longer appropriate to consolidate the three cases and ordered the cases severed. Additionally, the ALJ dismissed this matter with prejudice since the issue involving the education laws has been resolved as a result of the decision in the companion workers' compensation case.

The Commissioner adopted the recommendation of the ALJ severing the matter herein from several other matters with which it was previously consolidated and dismissing the instant matter with prejudice for the reasons set forth in the initial decision.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION AND ORDER

OF SEVERANCE

OAL DKT. NO. EDU 803-96S

AGENCY DKT. NO. 34-1/96

BETTY SHERESHEWSKY,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,

Respondent.

Kathleen A. Naprstek, Esq., for Petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Carl J. Palmisano, Esq., for Respondent (Palmisano & Goodman, attorneys)

Record Closed: July 6, 1999 Decided: July 21, 1999

BEFORE **BARBARA A. HARNED,** CALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law by the Department of Education for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. In her petition, Ms. Shereshewsky alleged that she had been disabled as a result of a work

related injury and that she had filed a workers compensation claim. Petitioner further alleged that during the period of her disability respondent Board did not pay her the statutory sick leave salary she is entitled to pursuant to *N.J.S.A.* 18A:30-2.1 and improperly charged her accumulated sick leave for absences caused by her injury.

On June 3, 1996, a conference call was conducted during which counsel for both parties requested that this matter be held in abeyance pursuant to the decision of the State Board of Education in *Jacques Verneret v. Board of Education of the City of Elizabeth, Union County,* 95 *N.J.A.R.* 2d (EDU) 134. In addition, counsel for petitioner advised that she was representing petitioners in two other matters involving the Board in which the identical issue was raised and requested that those two matters be consolidated with the instant case. On June 18, 1996, an Order was entered consolidating this case with the two other matters, *Sally Yaffee v. Board of Education of the Township of Woodbridge, Middlesex County,* OAL DKT. NO. EDU 2984-96S and *Cynthia McDay v. Board of Education of the Township of Woodbridge, Middlesex County,* OAL DKT. NO EDU 2987-96S. That Order also placed all three matters on the inactive list until such time as a workers compensation judge rendered a decision on the issue of whether petitioners' injuries arose out of and in the course of their employment. All three matters remained inactive until July 6, 1999 when counsel for petitioner Shereshewsky advised the undersigned that Shereshewsky's workers compensation case had been resolved and that the Board had reinstated days which it had deducted from petitioner's sick leave account (P-1). Accordingly, counsel for petitioner requested that the pending OAL matter be dismissed with prejudice (P-1).

LEGAL DISCUSSION

In *Jacques Verneret v. Board of Education of the City of Elizabeth, Union County, supra,* the State Board of Education held that "[t]he question of whether an injury 'arose out of and in the course of employment' within the meaning of *N.J.S.A.* 18A:30-2.1 is controlled by the standards established under the Workers' Compensation Act." 95 *N.J.A.R.* 2d at 134. In such cases, "the State Board has held that the Commissioner of Education should refrain from exercising his jurisdiction pending a determination of that issue by the Division of Workers Compensation." *Id.* at 135. While the Commissioner may decide to refrain from acting until a determination by the Division of Workerss

Compensation, a petitioner is nevertheless required to file her petition under the school law with the Commissioner of Education within the 90-day filing period provided by *N.J.A.C.* 6:24-1.2. Accordingly, the State Board concluded that "the proper course for the Commissioner to follow when he confronts [such] a case . . . is to hold the matter in abeyance, rather than to dismiss the petition, while awaiting the determination by the Division of Workers' Compensation." *Ibid.*

Pursuant to *Verneret, supra,* the three consolidated cases were placed on the inactive list. However, two of the matters have now been resolved while the third matter remains pending. Accordingly, it is no longer appropriate to consolidate the three cases and they are hereby severed from each other. Additionally, since the issue in *Shereshewsky* involving the education laws has been resolved as a result of the decision in the companion workers compensation case, this matter will be dismissed with prejudice.

ORDER

For the above stated reasons, it is **ORDERED** that the consolidated cases of *Betty Shereshewsky, Sally Yafee and Cynthia McDay vs. Board of Education of the Township of Woodbridge, Middlesex County,* OAL DKT. NOS. EDU 803-96S; EDU 2984-96S and EDU 2987-96S are hereby severed. It is further **ORDERED** that the matter captioned *Betty Shereshewsky v. Board of Education of the Township of Woodbridge, Middlesex County,* OAL DKT. NO. EDU 803-96S is hereby dismissed with prejudice.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

7/21/99
DATE

Barbara A Harned
BARBARA A. HARNED, ALJ

Receipt Acknowledged:

7/23/99
DATE

DNH
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 26 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

DOCUMENTS IN EVIDENCE

For Petitioner

P-1 Letter from Kathleen A. Naprstek, Esq. dated July 1, 1996

OAL DKT. NO. EDU 803-96
AGENCY DKT. NO. 34-1/96

BETTY SHERESHEWSKY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon review of the record, the Commissioner adopts the recommendation of the Administrative Law Judge severing the matter herein from several other matters with which it was previously consolidated and dismissing the instant matter with prejudice for the reasons set forth in the initial decision. *

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.
September 7, 1999
Date of Mailing, September 7, 1999

296-99

SOMERSET COUNTY EDUCATIONAL SERVICES COMMISSION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NORTH PLAINFIELD BOARD OF EDUCATION, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Commission contended that respondent Board's refusal to pay for tuition and services rendered to L.G., a child under the age of 16 enrolled in the Alternative to Incarceration (ATI) Program pursuant to order of the Superior Court, Chancery Division, Family Part and residing in the District, was arbitrary, capricious, unreasonable and violative of the law. Commission sought tuition and pre- and post-judgment interest. Board denied obligation for tuition for L.G., contending that it had no obligation to provide any educational services to L.G., who had been expelled, and, further, that the Commission did not follow the necessary legal procedures to approve its involvement in operating the ATI.

ALJ found that the Commission did violate the law (*N.J.S.A.* 18A:6-63) since at no time did the Representative Assembly ever vote upon a proposal for the Commission to participate in the ATI Program. However, the ALJ determined that even though the lack of a direct approval by the Representative Body was a flaw in the procedural background, the violation was purely technical and such a detail, which the Commission argued was a matter of form over substance, should not stand in the way of the Commission recovering the tuition for services rendered to a student domiciled within North Plainfield. Moreover, the ALJ found that the fact that a local board expels a student under 16 does not necessarily mean that it should be permitted to escape any reasonable financial obligation toward the education of that child in whatever alternative school program he enters, whether with board input or here at the order of the Family Court. Expulsion need not be considered a financial issue. In the circumstances of this case, where the District was a constituent member of the Educational Services Commission (ESC) and the child in question was educated under the ATI Program under the auspices of the ESC, it was not at all improper for the local District, the child's domicile, to pay its mandated financial obligation pursuant to the contract approved by the county superintendent. It would be inappropriate to shift the cost of the services rendered to the other constituent members of the ESC, while excluding any fiscal responsibility for the domiciliary District. Thus, the ALJ ordered that respondent pay petitioner the sum of $20,050, plus post-judgment interest.

Commissioner adopted the initial decision with modification. Commissioner adopted that portion of the initial decision ordering respondent to pay petitioner the sum of $20,050. Commissioner found and determined that a board of education's action to expel a student, even when lawfully taken pursuant to the authority granted by *N.J.S.A.* 18A:37-1 *et seq.*, does not absolve a board from responsibility for a child's tuition when, as herein, the school placement was controlled by the statutory provisions of *N.J.S.A.* 18A:47-1 *et seq.* Further, the Commissioner emphasized that he rejected arguments advanced by petitioner, or otherwise conveyed by the ALJ, that there was any obligation whatsoever on the part of a board to provide or pay for educational services for a student after it has lawfully acted to expel a student pursuant to *N.J.S.A.* 18A:37-1 *et seq.*, except, where as here, a court of appropriate jurisdiction ordered the student's school placement or there exists a statutory or regulatory provision mandating such an obligation. Commissioner found that the fact that an expelled student may be under 16 does not alter this holding. Commissioner rejected award of post-judgment interest.

September 7, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 02793-98S
AGENCY DKT. NO. 63-3/98

SOMERSET COUNTY
EDUCATIONAL SERVICES
COMMISSION,
Petitioner,
v.
NORTH PLAINFIELD
BOARD OF EDUCATION,
SOMERSET COUNTY,
Respondent.

Nicholas Celso, III, Esq., for petitioner (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys; Nicholas Celso III, Esq. and Marc H. Zitomer, Esq., on the brief)

Theodore E. Gast, Esq., for respondent (Vogel & Gast, attorneys; Theodore E. Gast, Esq., and Deborah A. Pierce, Esq., on the brief)

Record Closed: July 8 , 1999 Decided: July 26, 1999

BEFORE **JEFF S. MASIN**, ALJ:

The Somerset County Educational Services Commission ("Commission"), a body corporate organized pursuant to *N.J.S.A.* 18A:6-51 *et seq.,* filled a petition with the Commissioner of Education ("Commissioner") alleging that the respondent North Plainfield Board of Education ("Board") had failed and refused to pay to the Commission the tuition payments due and owing to the Commission for educational services rendered to L.G., a child under the age of 16 residing in the respondent district. These services were provided after the child was enrolled in the Commission's Alternative to Incarceration ("ATI") Program pursuant to

the order of the Family Court. The Commission seeks to recover the tuition costs and pre- and post-judgment interest.

The Board denies that it is obligated to the Commission for tuition for L.G., contending that it had no obligation to provide any educational services to L.G., who had been expelled, and further that the Commission did not follow the necessary legal procedures to approve its involvement in operating the ATI and therefore it cannot seek to collect tuition for this student's attendance therein.

The Commission's petition to the Commissioner was filed with the Department of Education on March 16, 1998. An Answer with affirmative defenses was filed on March 30, 1998. After the case was transferred to the Office of Administrative Law ("OAL") as a contested case a prehearing conference was held on June 16, 1998. Hearings were held on October 15 and 16, 1998, and thereafter counsel filed briefs and reply briefs. The record closed upon receipt of the last reply on January 20, 1999. On March 10, a letter was sent to the parties regarding the possible application of the 90-day rule, *N.J.A.C.* 6:24-1.2(c), as a bar to the Board's challenge.[1] Counsel were asked to respond to this inquiry and the record was reopened. Thereafter, on May 7, 1999, counsel were again solicited to present any additional information available regarding the communication of the action of the Board of Directors to the members of the Representative Assembly. After receipt of counsels' submissions and a conference call held on July 8, 1999, the record again closed.

The Commission is comprised of 18 member school districts, including the respondent. A local board of education must approve membership in the Commission. *N.J.S.A.* 18A:6-51(g). Each member district elects a person to represent it on the Commission's Representative Assembly. The member from a district may be a member of the local board or the board's chief

[1] The 90 day rule issue was raised because the North Plainfield Board's objection to paying the bill rendered to it, or its objection to the Commissioner's undertaking the ATI Program, was not filed with the Commissioner within 90 days of the Board of Director's approval or the receipt of the bill. However, since the Board's rejection of the bill did not automatically mean that the Commission would press for payment, it is not entirely clear that the Board had to seek the Commissioner's involvement until the Commission itself filed in order to force payment. While imposition of the 90 day rule against the Board may be appropriate in these circumstances, the better and more certain procedure is to decide the case on its merits.

school administrator. *N.J.S.A.* 18:6-53. The Representative Assembly elects a Board of Directors from its membership, and by statute that Board of Directors must number at least fifteen (15) members. *N.J.S.A.* 18A:6-51(i); *N.J.S.A.* 18A:6-55. In the case of this Commission, its Board of Directors numbered 16.

N.J.S.A. 18A:6-62 provides that the Representative Assembly is responsible for adopting the annual budget. Significantly for the issues in this proceeding, it "shall from time to time determine what services and programs shall be provided by the commission, subject to approval of and pursuant to rules of the State Board of Education." *N.J.S.A.* 18A:6-63a. Commissions are authorized to "enter into contracts with other public and private agencies for the provision of approved services and programs to participating public school districts and nonpublic schools." *N.J.S.A.* 18A:6-63b. The Board of Directors are "members elected by the representative assembly to act on commission business on behalf of the assembly." *N.J.S.A.* 18A:6-51(i). Pursuant to *N.J.S.A.* 18A:6-57 a written record of all action taken by the Board of Directors shall be forwarded to the Representative assembly after each meeting of the Board.

The ATI Program was formerly operated jointly by a private organization known as Middle Earth and by the Somerset County Vocational and Technical School. The program is designed to provide an intensive day treatment and aftercare program for teenage males ages fifteen to eighteen from Somerset County whose involvement in the juvenile justice system has been such that they face incarceration. By order of the Family Court, these youths may be placed in the ATI Program as an alternative to incarceration. They are given a suspended sentence with the condition that they complete the program. According to the testimony received from former County Superintendent Novembre, the Commission became involved in the ATI Program at his behest, when it was determined that it could better provide the educational component of the program and collect payment for its services from the school districts of residence of the participating students.

The undisputed evidence demonstrates that at no time did the Representative Assembly ever vote upon a proposal for the Commission to participate in the ATI Program. The record also establishes that the Board of Directors did approve the Commission's participation. The

provisions of the application for approval submitted to the County Superintendent for his approval contained Section VIII which provided in pertinent part that

> A student's local district is ultimately responsible . . . for the tuition established by the Board of Directors of the Somerset County Educational Services Commission. . . .

This provision appears reflective of *N.J.S.A.* 18A:47-5, which, as a provision of legislation authorizing the creation of special schools of instruction for dependent and delinquent children under 16 years of age, *N.J.S.A.* 18A:47-1 *et seq.*, provides that the board of education of a receiving district "shall" be entitled to collect and receive from the board of education of the sending district the agreed upon sum for the tuition and maintenance of the student. The annual tuition rate approved by the Board of Directors was $22,100, which figure was prorated to September 17, 1997. The Commission entered into an agreement with Middle Earth and the Vocational-Technical School to operate the ATI Program in conjunction with them and the Board of Directors approved this agreement by virtue of its ratification and approval on September 25, 1997, of the minutes of the Commission's Executive Committee Meeting of September 15, 1997.

The record establishes that L.G. was a student in the respondent district as a ninth grader until suspended on January 31, 1997. He was expelled by vote of the board on March 6, 1997. He was then 15 years old. In a court order dated November 20, 1997, Honorable Graham T. Ross, Presiding Judge of the Family Part, Chancery Division of Superior Court, placed L.G. in the ATI Program, in lieu of incarceration. He was also placed on probation and as a part of the probation conditions was required to attend the ATI Program. L.G. was enrolled in the ATI Program November 20, 1997. The respondent has been billed for his attendance, but it has declined to pay. The petitioner seeks $20,000.50, based upon attendance from November through October 22, 1998, with November, 1997 and October, 1998 prorated and no charge for the months of July and August, 1998.

Initially, the Board challenges the jurisdiction of the Commissioner, and thus of OAL, to determine the Commission's claim. The Board argues that the Family Court has exclusive jurisdiction to the exclusion of the Commissioner. The Board cites language from *State in Interest of F.M.*, 167 *N.J.Super.* 185 (N.J. Juv. & Dom. Rel. 1979) and *N.J.S.A.* 2A:4A-24.

There the court states that it "is clothed with exclusive jurisdiction in all cases where it is charged that a juvenile has committed an act of delinquency or is in need of supervision." *Id.* at 191. Within this authority is the power to order placement of such juveniles into an educational setting, and the court makes it clear that it is not bound by the rules and procedures of the State Board of Education and the New Jersey Administrative Code when it exercises that authority. In fact, the court relates that it "may order a local board of education to subsidize the tuition of a juvenile domiciled in its municipality." *Id.* at 193. This power follows upon the authority of the court to order a placement of the juvenile in an appropriate facility that will provide the necessary education. However, while counsel for the Board writes in the Board's brief that the court in *F.M.* has the "exclusive power to order a local board to bear the cost of tuition at a particular facility," nowhere does the court say that. Indeed, while it "may" do so, and while it may even do so without necessarily complying with regulations, the court does not assert that its power to do so is exclusive. Its power is not to be disputed, but the court never suggests that the Commissioner of Education cannot also exercise authority over the issue of tuition responsibility for the district in which a juvenile placed in an educational facility is domiciled. Presumably the court's authority to act may be paramount, given its need to effectively and often promptly deal with the needs of the juvenile who comes within its purview, but at least where the court has not acted, the Commissioner can act, commensurate with his jurisdiction over matters affecting the educational process in this State and in accord with the rules and regulations of the State Board. The court and the Commissioner thus each have jurisdiction to act. The respondent's assertion of a lack of jurisdiction in the Commissioner and, by extension in the OAL, fails.

In part, the respondent contends that since the Representative Assembly is the body designated by statute to determine the programs and services which the Commission will offer and it never exercised that authority to approve the Commission's participation in the ATI Program, the Commission has acted in violation of *N.J.S.A.* 18A:6-63 and cannot seek to recover from the Board for services which were provided to L.G. without proper authority and therefore without any binding effect upon the Board as a member of the Commission. In response, the Commission argues that the action of the Board of Directors was adequate in itself to constitute the necessary approval for the Commission's participation of the ATI Program, as the Board is authorized by the statute to conduct Commission business on behalf of the representative assembly. In addition, even if the lack of a direct approval by the representative assembly is a flaw in the procedural

background, the violation is purely technical and such a detail, which the Commission argues is a matter of form over substance, should not stand in the way of the Commission recovering the tuition it rightly deserves for services rendered to a student domiciled within North Plainfield, services which, it argues, fulfilled the "laudable" goal of the ATI Program. In support of its position, the Commission cites case law which emphasizes the need to construe statutes in such a manner as to uphold "the objectives of legislation and the commonsense of the situation." *Jersey City v. City Council*, 55 *N.J.* 86, 100 (1969).

As the statute presently is constructed, the Board of Directors of the Commission is empowered to carry out the business of the Commission. However, while the Directors at one time had the authority to determine which programs the Commission is to undertake, since the statute was amended by L. 1989, c. 254, §13, that responsibility is most definitely placed with the Representative Assembly. The statutory direction to the Assembly is clear. Once the Assembly determines that the Commission will operate a particular program or provide a particular service the Board of Directors has the authority and responsibility to carry out the mandate of the Assembly and to enter into contracts, hire personnel, obtain necessary space, equipment, etc., and to establish the details of the program in a way which effectuates the concept approved by the Assembly. There is no way to read the statute as delegating to the Directors the role of the Assembly in determining the services and programs to be offered by the Commission, particularly after the Legislature decided in 1989 to change the previous structure. Thus, since the Representative Assembly did not act, if the decision to become involved in the ATI Program constituted a determination to offer a service or program which the Commission was not previously involved in, then the Commission did not adhere to statutory requirements for the establishment of new services and programs. While the Commission points out that it has been involved in alternative educational programs prior to the institution of its involvement with the ATI Program, nevertheless, a decision to enter into this program, to do so with Middle Earth, a private enterprise, and the Vo-Tech School, appears to be the sort of fundamental decision on programs and services which the statute now dictates be made by the Representative Assembly, and not by the Directors, whose role is to carry out the business of effectuating the decision reached by the Assembly to enter into the venture.

The question then is whether, because the Commission failed to follow the statute in regard to the decision to involve itself in the ATI Program, it has forfeited any right to collect from the respondent Board for services rendered to the student. The Commission argues that such an outcome would be "absurd" and in fact would call into question the need for any Board of Education who may have had a student in the ATI Program to pay for the services. The Commission argues that even if, as here determined, the Commission did fail to follow the statute, the Directors acted as a *de facto* Representative Assembly and therefore the Commission's role in the ATI Program was lawful.

The concept of "*de facto*" has been recognized by the Commissioner and State Board as a legitimate basis for approving actions when there was a flaw affecting the makeup of a Board of Education which on its face threatened the *de jure* legitimacy of the body. Thus, in cases such as *Pijeaux v. Bd. of Ed. of the City of Orange*, 94 *N.J.A.R.*2d (EDU) 345 (Comm. Ed. 1994) and *Williams v. Cilberto*, 96 *N.J.A.R.*2d (EDU) 990 (Comm. Ed 1996), the ALJ and the Commissioner upheld the actions of school boards on which sat members whose membership thereon was legally inappropriate. In *Pijeaux*, *supra.*, the Board terminated an employee. It was later determined that two members of the Board were ineligible for membership because one was not a registered voter in the county and the other was not a citizen of the United States. In *Williams*, *supra.*, the board appointed a new attorney, but one board member who voted in favor of the appointment was later deemed to be ineligible to sit on the board. In each case the Board's action was upheld because the members who acted despite their disqualifying conditions were nevertheless acting under color of title and at a time when the ineligibility affecting each was unknown to the public. The members were *de facto* members, despite the flaws affecting their *de jure* status.

The Commission asserts that in the current matter, the Board of Directors, made up of 16 members, acted to approve what should have been approved by a body, the Representative Assembly, which had 18 members. There is no claim that the Board of Directors was anything other than the legitimate board. Its status as such is unchallenged. It simply acted upon a subject which it no longer had the authority to act upon, but it did so nevertheless, with no indication that it was aware that it was not the authorized body. It undertook to approve the Commission's involvement in the ATI Program, and the Commission thereafter did enter into the Program and

operate it with its partners. The public was not aware that the approval of the Directors was not sufficient to meet the statute's requirements. The approval of the Program was carried out by a body acting under the color of law. "Under these circumstances the acts of the" (Commission), "in which third persons are interested, cannot be impugned on the ground that the" authority of the Board was defective. *Pijeaux, supra.*, Initial Decision at 346, quoting *Kimball v. Hendee*, 57 *N.J.L.* 307, 309 (S.Ct. 1894).

The problem posed by the *de facto* argument is that while the Boards whose actions were deemed to be authorized *de facto* in *Pijeaux* and *Williams* were the very bodies otherwise authorized to perform the acts whose validity was questioned due to the ineligibility of members of the board, in this case, the law did not permit the Board of Directors to approve the new program, at least not the necessary statutory approval. Only the Representative Assembly could do so. Thus, the Board of Directors could not really claim to be acting under color of authority to perform an act which it had the power to perform, as the boards in *Pijeaux* and *Williams* could claim. Thus, the *de facto* concept really is inapplicable. However, that does not mean that the Commission's case is any weaker.

The Board of Directors which voted to approve the minutes of the Executive Committee and thereby approve the entry of the Commission into the ATI Program consisted of 16 members. In the case of this particular ESC the entire membership is 18 districts. Thus, the Board of Directors membership is virtually identical with the Representative Assembly membership. While in other cases the numerical difference in the membership of the Representative assembly *vis a vis* that of the Board of Directors may be greater, even significantly so, in the case of the Somerset ESC there is very little difference in composition between the two bodies. Thus, the Board of Directors, while not legally the same as the Representative Assembly, and not factually the same as well, is nevertheless substantially a mirror of the membership of the Representative Assembly. In addition, Mr. Stuart Malin, the North Plainfield Board representative to the Representative assembly, was a member of the Board of Directors and in fact the very member who moved the approval of the Executive Committee minutes on September 25.

The Commission's response to the request regarding any written report to the Assembly pursuant to *N.J.S.A.* 18A:6-57 reveals that there was apparently no specific written report as such

delivered to the Assembly as a body. Superintendent of Schools Thomas F. Boyle does report that formal notification of the approval and commencement of the ATI Program by either himself or former Superintendent Roberta Kanarick of 17 of the 18 members of the Assembly through written Superintendent's monthly reports. Only one member was not definitively notified.

While Mr. Malin posited that he did not view himself as a representative of the North Plainfield Board while sitting in his capacity as a Director of the ESC, as opposed to sitting as a member of the Assembly, such distinctions cannot hide the fact that at the time that he moved to approve the Executive Committee's actions of September 15, he most assuredly knew that the Commission was well on its way to undertaking the ATI Program. He never objected to this, never requested that the Representative Assembly vote on the idea, and apparently no other member of the Board or the Assembly did so either. This could perhaps be simply because in a situation where the membership of the two bodies was so virtually identical, a unanimous vote in favor of the idea by the Directors was tantamount to a vote in favor by the Representatives. In such a situation, it would substantially favor form over substance to void the actions of the Commission and deny it compensation for services rendered simply because a second vote of the nearly identical body of persons did not occur. Under the specific facts of this case, the failure of the Commission to obtain approval by vote of the Assembly is not a basis for defeating its claim for payment.

In addition to its objections to paying based upon the lack of a vote by the Representative assembly, the Board also objects that, having expelled L.G. in March, 1997, it should not have any financial responsibility for his education thereafter and should not be required to pay for an alternative placement ordered months later by the Family Court.

There is no state statute which mandates that a local board of education pay for the education of a student who has been expelled from the district. The Commissioner of Education has never determined whether there is any residual financial obligation for a local district which has taken the extreme step of expelling a student, especially one under the age of 16, who, by state law, is mandated to attend school. Decisions by the Commissioner have on occasion mandated that the board provide an alternative program such as home instruction for a student

who has been expelled, but the Commissioner has reviewed these situations on a case by case basis and no distinct pattern has emerged.

In the present case, the local district expelled L.G. There is no evidence where or if he attended school after his expulsion. The Family Court later saw fit to order the child, still under the age of 16, into the ATI Program in order to attempt to avoid his incarceration while still attempting to provide him with the benefits of education. While it clearly has the authority to order the district of domicile to pay for the costs of the education, the court did not do so, and did not mention anything about a funding source. The provisions of the ATI Program as approved by the county superintendent and as reflective of the legislative direction afforded by *N.J.S.A.* 18A:47-5, place the ultimate financial responsibility for the cost of educating a child in the ATI Program on the local district. Here, the child remained domiciled within North Plainfield. While the school board had acted to cut the child off from attendance within the district and to thereby avoid the necessity of its students and personnel having further contact with him, one presumes that expulsion was imposed based upon safety, security and other considerations which the child's conduct had implicated and which were deemed so severe that he needed to be physically separated from the district and its personnel, and was not imposed because the Board sought to save money by excluding a child. The fact that a local board expels a student under the age of 16 does not necessarily mean that it should be permitted to escape any reasonable financial obligation toward the education of that child in whatever alternative school program he enters, whether with Board input or here at the order of the Family Court. Expulsion need not be considered a financial issue. In the circumstances of this case, where the District was a constituent member of the ESC and the child was educated under the ATI Program under the auspices of the ESC, it is not at all improper that the local district, that is the district of the child's domicile, pay its mandated financial obligation pursuant to the contract approved by the county superintendent. It would be inappropriate to shift the cost of the services rendered to the other constituent members of the ESC, while excluding any fiscal responsibility for the domiciliary district.

For the reasons expressed, it is **ORDERED** that the respondent pay to the petitioner the sum of $20,050, plus post-judgment interest as permitted by Court Rules.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 26, 1999
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

7/27/99
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 27 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETITIONER:

P-1 1-Page SCESC Executive Committee Minutes, appr'g App. 7/31/97

P-2 Letter Transmittal and 6 Page Application of SCESC to operate ATI Program 7/31/97

P-3 County Sup't. Approval to Operate ATI Program in Substandard Facility 8/7/97

P-4 8-Page Agreement between SCESC, Somerset County Vo-Tech, and Middle Earth dated 9/97

P-5 1-Page ATI proposed Budget Worksheet, appr'd 7/31/97

P-6 32-Page Subcontract Agreement between Middle Earth and Somerset County re: ATI Program

P-7 3-Page SCESC Executive Committee Minutes dated 9/15/97

P-8 6-Page Minutes of SCESC Bd. of Directors meeting, ratifying 9/15 action 9/25/97

P-9 8-Page Minutes of the SCESC Bd. of Directors, 10/16/97, approving minutes of the 9/25/97, Bd. of Directors meeting

P-10 2-Page letter from Cheryl Messler, Supervisor of Child Study, Somerset/Hunterdon Co., from David Livingston, Somerset Co. Superintendent of Schools regarding observation of ATI program dated 7/8/98

P-11 2-Page letter from David Livingston to Jean Krauss, Youth Services Comm. Coordinator regarding review and approval of ATI program dated 7/9/98

P-12 1-Page Order of Disposition of Hon. Graham T. Ross dated 11/20/97 regarding referral of L.G. to ATI Program

P-13 1-Page Standard Conditions of Family Probation form for L.G. dated 11/20/97

P-14 2-Page letter to Vito D'Alconzo, Principal, from Daniel J. Puntillo, Jr., dated 11/21/97

P-15 1-Page cover letter from Thomas Boyle to Ronald Rossi dated 11/18/97 re: admission of L.G. into ATI program

P-16 1-Page Tuition Contract Agreement between N. Plainfield Bd. of Ed. and SCESC dated 11/21/97

P-17 1-Page memo from Maria V. Strada to Thomas Boyle dated 2/26/98 re: ATI's agreement to pay for L.G.

P-18 1-Page letter from Daniel J. Puntillo, Jr., to Thomas Boyle dated 3/2/98 re: ATI's payment to SCESC for L.G.

P-19 9-Page memo from Marie Strada dated 10/6/98 with attached attendance records re: L.G.'s 1997-98 attendance in the ATI Program

P-20 4-Page letter from Nicholas Celso, III, Esq., to Theodore E. Gast, Esq., dated 2/10/98 making formal demand for ATI tuition payment from N. Plainfield

P-21 1-Page letter from Theodore E. Gast, Esq., to Nicholas Celso, III, Esq., dated 2/24/98 denying payment to SCESC for attendance of N. Plainfield students in ATI Program

P-22 8-Page SCESC Minutes of Board of Directors Meeting of 8/28/97

P-23 Certification of Thomas F. Boyle, dated 5/27/99, with attached Exhibits: A transcript excerpts from the 10/15/97 hearing; B SCESC 9/18/97 Superintendent's Report; C SCESC Executive Committee Minutes of 9/15/97 meeting; D SCESC Superintendent's Report of 10/13/97; E SCESC Acting Superintendent's Report of 10/21/97.

FOR THE RESPONDENT:

R-1 2-Page Somerset Co. Ed. Services Comm. Minutes of 7/24/97 meeting

OAL DKT. NO. EDU 2793-98
AGENCY DKT. NO. 63-3/98

SOMERSET COUNTY EDUCATIONAL SERVICES COMMISSION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NORTH PLAINFIELD BOARD OF EDUCATION, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon a comprehensive and independent review of the record, the Commissioner adopts that portion of the initial decision which determines that, under the specific facts of this matter, the failure of the Commission to obtain approval of the Alternative To Incarceration (ATI) Program by vote of its Representative Assembly is not a basis for defeating petitioner's claim for tuition payment. However, notwithstanding such adoption, the Commissioner strongly admonishes petitioner that its Board of Directors is to refrain from carrying out any functions which by statute have been designated to the Representative Assembly, *not* the Board of Directors.

Further, the Commissioner adopts, with clarification and modification, that portion of the initial decision which orders respondent to pay petitioner the sum of $20,050. Given the factual circumstances of this matter, the Commissioner is in full agreement with

petitioner's legal position that the provisions of *N.J.S.A.* 18A:47-1 *et seq.* obligate respondent to pay tuition for L.G., an unclassified child, who at age 15 was placed into petitioner's ATI program by court order. *N.J.S.A.* 18A:47-1 authorizes a board of education to establish and maintain a special school of instruction for the purpose of restraining, instructing and caring for dependent and delinquent children under age 16 who are committed to the school by the Superior Court, Chancery Division, Family Part. *N.J.S.A.* 18A:47-4 reads in pertinent part that "[s]uch special school shall *receive*, restrain, and instruct dependent delinquent children, and children under the age of 16 years, committed to such school by the Superior Court, Chancery Division, Family Part..." (emphasis supplied). Further, *N.J.S.A.* 18A 47-5 is clear and unambiguous as to the obligation of a board of education to pay for such court-ordered school commitments of juveniles who reside in its district. It reads:

> Children who are dependent and delinquent, or who are habitually truant or incorrigible, or who shall be found by the court to require special instruction, and who reside in a school district in which there is no such special school of instruction may be committed to such a special school of instruction maintained in another district. The board of education of the receiving district shall be entitled to collect and receive from the board of education of the sending district such sum for the tuition and maintenance of such children as the boards agree to, but not in excess of the actual cost per pupil as determined according to rules of the commissioner approved by the state board. The board of education of the sending district shall issue an order, payable from any funds available for current expense, for such sum in favor of the custodian of school moneys of the school district maintaining the school to which the child shall have been committed.

As correctly argued by petitioner, it is undisputed that the above-cited statutory criteria have been satisfied in the instant matter; *i.e.*, L.G. was adjudged delinquent by Superior Court, Chancery Division, Family Part (Petitioner's Exhibit 12); L.G. was committed by order of that court and as a condition to his probation (Petitioner's Exhibits 12 and 13) to petitioner's

ATI Program, a school for delinquent children approved by the State Board of Education pursuant to *N.J.S.A.* 18A:47-1 *et seq.*; respondent does not argue that it has such an approved school/program; and L.G. was 15 years old at the time the court committed him to the ATI Program (Petitioner's Exhibit 12).

With regard to respondent's legal position that its action to expel L.G. terminated any obligation on its part to provide him educational services or to pay his tuition in the ATI Program, the Commissioner finds and determines that a board of education's action to expel a student, even when lawfully taken pursuant to the authority granted by *N.J.S.A.* 18A:37-1 *et seq.*, does *not* absolve a board from responsibility for the student's tuition *when*, as herein, the school placement is controlled by the statutory provisions of *N.J.S.A.* 18A: 47-1 *et seq.* In so holding, however, the Commissioner expressly rejects arguments advanced by petitioner, or otherwise suggested by the Administrative Law Judge (ALJ) in the initial decision, that there is any *general* obligation on the part of a board of education to provide or pay for educational services for a student after it has lawfully acted to expel the student pursuant to *N.J.S.A.* 18A:37-1 *et seq.*, notwithstanding that the student may be under 16 years of age; the exception occurs *only where,* as here, a court of appropriate jurisdiction has ordered the student's school placement or there exists a statutory or regulatory provision mandating such an obligation.[1] The Commissioner stresses, though, that this holding does not prevent, nor is it in any way intended to dissuade, boards of education from providing continued educational services to a student whom it has expelled, if the board so desires.

Lastly, the Commissioner clarifies the ALJ's order that respondent pay post-judgment interest to petitioner. Consistent with the regulations governing award of post-

[1] For example, under certain circumstances, a continuing obligation for the provision of a free appropriate public education may exist for a disabled student who is expelled.

judgment interest, *N.J.A.C.* 6:24-1.16, petitioner may apply for such interest should the Board fail to satisfy the award within 60 days as provided by rule.

Accordingly, as clarified and modified herein, the Commissioner adopts the initial decision of the ALJ.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.
September 7, 1999
Date of Mailing, September 7, 1999

299-99

PENNSVILLE EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSVILLE, SALEM COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Education Association contended the Board violated the provisions of *N.J.A.C.* 6:11-11.6, and statutory and decisional law, by operating its school library at the Pennsville Middle School without a properly certified professional librarian in place. It argued the Board replaced the retired librarian at the library with an aide, who was performing several professional functions formerly performed by the school's librarian without the education, experience or educational services certificate with an educational media specialist endorsement as required by law. The aide held a county substitute certificate; she was neither certificated as a professional librarian nor as an educational media specialist. Board contended the aide performed clerical duties, not professional duties, and aided the principal of the Middle School, who oversaw the operation of the library.

In light of the testimony of witnesses, the ALJ found and concluded that the aide only coordinated the library services; the building principal was totally responsible for the supervision of the library and the Librarian Aide. Moreover, the County Superintendent was fully aware of the scope of the position of Librarian Aide, the Board's job specifications and the certificate required (county substitute certificate). ALJ concluded the middle school building principal was responsible for supervision; the aide neither supervised the library nor conducted instruction while there. ALJ determined the aide performed clerical and custodian functions under her Board-adopted job description. Citing *Lippincott* Appellate Division decision, the ALJ noted the principal has the authority to develop and coordinate the educational media services of a school. Thus, the ALJ concluded the Board's action creating and filling the position of Librarian Aide was proper and in accordance with the law. Petition was dismissed.

Upon careful and independent review of the record, and even accepting the ALJ's credibility assessments, the Commissioner determined to reverse the initial decision. Initially, the Commissioner affirmed that the Board was not compelled to employ the services of an individual with a standard educational services certificate and endorsement in educational media services (EMS) (N.J.A.C. 6:11-11.17) or an endorsement as an Associate EMS (N.J.A.C. 6:11-11.18). The Board, however, may not assign duties which are professional in nature to a paraprofessional aide. Commissioner found that there was ample evidence to support the conclusion that the aide, for all practical purposes, operated independently and performed educational media services, which did not involve the genuine, consistent involvement of a properly certified individual. Moreover, the Commissioner found that notwithstanding the aide's possession of a substitute certificate, she substituted for no one. Commissioner directed the Board to modify, within 90 days of the issuance of this decision, its job description for Librarian Aide to conform with applicable regulations, as well as this decision. A copy of the revised job description shall be submitted to the County Superintendent for review and approval in accordance with *N.J.A.C.* 6:11-4.6. Commissioner directed Board to append to its proposed job description for the Librarian Aide a job description for Principal, clearly setting forth that position's role in the delivery of educational media services in the middle school.

September 9, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6485-98

AGENCY REF. NO. 141-5/98

PENNSVILLE EDUCATION ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSVILLE, SALEM COUNTY,

Respondent.

Keith Waldman, Esq. for petitioner (Selikoff and Cohen, attorneys)

Judith A. Karr, Esq., **Gary M. Salber**, Esq., for respondent (Karr and Salber, attorneys)

Record Closed: June 9, 1999 Decided: July 20, 1999

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, the Pennsville Education (PEA) alleges, among other things, that the Pennsville Township Board of Education (Board) violated and continues to violate the regulatory provisions at *N.J.A.C.* 6:11-11.6, statutory and regulatory law and decisional law of the Commissioner of Education (Commissioner), by operating its school library at the Pennsville Middle School without a properly certified professional librarian in place. Petitioner seeks, among other things, an order from the Commissioner directing the Board to immediately employ a properly certificated professional librarian. The Board denies the allegation that it is in violation of *N.J.A.C.* 6:11-11.6.

The PEA initiated this case by petition for a Declaratory Ruling alleging that the Board has violated and continues to violate the statutory and regulatory law and the decisional law of the Commissioner by operating the library without having a properly certificated librarian (educational media specialist) in place.

The petition initially named Mark Elwell, County Superintendent of Schools (County Superintendent) as a respondent as well. By letter dated July 17, 1998, the Commissioner granted the County Superintendent's motion to dismiss. The Commissioner also decided not to consider the matter as one for declaratory ruling, and transmitted the case to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 14F-1 to -13. The hearing was held on March 8, 1999, at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City, New Jersey. The parties requested and were granted leave to submit posthearing briefs and proposed findings of fact. The last submission was received by the undersigned on June 9, 1999, which constitutes the closing of the hearing record.

UNCONTESTED FACTS

Based upon the testimony and other evidence adduced at the hearing, I **FIND** the following **FACTS** to be uncontested. Therefore, they form a basis of my **FINDINGS OF FACT.**

Mr. Richard Blocksom was employed by the Board for approximately 35 years and served as a school librarian during his employ. At all times, Mr. Blocksom was appropriately certificated for the position of librarian. (educational media specialist).

Mr. Blocksom retired from the Board's employ in June 1997, as the Board's Middle School librarian. Prior thereto, at the request of the Board's Superintendent of Schools, Dr. Robert Peddle, Mr. Blocksom provided the Superintendent with two job descriptions; *i.e.*, librarian (J-1) and librarian aide. The original draft for the position of librarian aide was not available for this hearing.

Thereafter, Superintendent Peddle revised Mr. Blocksom's job description of Librarian Aide and executed J-2 in evidence. The job description for the position of Librarian Aide was forwarded to the Salem County Superintendent of Schools, Michael R. Elwell, for his approval. The position of Librarian Aide was posted and advertised. Superintendent Peddle interviewed all interested candidates and Ann Marie Bell was selected as the successful candidate.

The Board adopted the job description for Librarian Aide on a date not set forth on this hearing record. Ms. Bell commenced her duties as Librarian Aide in the Board's Middle School on or about September of 1997. The Salem County Superintendent of Schools approved the position on or about October 15, 1997.

Ms. Bell holds a County Substitute Certificate. She is neither certificated as a professional librarian nor as a educational media specialist.

POSITION OF THE PARTIES

Petitioner's Position

Preliminary Statement

No board of education has authority to replace the duties of a teaching staff member by assigning such duties to an aide. In violation of statutory and regulatory law and the decisional law of the Commissioner, the Board has replaced the librarian at the library with an aide. The Board's denials to the contrary, the aide is performing several professional functions formerly performed by the school's librarian without the education, experience or educational services certification with an educational media specialist endorsement as required by law.

Proposed Findings of Disputed Fact

Overview of Disputed Facts. Substantially all of the material facts in dispute center upon the job duties actually performed by the librarian aide from September of 1997 to date. As to duets one through 4[1] in the petition and the accompanying affidavit of Mr. Blocksom dated April 28, 1998, the PEA contend that: (a) these duties are predominately professional in nature, requiring the exercise of professional judgment; (b) these duties are customarily performed by properly-certificated educational media specialists and (c) Mr. Blocksom actually performed these duties during this career with the Board. (Petition, ¶6F.) In its answer, the Board admitted contention (c) (that Mr. Blocksom had performed these duties) but denied contentions (a) and (b) (that these duties are predominately professional in nature, requiring the exercise of professional judgment and that they are customarily performed by properly-certificated educational media specialist). (Answer, ¶6F.)

[1] These tasks are "supervise[ing] class research," "evaluate[ing] collection when necessary," "select[ing] and order[ing] books," and catalog[ing] and classify[ing] books when indicated," respectively.

Proposed Findings of Fact:

1. Ms. Bell does not serve as an aide. This finding is supported by Ms. Bell's own testimony that there is no librarian in the library for her to aide and that her job is not simply to assist an educational media specialist by relieving him or her in the performance of easy or repetitive tasks. This finding is further supported by the testimony of Dr. Peddle, who had a difficult time identifying precisely who Ms. Bell is supposed to be aiding. Dr. Peddle's testimony on this point is telling:

> Q: Who is she aiding?
>
> A. (pause) Who is she aiding?
>
> Q. That's right. Is there a professional who she aides?
>
> A. (pause) Ultimately, the principal of the building she is aiding to run that library.

If Ms. Bell were, in fact, aiding a professional who was coordinating the use of the library, these questions would not have been difficult to answer. Dr. Peddle's equivocal responses to these questions demonstrates that he understands that Ms. Bell is not really serving as an aide to anyone.

This conclusion is also supported by the job title itself, referring to the position as "Librarian Aide" as opposed to "Library Aide," and the specific duties listed in the job title. The Board's protestations to the contrary, it is clear that the adoption of the job title was little more than an attempt to merge the professional duties of a librarian with the clerical duties of an aide.

Additionally, the Board is paying the Librarian Aide a starting salary of slightly more than one and one-half times the starting salary of other aides. (Peddle Testimony; Bell Testimony). This is strong evidence that the Librarian Aide is functioning as something more than an aide.

2. The tasks of coordinating the use of "educational media services," curating a library's collection, and instruction in research are professional in nature. This finding is supported by the uncontested testimony of Mr. Blocksom, an educational media specialist with more than 35 years

of experience, who testified extensively as to the specific education and experience necessary to perform each of these tasks.

3. In the absence of a librarian, for the library to properly function, someone must be performing each of these tasks. This finding is supported by the testimony of Mr. Blocksom.

4. Ms. Bell is coordinating the use of "educational media services, curating the library's collection, and providing instruction on research. This finding is supported by the following subordinate findings of fact:

A. Ms. Bell coordinates the use of the library services at the library. This finding is supported by the testimony of Ms. Bell and, to an extent, by the testimony of Dr. Peddle. Although Dr. Peddle attempted to downplay Ms. Bell's role in coordinating the use of the library by contending that she operates the library "in consultation with" Principal Idarolla, her testimony on this issue clearly establishes that she, alone, coordinates the use of its equipment, schedules its use, decides who uses it, and decides when they use it. She testified that she does all of this without approval of any professional. The library has been open and operating since September of 1997, educational media are being selected, processed upon receipt, cataloged and shelved. Library services are being provided to the school on a daily basis. As the only person on site, she is running the library.

B. Ms. Bell is performing several curatorial functions in the library. Although the Board attempted to downplay the amount of professional discretion exercised by Ms. Bell, her testimony reveals that she exercises considerable discretion in performing a number of curatorial functions;

(1) For example, she selects and orders books. She tried characterize to the selection process as a rote one by discussing how she uses several "rules of thumb" in proposing the selection of books. Even though she looks to lists of Newberry Award winners, selections by the American Librarians' Association and requests by teaching staff and students, she alone is the person who proposes the selections of materials. Although she testified that she makes the selections in consultations with teaching staff members, Mr. Blocksom explained that an aide would lack the education and professional background necessary for such consultation to be

meaningful and to make a professional assessment of the library's needs given the classroom curriculum. While Ms. Bell also testified that Mr. Idarolla signs each purchase order, the Board has not dared to suggest that he carefully sifts through each selection before signing a given purchase order. Indeed, such a contention would be incredible given the day-in, day-out time pressures a building principal faces.

(2) Ms. Bell also exercises considerable discretion in discarding books. Again, she attempted to minimize the scope of her discretion by citing "rules of thumb" she uses in determining which books would be discarded. She noted that during the summer of 1998 she evaluated the library's nonfiction section. In reviewing the collection, she used a "rule of thumb" that "if a book is more than ten years old, you think about replacing it." If a book is dated after 1980 and has not been used in the last five to ten years, it would be placed in the discard pile. She also testified that she made the discard pile available and teachers were able to retrieve the books from that pile for classroom use. Significantly, her testimony failed to identify any input by a qualified educational media specialist or other properly certificated person in adopting or implementing her "rules of thumb." A fair inference arises that such a single minded approach of looking to currency of materials and frequency of use has diminished the scope of the library's collection, to retrieve books from the discard pile may have allowed the individual teacher to ensure that his or her own class had the use of a valuable book. Nonetheless, the practice undoubtedly deprived the school population as a whole of the use of any given book which was consigned to the discard heap.

(3) Ms. Bell also exercises considerable discretion in deciding which books will be placed on the library's shelves. Ms. Bell explained how she tries to avoid the need to catalog books by ordering from major suppliers who sell books complete with catalog cards. She testified that, in one case, she had a book which Mr. Blocksom ordered before his retirement. When the time came to process the book for shelving, it did not have a catalog care. Instead of consulting with the librarian at the high school, she made the judgment call that it was not worthwhile to catalog the book. Instead, she chose to give the book to a teacher, removing it from school-wide circulation.

C. Ms. Bell is also engaging in the instruction of students. At hearing, the Board tried to narrowly define the term "instruction" to "direct instruction," attempting to limit the term to mean the teaching of classes in research techniques or Library Science. However, Mr. Blocksom testified that, in a library setting, instruction also includes formal one-on-one instruction of students in how to use the library's materials. While Ms. Bell was careful to note that she had been instructed not to engage in the "direct instruction" of students, she indicated that students come to the library during study hall. Her testimony reveals that she does not simply serve as a study hall monitor. Instead, she helps students with research by directing them to materials when they ask. Mr. Visalli who also testified that he has seen Ms. Bell perform the same function when he has brought his class to the library. In short, as the only staff member in the library, Ms. Bell cannot help but to field students' research questions, especially during study hall. She is fielding such question and is, therefore, providing informal instruction to students.

5. Neither Ms. Bell nor Mr. Idarolla has an Educational Services Certification with an educational media specialist endorsement. This finding is supported by the uncontested testimony of Dr. Peddle and Ms. Bell.

6. Ms. Bell does not have the education and experience necessary to obtain such a certification and endorsement. This finding is supported by the uncontested testimony of of Dr. Peddle and Ms. Bell.

LAW AND ARGUMENT

I. The Board is Engaging in an Ongoing Violation of *N.J.A.C.* 6:11-11.17 and the Decisional Law of the Commissioner.

The State Board of Education (State Board) has promulgated the Education Regulations which appear at Title 6 of the Administrative Code. In particular, at *N.J.A.C.* 6:11-11.17, the State Board has determined that any person who is assigned to "develop and coordinate educational media services" in the public schools must have an Educational Services Certification with an educational media specialist endorsement. *N.J.A.C.* 6:11-11.17(a). The regulation

defines "educational media" as "all print and nonprint resources and the equipment needed for their use." *Id.*

The State Board has also seen fit to require candidates for such endorsements to have extensive education and experience. *N.J.A.C.* 6:11-11.17(b). The holder must possess:

1. A master's degree from an accredited institution;

2. A standard New Jersey teacher's certificate or associate educational media specialist endorsement;

3. One year of successful teaching or one year of experience as an associate educational media specialist.

4. Successful completion of one of the following:

   i. A graduate curriculum approved by the New Jersey State State Department of Education as the basis for issuing this endorsement; or

   ii. A minimum of 30 semester hours credits of post-baccalaureate studies. Courses completed in the candidate's graduate degree program may be applied toward fulfilling these requirements. The following areas of study must be included in either separate or integrated courses:

   (1) Organization and coordination of school media services and materials;

   (2) Application of learning theory in reading, listening and viewing educational media materials;

   (3) Design and development of educational media programs;

   (4) [illegible]velopment of educational media materials;

   (5) Integration of educational media through the school curriculum;

   (6) Evaluation, selection and utilization of educational media;

   (7) Development of individual and group processes in the media program;

   (8) Field experience in a school media program. *Id.*

Mr. Blocksom was a duly qualified and certificated educational media specialist. Unfortunately, ever since Mr. Blocksom's retirement, the Board has had Ms. Bell, an individual who possesses only a county substitute certificate, to develop and coordinate the "educational media services" being provided in the library. As is set forth in the Proposed Findings of Fact above, Ms. Bell coordinates the use of "educational media services," curates the library's collection, and provides informal instruction in research to students. This is a plain violation of the regulation.

The Board's best argument is that because Mr. Idarolla is supervising Ms. Bell, she functions as an aide and is not performing the work of professional. This argument is flawed in two fundamental ways. First, as is set forth in the Proposed Findings of Fact above, Ms. Bell has served as the *de facto* librarian. Her testimony, the testimony of Dr. Peddle, her job description, and her job title all demonstrate that in reality: (a) she serves as an aide to no one; (2) she coordinates the use of the library's services on a day-to-day basis; (c) she orders, processes, shelves and removes media materials and, (d) she assists students in research thereby providing informal instruction in the process. She has performed each of these discretionary tasks without the education, experience or certification required by the State Board's regulations. What is more, as is set forth in the Proposed Findings of Fact above, the proofs in this case demonstrated that she has performed some of these tasks with little supervision and other tasks with no supervision at all.

Second, if one were to ignore these proofs and assume for the sake of argument that Mr. Idarolla coordinates the use of library services, he does not have an Educational Services Certification with an educational media specialist endorsement either. As the holder of a Supervisory Certification with a Principal's Endorsement, he has the power to supervise everything in his building, including the power to supervise the coordination of "educational media services.' However, under *N.J.A.C.* 6:11-11.17, he does not have the power to develop and coordinate those services himself unless he also has an Educational Services Certification with an educational media specialist endorsement. As set forth in the Proposed Findings of Fact above, it is undisputed that Mr. Idarolla lacks such a certification and endorsement.

In promulgating *N.J.A.C.* 6:11-11.17, the State Board has determined that if a person is to coordinate "educational media services" in a public school, he or she has to have the educational media specialist endorsement. In short, someone is coordinating the use of "educational media services" in the library. *N.J.A.C.* 6:11-11.17 requires such a person to have an educational media specialist endorsement. However, neither Mr. Idarolla nor Ms. Bell has this certificate or endorsement. Accordingly, under the regulatory law of the State Board, neither is qualified to develop and coordinate "educational media services" at the school. Regardless of whether either is or both are coordinating such services, the Board is engaging in an ongoing violation of *N.J.A.C.* 6:11-11.17.[2]

II. The Librarian Aide Job Title is a Sham Title Because the Aide is Serving as Librarian

Under the decisional law of the Commissioner, an *Aide is someone who assists* a properly-certificated teaching staff member in supervising student activities. *Roach vs. School District of South Orange-Maplewood,* OAL Dkt. No. EDU 8315-93, Agency Docket No. 287-7/93, 96 *N.J.A.R.* 2*d.* (EDU) 370 (citing *Rossi vs. Willingboro Tp. Bd. of Ed.*, Agency Docket No. 294-8/78 (Sept. 24, 1980), adopted (Comm'r. Nov. 7, 1990), aff 'd. (St. Bd. Aug. 5, 1981)) (Emphasis supplied). In other words, "[a library aide] is a paraprofessional *who assists* the librarian and teaching staff, much like a classroom aide helps certified teachers or a nurse's aide helps a licensed school nurse. As the name applies, *an aide's primary function is to aid*

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[2] The PEA notes is passing that the situation presented by the present case is distinct from that in *Lippincott v. Board of Education of Watchung Hills Regional High School District,* OAL Docket No. EDU 5339-92, Agency Docket No. 248-6/92, 94 *N.J.A.R.* 2*d.* (EDU) 430 (St. Bd.), aff'd., App. Div. Docket No. A-5592-92T5, 95 *N.J.A.R.* 2*d.* (EDU) 304, certif. den. 142 *N.J.* 518 1995). In *Lippincott,* the librarian at the Watchung Hills Regional High School held an Educational Services Certificate with an Educational Media Specialist Endorsement. She argues, in essence, that the *power to develop and coordinate* "educational media services" included the *power to supervise* the non-certificated support members employed within the library. The ALJ, the Commissioner, the State Board and the courts all rejected this contention, finding that the vice principal was properly assigned to supervise the media center. In contrast, the present case does not contest a principal's or vice principal's power to supervise library personnel where the school district already has a properly certificated Educational Media Specialist in place. The present case involves a school district's attempt to provide "educational media services" without having a qualified person in place to develop and coordinate such services in violation of *N.J.A.C.* 6:11-11.17. In short, the PEA does not dispute that Mr. Idarolla would have the power to supervise an Educational Media Specialist. However, under *N.J.A.C.* 6:11-11.17, neither he nor Ms. Bell is qualified to develop and coordinate use of "educational media services" without an Educational Medial Specialist Endorsement.

professionals by relieving them of easy or repetitive tasks which do not require extensive training and expertise." (Emphasis supplied).

However, as set forth in the Proposed Findings of Fact above, the librarian aide in the present case is the only full-time employee assigned to the library. She does not act as a "paraprofessional who assists the librarian" because there is no librarian working in the library. Instead, as is set forth in Proposed Findings of Fact above, Ms. Bell exercise considerable discretion in performing a number of tasks which are professional in nature, including coordinating the use of "educational media services," curating the library's collection, and providing informal instruction in research to students.

Under the circumstances, Ms. Bell is an aide in name only. She is functioning as the librarian and is performing the job duties of an educational media specialist without possessing the Educational Services Certification and the Educational media specialist endorsement required by the State Board.

III. The Board Failed to Prove it Obtained Approval of the Librarian Aide Position from the County Superintendent. Even if proven, such Approval Would be Ineffective to the Extent it Would Contravene the State Board's Regulations.

In the Board's case, the Board presented the testimony of Dr. Peddle that, before filling the position of Librarian Aide, he wrote to the County Superintendent and requested approval of the position. Dr. Peddle then provided hearsay testimony that the County Superintendent approved the creation of the position. Yet, the Board failed to present any other proofs to substantiate this claims and, as a result, the only evidence of record that the County Superintendent approved the creation of the position is Dr. Peddle's hearsay claim. To substantiate this claim, the Board could have provided competent proof in the form of live testimony by the County Superintendent approving the creation of the position certified by him or her as an official record or, at the very least, a truce copy of such a letter. Unfortunately, the Board has failed to introduce any competent proofs to substantiate its claim that the County Superintendent approved the creation of the position.

Under the circumstances, the Board has failed to present a residuum of competent, credible proof of support this defense and the defense must fail as unsubstantiated. *Weston v. State,* 60 *N.J.* 36, 51 (1972) (although hearsay is admissible in an administrative proceeding, for the court to sustain an administrative decision which effects the substantial rights of a party, there must be a residuum of legal and competent evidence on the record to support it). *See also, In the Matter of Allegations of Sexual Abuse at East Park High School,* Slip Op. (Superior Ct. of NJ., App. Div. Appeal No. A-3715-93T5 decided July 21, 1998) (administrative issue preclusion depends, among other things, upon the existence of competent, credible evidence on the record in an administrative hearing.)

Even if the Board had proven it received approval from the County Superintendent, the Board still would not have established a complete defense. First, the mere fact that the County Superintendent's approved the creation of the position does not mean that the County Superintendent approved the Board's use of the librarian aide to staff the library by herself and to coordinate "educational media services" in the process. Second, although a County Superintendent has the authority to approve a paraprofessional position where none exists, he or she does not have the power to create a title in contravention of the certification requirements promulgated by the State Board.

The Commissioner has long held that a local board of education cannot use aides to perform job functions which the State Board has determined are professional in nature. In such cases, it makes no difference whether the local board seeks and receives approval from the County Superintendent to approve the creation of the aide position.

For example, in *Scrupinski v. Bd. of Ed. of Warren Tp.,* 1977 *S.L.D.* 1051, the local board eliminated two nursing positions and created five "school health aide" positions. In the process, the local board sought and received the approval of the County Superintendent for the creation of the aide positions. The job descriptions for the aide positions required the aides to be registered nurses and to hold county substitute certificates. The petitioners in that case claimed that the aides had assumed some of the duties of the school nurse title recognized by the State Board's regulations. The Commissioner agreed, holding:

> The Board's requirement that its school health aide applicants be registered nurses establishes, in the Commissioner's judgment, the attempt by the Board to provide "full nurse coverage" through the use of the less than fully trained school nurses who meet the State Board of Education's academic requirements set forth in [the regulations].
>
> The Commissioner has reviewed the job description . . . of the school health aides, the hearing examiner's finding that such duties more properly are assigned to school nurses, and the Board's objections thereto. The Commissioner opines that if the assigned duties were solely of a clerical nature, as the Board insists, then there would be no sound reason why the aide must also be a registered nurse. In reality, the school health aides are assigned the duties of providing nursing services to pupils, which duties are reserved for properly certified school nurses. 1977 *S.L.D.* at 1055.

The Commissioner concluded "[n]o board of education has authority to replace the duties of a teaching staff member by assigning such duties to an aide." 1977 *S.L.D.* at 1056.

More than 20 years later, the Board in this case is trying to do the same thing. Like *Scrupinski,* the job description in the present case requires the aide to have more education than other aides and to hold a county substitute certificate. As is set forth above, the record in this case plainly reveals that the aide has assumed some of the duties originally contained in the draft librarian job description and is coordinating "educational media services" on a day-to-day basis, a task for which the State Board's regulation plainly require an educational services certificate. The analysis is the same:

> . . .if the assigned duties were solely of a clerical nature, as the Board insists, then there would be no sound reason why the aide must also [have an associate's degree and a county substitute certificate]. In reality, the [librarian aide is] assigned the duties of providing [educational media services] to pupils, which duties are reserved for properly certificated [educational media specialists]. *Id.*

Moreover, the librarian aide description also fails under the State Board's regulations providing for the issuance of a county substitute certificate. Those regulations authorize the

holder of such a certificate to substitute teach on a temporary basis, not permanently. The regulation provides:

> (a) Persons who do not hold a standard instructional certificate issued by the State Board of Examiners but who can present a minimum of 60 semester hour credits completed in an accredited college, may be granted a county substitute certificate *for a day to day substitute teaching* in the county which grants the certificate.
>
> (c) The certificate will be issued for a three year period, *but the holder may serve for no more than 20 consecutive days in the same position in one school district during the school year.* Such certificates, which are issued by the County Superintendent of Schools, are to be granted only when the supply of properly certificated teachers is inadequate to staff the school. They carry none of the accr[illegible] benefits, such as pension and tenure, to which a regularly employed teacher is entitled, and *[such certificates are intended only for persons temporarily performing the duties of a fully certificated and regularly employed teacher.(Emphasis supplied).*

In clear violation of this regulation, Ms. Bell plainly does not serve as a day to day substitute teacher. In further violation of this regulation, the uncontested record in this case demonstrates that she has worked since September of 1997 in the same position -- far more than the 20 consecutive days permitted by the regulation. Such service also contravenes the stated intention of the regulation that such certificates be used only for persons temporarily performing the duties of a fully certificated and regularly employed teacher. Ms. Bell substitutes for no one.

IV. The Board is Engaging in a Continuing Violation *N.J.A.C.* 6:11-11.6 by Operating the Library Without Having a Professional Librarian in Place.

N.J.A.C. 6:11-11.6 reads:

Professional librarian

> (a) This certificate is required for employment as a professional librarian in libraries supported in whole or in part by public funds, serving communities of 10,000 population and above.
>
> (b) The requirements include a master's degree in library or information science in an approved library program.

Accordingly, the regulation requires that a library serving a community of 10,000 or more which is supported in whole or in part by public funds to have a professional librarian with an appropriate certificate.

It is uncontested that the population of Pennsville Township, Salem County is greater than 10,000 (petition and answer, ¶5.) and that the library is operating without a professional librarian with a professional librarian certificate or a master's degree in place. This constitutes a continuing violation of *N.J.A.C.* 6:11-11.6.

Conclusion

For the foregoing reasons, the Board has violated and continues to violate the statutory and regulatory law and the decisional law of the Commissioner by operating the Pennsville Middle School Library without having a properly certificated educational media specialist in place. Your Honor should:

A. Find and declare that the Board has violated and continues to violate statutory and regulatory law and the decisional law of the Commissioner by providing "educational media services" at the library at the Pennsville Middle School without having a properly certificated educational media specialist in place to develop and coordinate them;

B. Order the Board to immediately hire a properly certificated person to perform these tasks, and

C. Award such other and further relief as this tribunal deems appropriate.

The Board's Position

Statement of Facts

At the end of the 1996-97 school year, Mr. Richard Blocksom, retired as the librarian of the Pennsville Township Middle School which serves grades sixth, seventh and eighth. Prior to his retirement, Mr. Blocksom, at the request of Dr. Robert Peddle, provided job descriptions for two positions, those being librarian and librarian aide. Dr. Peddle reviewed the job descriptions provided to him by Mr. Blocksom and made some alterations or melded some of the duties. Thereafter, the position of librarian aide was advertised within the school district and Mrs. Anne Marie Bell responded by applying for said position.

Dr. Peddle forwarded a copy of the job description and job title to Michael R Elwell, County Superintendent of Schools for his review and comments as required when a new position is created. This application for approval of school aide position was approved by Michael R. Elwell on October 15, 1997. Reference to this approval is made in the letter dated February 20, 19997, from Michael R. Elwell to Mr. Thomas G. Myers, of the NJEA which was attached to petitioner's Petition for Declaratory Ruling pursuant to *N.J.A.C.* 6:24-2.1 as Exhibit B.

Anne Marie Bell began serving as librarian aide in the Fall of 1997-98 school year. She continues to the present time in that position. Anne Marie Bell holds a county substitute certificate.

Petitioner contends that Anne Marie Bell in her position as librarian aide performs the duties of a librarian and educational medial specialist in violation of statutory and regulatory law and the decisional law of the Commissioner. The position of the respondent, Pennsville Township Board of Education is that Anne Marie Bell performs clerical duties not professional duties and aides and the principal of Middle School, Mr. Idarolla who is responsible for overseeing the operation of the library.

LAW AND ARGUMENT

I. The Pennsville Township Board of Education is not in Violation of *N.J.A.C.* 6:11-11.17 nor is it in Violation of Decisional Law of the Commissioner

The respondent agrees that there are specific requirements to be designated an Educational media specialist which are set forth at *N.J.A.C.* 6:11-11.17(b). If the Board had decided to replace Richard Blocksom with an individual who was responsible for developing and coordinating educational media services in the Board's Middle School Library, it is admitted that that person would be required to be an educational media specialist. However, the Board decided instead to hire a librarian aide or library aide as the full time employee for the Middle School Library with the clerical functions of the library being assigned to that person.

The issues in dispute as to the job description for librarian aide centers on the first four subheadings under Duties, Responsibilities and Authority. Exhibit J-2. Mrs. Bell testified that she does not supervise class research. She stated that it was made very plain to her when she was hired that she would not be supervising class research and that she was not permitted to supervise class research. The testimony of Mr. Anthony Visalli and Mrs. Bell was consistent in regard to this issue. Mrs. Bell testified that normally a student had already been told what resources to use for research by their teacher before the student came to the library. Upon being asked for help from a student, Mrs. Bell would direct them to the card catalogue and if they still experienced difficulty, she would direct the to the area of that subject matter on the shelves. Mr. Anthony Visalli, one of petitioner's witnesses testified that he typically supervises research for his class when he takes them to the library. He was asked if he ever saw Mrs. Bell assist one of his students and he answered affirmatively. Upon more specific questioning on cross examination, he stated that he had seen students walk up to Mrs. Bell to ask questions. He went on to state that this interaction related to their inquiries regarding video disks which had to be signed out by her. Upon being asked whether this wasn't a clerical function, Mr. Visalli stated, "yes, *I would* say so."

The second area objected to by the petitioner concerns "Evaluating the collection when necessary." Mrs. Bell testified that there is no specific evaluation process. Mr. Blocksom testified that due to the small size of the library that books needed to be "weeded out" to make room for new books. The rule of thumb followed by Mrs. Bell was that if the book was printed prior to 1980 and had not been used in the last five to ten years that it would probably make the discard pile. It is submitted that this method of checking the printing date of a book and the card for the date of last usage as a method of "weeding out" books is a clerical function. This does not involve a professional evaluation of the collection.

The third area of contention is that of "Selecting and ordering books." The testimony of Mrs. Bell was that she followed student preferences for particular authors or sorts of books as well as teacher recommendations. She also placed Newberry Medal winning books as well as books recommended by the American Library Association on her list of proposed purchases. The procedure after completing a list of recommended purchases of books was that the list then went to the building principal for review and thereafter Dr. Robert Peddle for review. It is admitted that Mr. Blocksom or a comparable professional would be capable of doing a more in depth evaluation and analysis of what books should be purchased for the Middle School Library. The method of taking teacher and student recommendations and the recommendations of two reputable associations and placing them on an order form is clerical in nature. Mrs. Bell also testified that when there was a shortage of a poplar title she would go to Borders Books or Waldman Books to purchase additional copies. It is submitted that these purchase decisions are also clerical in nature in that a shortage of a book is observed and the situation is remedied.

The fourth and last area in dispute is that of cataloguing and classifying books when indicated. Mrs. Bell testified that all major book sellers precatalogued books so that there is no need to determine how to catalogue them when they come into the library. With the books precatalogued, the entry of the book into the inventory of the library is a clerical function. For those book sellers that do not offer cataloguing, Mrs. Bell testified that there is a service available that will catalogue a book at the cost of 95 cents per book. Mrs. Bell testified that on one occasion when she first began working in the library, there was at least one book left uncatalogued by Mr. Blocksom. Rather than attempt to catalogue this book she gave it to a teacher for his classroom library.

The testimony of Mr. Blocksom is enlightening on the subject of clerical v. professional duties. On re-direct, Keith Waldman, Esquire, asked Mr. Blocksom if some of the tasks in 1-4 of duties on Exhibit J-2 could be clerical and Mr. Blocksom responded "Aspects of each 1-4 could be clerical." Keith Waldman, Esquire, then asked if each and every aspect of 1-4 could be considered clerical and Mr. Blocksom stated, "yes it could be, to a certain extent." In summary, the testimony of Mrs. Bell was consistent with the position of the Board that her position is clerical in nature and does not cross over into the professional duties of a librarian.

It is the Board's position that Mrs. Bell reports to the building principal, Mr. Idarolla. The petitioner cites *Lippincott v. Board of Education of Watchung Hills Regional High School Districts,* OAL Docket O. EDU 5339-92, Agency Docket No. 248-6/92, 94 *N.J.A.R.* 2*d.* (EDU) 311, aff'd., 94 *N.J.A.R.* 2*d.* (DU 315 Comm'r. Ed.) aff'd., 94 *N.J.A.R.* (EDU) 430 (St. Bd.), aff'd., App. Div. Docket No. A-5592-92T5, 95 *N.J.A.R.* 2*d.* (EDU) 304, certif. den. 142 *N.J.* 518, (1995) and attempts to distinguish the facts from the within case. The Board states that while the facts are somewhat different in *Lippincott,* the findings in regard to the authority of the principal or vice principal over a library's functions are most pertinent. The Watchung Hills Library had a certificated educational media specialist in their library. The library also had several employees in clerical positions. The Board had the assistant principal supervise these employees rather than the educational media specialist. The petitioner argued that this was improper and that the vice principal did not hold an educational media specialist endorsement. Petitioner argued that the educational media specialist endorsement was required of anyone supervising the library and its personnel under *N.J.A.C.* 6:11-11.17.

The argument of petitioner was rejected by the Administrative Law Judge, the Commissioner of Education, the State Board of Education and the Superior Court, Appellate Division. The Administrative Law Judge found *N.J.A.C.* 6:11-9.3 to be dispositive.

> The petitioner's assertion that there is no merit to the argument that *N.J.A.C.* 6:11-9.3(b) give authority to the vice principal to develop and coordinate educational media services itself without merit. . .

> By failing to read the language concerning school medial personnel in the larger context, she has lost sight of the fact that certain certificates subsume the powers, duties, and authorities of other certificates. Reading the certification rules in their entirety, I **FIND** that a person holding a principal endorsement on an administrative certificate is authorized, among other things, to perform the duties involved in supervising a media center and the persons attached to a media center. At ¶314, 315.

The Appellate Division affirmed this decision is *Lippincott,* 95 *N.J.A.R.* 2*d.* (EDU) 304. The Court stated:

> The ALJ rejected petitioner's legal contentions, and concluded that the vice principal, who holds a principal endorsement on a school administrator's certificate, could be assigned to supervise the Media Center and its personnel, *and could be given authority to develop and coordinate the educational media services program (emphasis added).*

It is clear from this language that a vice principal or in this case, the principal, Mr. Idarolla, under his principal's endorsement had the authority to develop and coordinate the educational media services program. Therefore, in the within case, it is entirely proper under the Administrative Code and Case Law for Anne Marie Bell to perform the clerical functions in the library and for Mr. Idarolla to be responsible for her supervision and for him to develop and coordinate the educational media services program at the Pennsville Township Middle School.

II. The Board Proved that it Obtained Approval of the Librarian Aide Position from the County Superintendent

Respondent agrees that Dr. Peddle testified at the hearing that he wrote to the County Superintendent and requested approval of the position. He further testified that the County Superintendent did in fact approve the creation of this position. Petitioner claims that this testimony was unsubstantiated hearsay testimony. Respondent would note that if this position is correct that petitioner did not object to this hearsay testimony being presented by Dr. Peddle at the hearing and, therefore, did not preserve any right to object to same at a later date.

Petitioner states that the only evidence of record that the County Superintendent approved the creation of the position of librarian aide is the testimony of Dr. Peddle and, therefore, this claim is unsubstantiated and, therefore, should not be accepted as evidence by the Court. It should be noted that petitioner's original petition for declaratory ruling pursuant to *N.J.A.C.* 6:24-2.1 contained Exhibit B which as part of their pleading is contained within the record of this case. Exhibit B is a letter dated February 20, 1998, from Michael Elwell, Salem County Superintendent to Mr. Thomas G. Myers of the NJEA which states:

> In response to your letter of February 4, 1998 regarding the use of a library aide at the Pennsville Middle School I have reviewed the Board of Education approved job description and spoken with the Superintendent of the School District. Based upon my review of the job description and the conference with the Superintendent of the School District, I am satisfied that the library aide is performing her duties based on the application for approval of school aide position approved by the County Superintendent of Schools on October 14, 1997.

This exhibit is sufficient evidence to substantiate the testimony of Dr. Peddle at the hearing in regard to this issue.

The petitioner argues in the alternative that if the Court accepts the evidence that the County Superintendent approved this position, that the County Superintendent was in error in doing so. Petitioner argues that that Board is using an aide to perform job functions which the State Board has determined are professional in nature. The petitioner cites *Scrupinski v. Bd. of Ed. of Warren Township,* 1977 *S.L.D.* 1051 to support petitioner's argument. In this case, the local Board eliminated two nursing positions and created five school health aide positions. One important distinction between that case and this is that each board of education is required to employ one or more school nurses pursuant to *N.J.S.A.* 18A:40-1. There is no statutory requirement that a Board employ an educational media specialist in a school library. In addition, the nurse's aides were required to be registered nurses. This requirement was the deciding factor for the Commissioner in deciding that this move by the Board was an attempt to provide nursing services through the use of less than full trained school nurses who met the State Board of Education's Academic Requirements as set forth in the regulations.

In this case only additional requirement for the library aide over that of a teacher's aide is that the person have a County Substitute Certificate. The sole reason for this requirement is to be able to permit students to go to the library during their study hall or at other appropriate times without the need for the presence of a teacher. If the library aide did not hold a County Substitute Certificate, the library use by students would be curtailed to those times that a teacher is present with their class. This is also the reason that the library aide is paid at a higher rate than a teacher's aide which position does not require a County Substitute Certificate.

Petitioner finds further fault with the present arrangement, arguing that the Board is in violation of *N.J.A.C.* 6:11-4.5. The regulations state in pertinent part that the holder of a substitute teaching certificate cannot substitute teach for more than 20 consecutive days in the same position in one school district during the school year. This argument fails because Anne Marie Bell is not a substitute teacher. The substitute teacher certificate is a requirement for her position as library aide so that students can utilize the resources of the library without the need to have a teacher present. This is merely an additional requirement over that of a teacher's aide for this sole purpose. Therefore the 20 day consecutive day limit for substitute teaching in the same position is inapplicable.

III. The Board is not Required to have a Professional Librarian in the Middle School Library

Petitioner argues that under *N.J.A.C.* 6:11-11.6 that because Pennsville Township has a population gre[illegible]10,000 that they are required to have a professional librarian in the Middle School Library. Respondent would agree that if a librarian were employed in the Middle School Library that said person would have to hold a professional librarian certificate. However, respondent disagrees that there is a requirement that a librarian be employed in the Middle School Library.

IV. If it is found that the Principal of the Middle School is not Authorized to Develop and Coordinate the Education Media Services in the Middle School Library without having an Educational Media Specialist Employed, the Board takes the Position that the Educational Media Services in the Middle School Library are not being Developed and Coordinated as that Term is Defined in *N.J.A.C.* 6:11-11.7

In the event that the Court finds *Lippincott, supra.* can be distinguished from this case in that that Board employed an educational media specialist in their library, then respondent adopts an alternate position. Respondent is not aware of any authority that requires an ongoing development and coordination of educational media services in a public school library. In fact, the Board is not required to even have a library for the Pennsville Middle School. As agreed by all parties, under the ideal situation, every school library would have a certificated librarian and educational media specialist. Such a library would have the advantage of a professional who could supervise class research for students on their study period and in conjunction with teachers who have brought their class to the library for research. Such an individual would be able to make a professional analysis and evaluation of the current collection and determine what media services should be added.

Respondent is of the opinion that there exists a middle ground between the permitted parameters of no library and a library operated by an individual with all of the applicable endorsements. The library aide in the Pennsville Middle School is a clerical position. The extent of the development and coordination of educational media services in this library, if that term is appropriate in this context, are as follows:

1. Old books which have not been used in the last 5 to 10 years are placed in the discard pile.

2. New Books are ordered based on the following:

A. Teacher request;

B. Student request for particular authors or sorts of books;

C. Newberry Medal winners;

D. American Library Association recommendations.

The only supervision of class research in the Middle School Library is provided by the student's teacher as verified by the testimony at the hearing. The cataloging and classifying of books is no longer required since most books are precatalogued and those that are not can be assigned a catalogue number by the payment of 95 cents. Respondent submits that their current operation of their library by a librarian aide or library aide, supervised by the Principal meets of the statutory, regulatory and case law requirements of New Jersey law and should be permitted to continue.

Conclusion

The Pennsville Township Middle School Library functions with the help of a librarian aide or library aide who performs clerical duties. She has a County Substitute Teacher certificate which permits students to come to the library on study hall without the necessity of a teacher. due to this additional requirement, she is paid at a level higher than that of a teacher's aide. This position reports to the Middle School Principal who has overall supervisory responsibility for the educational media services in the Middle School. Mrs. Bell is not performing professional services and, therefore, the Board has not replaced a professional with an aide as alleged. It is respectfully submitted that the action of the Board in creating and filling this position is proper and petitioner respectfully requests that this Court confirm the current operation of the Pennsville Middle School as being proper and lawful.

DISCUSSIONS AND CONCLUSIONS

The sole issue for determination by this administrative tribunal, as set forth in petitioner's Petition of Appeal and as agreed upon by the parties, pursuant to the Prehearing Order dated

October 8, 1998, is whether the Board is in violation of the regulations at *N.J.A.C.* 6:11-11.6? That regulation is entitled *Professional Librarian* and provides as follows:

> (a) This certificate is required for employment as a professional librarian in libraries supported in whole or in part by public funds, serving communities of 10,000 population and above.
>
> (b) The requirements include a master's degree in library or information science in an approved library program.

The Job Description of the Board's Librarian Aide, which petitioner asserts violates the provisions at *N.J.A.C.* 6:11-11.17, is repeated here below:

Job Description

Title: Librarian Aide

Certifications/ Qualifications	1.	Salem County Substitute Certificate
	2.	Basic knowledge of the Dewey Decimal system of classification
	3.	Basic knowledge of the circulation of library materials
	4.	Basic knowledge of computers
	5.	Basic typing skills

Reports to: Building Principal

Evaluated by: Building Principal

Supervises: There are supervisory activities related to this position.

Primary Function: To be responsible for the everyday administration of a school library.

Duties, Responsibilities and Authority:

1. Supervise class research.
2. Evaluate collection when necessary.
3. Select and order books
4. Catalog and classify books when indicated.
5. Keep track of circulation of materials in and out and send overdue notices when necessary.

6. Schedule classes for class research.
7. Record Channel 1 subjects when requested.
8. Repair books and type new cards.
9. Order supplies when necessary.
10. Keep library organized.
11. Display books.
12. Keep track of periodicals.
13. Process new books.

(J-2)

The PEA alleges and asserts, among other things, that the first four duties set forth in the Job Description (J-2) are predominantly professional in nature and are reserved for the holder of a professional librarian/educational media specialist certificate or endorsement. Petitioner contends that: (1) supervising class research; (2) evaluating collection when necessary; (3) selecting and ordering books; and (4) cataloging and classifying books when indicated are professional duties which requires the exercise of professional judgment and must be performed by a properly-certificated educational media specialist. Petitioner contends that Ms. Ann Marie Bell, Librarian Aide, lacks the certification required to perform those duties described above, among other duties.

Ms. Bell, testified, credibly, that she does not perform the four duties as set forth in the Job Description. Rather, the classroom teacher, who is assigned with her class for library on a given day, assists the pupils with research. The classroom teacher assists the pupils in locating the needed materials in books; magazines and other print material. Ms. Bell asserted that the extent of her involvement with the pupils research was to direct the pupils to the library card catalog. Ms. Bell asserted that she was clearly advised that she was not to supervise class research nor provide direct pupil instruction.

Mr. Joseph Visalli, seventh and eighth grade Social Studies teacher in the Board's employ, testified as petitioner's witness and asserted, among other things, that he, and not Ms. Bell, gave his pupils specific instructions as to what research resources to use. Mr. Visalli asserted, credibly, that he was in charge of his pupils when visiting the library and gave his pupils instruction about research. He testified that Ms. Bell performed clerical duties while he had his social studies pupils were in the library.

With regard to the evaluation of the library collection, Ms. Bell stated that there was a standard rule of thumb that any resource more than 10 years old and not utilized, was discarded. The discard was done after a check of the card file was completed to determine the materials use and after consultation with teachers who used the type of materials to be discarded.

With regard to the selection of books for the library, Ms. Bell testified that she took the recommendations of the teaching staff members as well as pupils requests. She also used the Newberry winners of children's fiction and the recommendations published by the American Library Association (ALA), of the best books for children. After the book selections are made, Ms. Bell presents the list to the building principal for approval.

As to the cataloging of the materials when they arrive at the library, Ms. Bell testified that the books are precatalogued and she only needs to enter the selection into the library's inventory, a clerical function. There is also a service provided for those books which are not precatalogued.

The testimony of Superintendent Peddle demonstrated that the building principal was totally responsible for the supervision of the library and the Librarian Aide. He asserted, credibly, that Ms. Bell only coordinate the library services.

Having carefully reviewed the relevant testimony, I **FIND and CONCLUDE** that the testimony of witnesses Ann Marie Bell, Joseph Visalli and Superintendent Robert Peddle was credible and to believed with respect to the work performed by Ms. Bell, pursuant to the Board's Job Description. *In re Perrone,* 5 *N.J.* 514, 522 (1950).

As for petitioner's argument that the County Substitute Certificate limits Ms. Bell's service in the performance of her duties as the Board's librarian aide to no more than 20 consecutive days in the same position in one school district during the school year, the herein record demonstrates that prior to his approval, the Salem County Superintendent was supplied a copy of the Board's Job Description for the position which included, among other things, the requirement of a County Substitute Certificate. The County Superintendent was fully aware of

the scope of the position of librarian's aide and the Board's specifications with regard to the work to be performed and certification it required prior to his approval of the position.

With respect to the supervision of the school library, I **FIND and CONCLUDE** that the middle school building principal is responsible for the supervision. Ms. Bell neither supervises the library nor conducts instruction while there. Rather, Ms. Bell performs clerical and custodian functions under her Board adopted Job Description.

Having so concluded, I **FIND and CONCLUDE** that the Superior Court, Appellate Division, decision in *Lippincott v. Board of Education of Watchung Hills Regional High School, supra.* is dispositive here. There, the Appellate Division upheld the Commissioner and the State Board that, under a principal's certificate, the principal has the authority to develop and coordinate the educational media services of a school. That is precisely the situation here.

I **CONCLUDE** that the petitioner, PEA, has failed to carry its burden of proof, by a preponderance of the reliable and credible evidence, that the Board was or is in any way in violation of *N.J.A.C.* 6:11-11.6 or any other statute or regulation with respect to its middle school library. I **CONCLUDE** that the Board's action is creating and filling the position of Librarian Aide was and is proper and in accordance with the law. I **CONCLUDE**, therefore, that the herein Petition of Appeal should be dismissed.

ORDER

Accordingly, it is **ORDERED** that the herein Petition of Appeal be **DISMISSED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does

not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

20 July 1999
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

7/26/99
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 26 1999
DATE

Barbara A Harnett
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

For Petitioner:

Richard Blocksom

Anne Marie Bell

Joseph Visalli

Dianne Beavers

For Respondent:

Robert Peddle

DOCUMENTS IN EVIDENCE

Joint Exhibits:

J-1 Job Description - Librarian (Educational media specialist)

J-2 Librarian Aide

For Petitioner:

None

For Respondent:

R-1 Affidavit of Richard Blocksom

OAL DKT. NO. EDU 6485-98
AGENCY DKT. NO. 141-5/98

PENNSVILLE EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSVILLE, SALEM COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4.

Petitioner excepts to the Administrative Law Judge's (ALJ) determination that an aide and a principal, who both lack an educational services certificate with an educational media services (EMS) endorsement, may legally run a library, particularly in light of his finding that Ms. Bell "coordinate[s] the library services" (Initial Decision at p. 28) and engages in the selection and removal of books. (*Id.*) Petitioner underscores that Ms. Bell is performing curatorial functions for the library, exercising considerable discretion in so doing (Petitioner's Exceptions at pp. 3-5), and is independently coordinating the use of library services on a day-to-day basis. (*Id.* at p. 5)

Petitioner also reasserts that *Lippincott, supra*, is distinguishable from the within matter, in that it dealt with questions of a principal's ability to *supervise* an educational media

specialist and media center staff. Petitioner avers that the decision "does not stand for the proposition for which the Initial Decision cites it," (*Id.* at p. 7), that is, that educational media service functions may actually be *performed* by a principal or vice-principal without the requisite EMS endorsement. Finally, petitioner argues that the Initial Decision errs in concluding that the County Superintendent may approve a job description in plain contravention of regulations promulgated by the Department of Education. (*Id.*)

In response, the Board affirms that the *Lippincott* decision is dispositive of the matter herein, inasmuch as "the Appellate Division upheld the Commissioner and the State Board that under a principal's certification, the principal has the authority to develop and coordinate the educational media services of a school." (Board's Reply at p. 1) Moreover, the Board argues that petitioner has failed to prove by a preponderance of credible evidence that the educational media services in the middle school are performed illegally. The Board proposes that

> [a]s the brief of Respondent suggested, even Mr. Blocksom on cross examination agreed that the job description's numbers one through four could be clerical.
>
> The principal or even a vice principal has the authority to develop and coordinate the educational media services program.*** (*Id.* at p. 2)

Upon careful and independent review of the record in this matter, and even accepting the ALJ's credibility assessments, the Commissioner determines to reverse the Initial Decision, for the reasons set forth below.[1] Initially, the Commissioner affirms that the Board is not compelled to employ the services of an individual with a standard educational services

[1] In so doing, the Commissioner specifically disavows the ALJ's reliance on the County Superintendent's apparent approval of the aide's position in this matter. By letter decision dated July 17, 1998, the County Superintendent was severed as a party in this matter, because, to the extent he was involved in the Board's decision to employ the aide, it was, ultimately, the Commissioner who would determine whether the issues raised in the petition were meritorious.

certificate and endorsement in EMS (*N.J.A.C.* 6:11-11.17) or an endorsement as an Associate EMS (*N.J.A.C.* 6:11-11.18) in order to operate its middle school media center. However, even assuming, *arguendo*, that the *Lippincott* decision stands for the proposition which the Board suggests, the Board may not, in devising an appropriate mechanism to deliver educational media services, and in allocating the functions attendant to that mechanism, assign duties which are professional in nature to a paraprofessional aide. By regulation, the purpose of a school or classroom aide is to *assist* "in the supervision of pupil activities under the direction of a principal, teacher or other designated certified professional personnel***." *N.J.A.C.* 6:11-4.6. The Commissioner is persuaded by the record before him that petitioner has demonstrated by a preponderance of credible evidence that Ms. Bell is *not* performing as an aide to a properly certified professional, but is acting, instead, in a capacity which calls for independent initiative, (*Glen Rock Education Association, Sarah Brown and N. Miles Leonard v. Glen Rock Board of Education,* State Board of Education May 1, 1985, *aff'd* May 22, 1986, N.J. Superior Court, Appellate Division, A-4576-84T1), thereby effectively nullifying the Board's plan to develop and coordinate EMS services through its middle school principal, with the auxiliary services of an aide.

On its face, the duties enumerated in the Board's job description for the Librarian Aide, particularly duties one through four, are not those of an aide, as they describe independent professional functions and there is no indication that Ms. Bell is expected to assist a properly certified person who is ultimately responsible for developing and coordinating educational media services.[2]

[2] Distinguish, *Rossi v. Board of Education of the Township of Willingboro*, Agency Dkt. No. 294-8/78 (September 24, 1980), adopted Commissioner of Education November 7, 1980, *aff'd* August 5, 1981 (slip. op. at p. 6) where the job responsibilities of the Learning Resource Center aide provided that, under the supervision of a certified librarian and teachers, the aide's duties were: "1. To assist with processing books, supplies, materials,

The regulations found at *N.J.A.C.* 6:11-11.17 and 6:11-11.18 set forth the requirements for EMS and Associate EMS endorsements. The EMS endorsement

> *** is required for any person who is assigned to develop and coordinate educational media services in the public schools. Educational media are defined as all print and nonprint resources and the equipment needed for their use. *** *N.J.A.C.* 6:11-11.17

The Associate EMS endorsement

> ***is required for any person assigned to perform the educational media services in the public schools under the supervision of a qualified supervisor. Educational media are defined as all print and nonprint resources and the equipment needed for their use. *** *N.J.A.C.* 6:11-11.18.

In *Glen Rock Education Association et al., supra,* the local board therein employed a single, certified Library Media Manager who assumed responsibility for the management of both its junior and high school facilities, with the assistance of two noncertified employees, an Assistant to the Librarian and a Media Technician. In analyzing whether the services performed by the noncertified Assistant to the Librarian could be performed only by an individual certified as an EMS or an Associate EMS, the State Board directed:

> While the definition of educational media clearly applies to the library material with which the Assistant to the Librarian is involved, the relevant inquiry is whether she either is *assigned to develop and coordinate* educational media services or "*performs* educational media services ... under the supervision of a qualified supervisor. . .", here the Library Media Manager. Based on her job description and analysis of the duties she performs, the State Board concludes that the Assistant to the Librarian neither is assigned to develop and coordinate educational media services nor does she pe[illegible]ducational media services. (emphasis in text)

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magazines, journals, newspapers in the Resource Center. 2. To assist with preparation of displays to motivate student interest and to provide supplementary instructional information. 3. To assist in checking out and retrieving of materials. 4. To assist instructional staff with preparation of special bibliographies and reading lists. 5. To care for the housekeeping duties of the Resource Center. 6. To assist with roll taking. 7. To assist with general typing. 8. To assist with collecting and filing of free materials. 9. To assist with cataloguing and care of audio visual materials in the Resource Center. 10. To assist pupils with locating books and materials applicable to their individual needs."

According to her job description, ***, and the findings of fact set forth in the initial decision, the position in question requires that the Assistant to the Librarian assist the Library Media Manager in ordering, cataloguing, covering, displaying, lending and collecting books, in preparing the budget, and by suggesting needs for books and equipment. *** The actual acquisition, organization, physical processing, classification and circulation of library materials and preparation of the budget is the responsibility of the Library Media Manager. *** While the Assistant to the Librarian assists teaching staff members in locating and reserving library materials and in preparing bibliographies and reading lists, ***the ultimate responsibility for these tasks lies with the Library Media Manager. *** The Assistant to the Librarian assists in creating exhibits and displays. *** She organizes library materials, maintains the periodical and pamphlet collections for the senior high school library, supervises the circulation desk and maintains a schedule of library use for the senior high school library, although all library scheduling is the ultimate responsibility of the Library Media manager. *** In addition to the tasks specifically enumerated in the job description, the Assistant to the Librarian also checks the books to ascertain balances in the book and periodical accounts. *** While the Assistant to the Librarian may participate in discussions concerning reorganization, long and short term planning, and new programs or projects, any decisions in these areas are made exclusively by the Library Media manager. ***

The Assistant to the Librarian assists the Library Media Manager in the annual library orientation of ninth grade students by advising each class as to available materials, library hours and overdue policies. *** However, the instructional component of the orientation -- teaching students research skills -- is the responsibility of the Library Media Manager. *** In fact, when students are present, the senior high school library is never attended by the Assistant to the Librarian alone, without the presence of the Library Media Manager or a certified teacher. *** Further, the Assistant to the Librarian has no responsibility for the instruction of pupils nor does she teach pupils. *** Such instruction is the sole province of the Library Media Manager *** whose ultimate responsibility is to formulate and implement library policy and to operate the library program in the junior and senior high school. ***

We find that in virtually every area in which she performs, the Assistant to the Librarian merely assists the Library Media Manager in the performance of her duties or performs tasks at the manager's direction. To borrow the language of the County

> *Superintendent, "there is nothing self-generating by way of initiative" involved in the position of Assistant to the Librarian. *** Thus, both in theory and in practice, the Assistant to the Librarian does not perform educational media services, but merely aids in the delivery of such services. Since she merely aids in the delivery of educational media service, the Assistant to the Librarian clearly is not charged with the greater responsibility of developing media services. We conclude that a position such as this, which requires that the employee merely aids in the delivery of media services, does not require either an Educational Media Specialist Certificate or an Associate Educational Media Specialist Certificate.* (emphasis added) *(Glen Rock, supra,* slip op. at pp. 4-7*)*

In the present matter, even looking beyond the four corners of the job description to the credible testimony adduced herein, there is little dispute about what Ms. Bell is actually *doing*; it is the *characterization* of her work that is in dispute. Moreover, the dispute arises within a context where crucial functions can, as recognized by all parties herein, legitimately involve both professional and clerical aspects. In examining the work performed by Ms. Bell, the Commissioner finds that, in each of the four central functions at issue in this matter, Ms. Bell is clearly performing at least some duties which cannot be considered clerical. With regard to instruction, it is clear that she is not acting merely as a study hall monitor, but is providing some minimal level of assistance to students; indeed, it is for this very reason that the Board required her to hold a county substitute certificate. With regard to selection and removal of materials, notwithstanding that she generally applies "rules of thumb" of unspecified origin rather than making case-by-case judgments, the fact remains that Ms. Bell is making the ultimate determinations in these critical curatorial processes; the record is devoid of even a claim that there is any meaningful review or oversight of her determinations. Finally, with regard to cataloging, it is clear that Ms. Bell retains the discretion, if a book is not pre-catalogued, to engage a cataloging service or dispose of the book by arranging for its use elsewhere, as in the

collection of an individual classroom teacher. Thus, there is ample evidence to support the conclusion that Ms. Bell is, for all practical purposes, operating independently, undertaking self-generating tasks and performing educational media services which do not involve the genuine, consistent involvement of a properly certified individual, contrary to *Glen Rock, supra.*[3] Concomitantly, there is a dearth of evidence on the record to support the Board's contention that Ms. Bell is merely assisting the principal who is primarily responsible for developing and coordinating the educational media services.[4]

Finally, the Commissioner finds, as petitioner correctly observes, that notwithstanding her possession of a substitute certificate, Ms. Bell substitutes for no one. Contrary to the Board's urging, persons who hold substitute certificates *are* to be employed only in the manner prescribed by *N.J.A.C.* 6:11-4.5. The Board may not simply employ a paraprofessional holding a substitute certificate and then assign to her tasks which are reserved for professional staff.

Accordingly, the initial decision of the ALJ is reversed, as set forth above. The Board is hereby directed to modify, within 90 days of the issuance of this decision, its job description for "Librarian Aide" to conform with applicable regulations, as well as the parameters of this decision. A copy of the revised job description shall be submitted to the county superintendent for review and approval in accordance with *N.J.A.C.* 6:11-4.6. Additionally, the Board is directed to append to its proposed job description for the Librarian Aide the job description for the position of Principal which shall appropriately evidence that

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[3] The Commissioner herein notes that, although the within record does not include transcripts of the hearing conducted at OAL, the Board does not rebut petitioner's summary of the testimony provided by Ms. Bell and Mr. Blocksom in its exceptions.

[4] Moreover, the Commissioner notes that to the extent the Board repeatedly attests that the aide's duties are, in fact, "clerical" in nature rather than plainly supportive of, and supplemental to, a certified professional, it invites an ambiguity in job assignment which may later give rise, *inter alia*, to a tenure claim. (*See Roach v. South Orange-Maplewood School District*, 96 *N.J.A.R.* 2d (EDU) 370.)

position's role in the delivery of educational media services in the middle school. A copy of this decision shall be forwarded to the Salem County Superintendent of Schools.[5]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION.

[5] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

September 9, 1999
Date of Mailing, September 9,1999

300-99

BARBARA DODD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

September 13, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 82-98

AGENCY DKT. NO. 445-11/97

BARBARA DODD,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,

Respondent.

Michael B. Berman, Esq., for petitioner (Collins & Berman, attorneys)

James T. Hundley, Esq., for respondent (Hundley and Parry, attorneys)

Record Closed: July 28, 1999 Decided: July 28, 1999

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

STATEMENT OF THE CASE

In this matter, petitioner asserts that the Board of Education failed to pay her full salary without loss of sick time for an injury sustained in the course of employment pursuant to *N.J.S.A.* 18A:30-2.1. It should be noted that this matter was originally the subject of a petition of appeal filed on October 29, 1996, but that matter was withdrawn as settled by attorney for petitioner on

October 30, 1996 (Exhibit A). However, by a letter dated November 7, 1997, attorney for petitioner indicated that respondent has failed and refused to fulfill its obligation under the terms of the settlement and requested that the matter be transmitted to the OAL. The matter was transmitted to the Office of Administrative Law (OAL) on January 7, 1998, for hearing as a contested case.

The matter was assigned to the undersigned on January 26, 1998, and was scheduled for a telephone prehearing conference to be held on March 3, 1998. This telephone prehearing conference was adjourned at the request of attorney for petitioner due to a court conflict and was rescheduled to March 11, 1998. The telephone prehearing conference scheduled for March 11, 1998, was adjourned to March 12, 1998, and on March 12, 1998, a conference was held between the attorneys and the ALJ wherein it was indicated that the matter was likely to be settled. The telephone prehearing conference was continued to April 22, 1998, but this was adjourned at the request of attorney for respondent based on the possible settlement and because of his inability to be prepared to discuss the issues in the matter. The matter was rescheduled for telephone prehearing conference to be held on June 3, 1998. The telephone prehearing conference scheduled for June 3, 1998, was adjourned at the request of attorney for respondent due to his unavailability and was rescheduled for July 9, 1998. The telephone prehearing conference scheduled for July 9, 1998, was held and at that time the attorneys represented that the matter was settled and that the attorneys were to finalize the computations and would be sending a consent order within approximately thirty days.

Commencing on August 14, 1998, attempts to contact the attorneys in order to obtain the consent order were unsuccessful. This was followed by a letter from attorney for petitioner dated October 9, 1998 (Exhibit B) which indicates that respondent Board of Education has failed to effectuate a proposed settlement which attorney for petitioner believed had been agreed upon by counsel. The matter was then scheduled for telephone status conference to be held on October 20, 1998. Because of attorney for respondent's unavailability, the matter was rescheduled for a telephone conference to be held on October 27, 1998. Because of attorney for petitioner's illness and hospitalization, this conference was adjourned and on October 27, 1998, the undersigned ALJ directed a letter to counsel indicating that the representation of counsel was

that this matter had been settled and that a motion to establish the terms of the settlement was expected to be received (Exhibit C).

By letter dated November 25, 1998, attorney for petitioner submitted an original and three copies of a proposed consent order (Exhibit D) which had been initially forwarded to attorney for respondent on June 4, 1998. The order was submitted under the five-day rule. It is noted that attorney for respondent filed no objection to nor any disagreement with the terms of the within consent order.

Based upon the record before me, I **FIND** that the attorneys represented to me that this matter had been settled between the parties subject only to the finalization of computations with respect to the salary to which petitioner was entitled. Based upon this undisputed representation, I **FIND** that this matter was, in fact, settled and that all that was necessary was to finalize the computations as previously indicated. I **FIND** that the consent order submitted in the within matter was submitted pursuant to New Jersey Court Rule 4:42-1(c) on notice to the attorney for respondent. I **FIND** that attorney for respondent has not objected or otherwise indicated his disagreement with the contents thereof. I **FIND** that the within consent order contains the computations necessary to finalize this matter. Accordingly, I **FIND** that this matter has been settled between the parties, and that the consent order embodies both the terms of the settlement as well as the necessary computations in order to effectuate the settlement. I therefore **CONCLUDE** that this matter is settled and **ORDER** that the parties comply with the terms of the consent order which is annexed hereto as Exhibit D.

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

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

July 28, 1999
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

7/30/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 2 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

ml

COLLINS & BERMAN

Attorneys at Law

18A Robbins Street, Toms River, NJ 08753
Tel (908) 341-2666 Fax (908) 341-2717

MICHAEL B. BERMAN
(Admitted in NJ & D.C.)
HENRY F. COLLINS III

LAKEWOOD OFFICE
P.O. Box 195
Lakewood, NJ 08701
(908) 901-7035

Please Reply to Toms River

96 NOV -4 AM 11:32
OFFICE OF THE COMMISSIONER OF EDUCATION

96 NOV -4 AM 11:16
CONTROVERSIES AND DISPUTES

October 30, 1996

Commissioner of Education
State of New Jersey
Department of Education
225 West State Street
CN 500
Trenton, New Jersey 08625-0500

RE: BARBARA DODD V. NEPTUNE TOWNSHIP BOARD OF EDUCATION

Dear Sir/Madam:

On October 21, 1996, the undersigned, attorney for Barbara Dodd, filed with the Commissioner a Petition of Appeal and Certification and Notice of Motion relative to the above-captioned matter. This matter has now been amicably adjusted between the parties and is respectfully requested that the Petition be dismissed by the Commissioner as a settled case.

Respectfully yours,

Michael B. Berman

MBB:cs
cc: Barbara Dodd
James T. Hundley, Esq.
Lucille Alfano, NTEA

Exhibit A.

COLLINS & BERMAN, P.A.

Attorneys at Law

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

1998 OCT 13 A 9:54

18A Robbins Street * Toms River, NJ 08753
Tel (732) 341-2666 Fax (732)341-2717

MICHAEL B. BERMAN
(Admitted in NJ & D.C.)
HENRY F. COLLINS III

LAKEWOOD OFFICE
P.O. Box 1447
Lakewood, NJ 08701
(732) 901-7035

Please Reply to Toms River

October 9, 1998

Honorable Joseph Martone, ALJ
Quakerbridge Plaza, Bldg 9
P.O. Box 049
Mercerville, NJ 08625-0049

Re: Barbara Dodd v. Neptune Twp. Board of Education, Monmouth County
OAL Docket No: EDUOR 00082-98S

Dear Judge Martone:

For reasons best known to the Neptune Township Board of Education, the Board has failed to effectuate a proposed settlement which I thought had been agreed upon by counsel. Therefore, I ask that this matter be restored to the active list of cases and be set for hearing on an expedited basis. There are several matters that have been consolidated or that are parallel matters and which can be heard simultaneously.

10/14 - Called MT w/ tele conf
10/20 @ 3:30

Respectfully yours,

Michael B. Berman

Michael B. Berman
MBB:kc
cc: James Hundley, Esq.
Barbara Dodd
Lucille Alfano

10/14 - Called (Cathy) Berman - not in 10/20 letter time. (3:30)
Yepsa

10/14 Called Hundley OK 10/20 3:30 PM

Please schedule a telephone conference for 10/20/98 at 3:30 PM or 4:30 PM
Thx

Exhibit B.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
PO BOX 049
Trenton, New Jersey 08625-0049
(609) 588-6542

Joseph F. Martone
Administrative Law Judge

October 27, 1998

Michael Berman, Esq.
Collins & Berman
18A Robbins Street
Toms River, NJ 08753

James T. Hundley, Esq.
Hundley & Parry
35 Pilgrim Pathway
PO Box 488
Ocean Grove, NJ 07756

RE: BARBARA DODD v. BOARD OF EDUCATION OF TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY; OAL DKT. NO. EDU 82-98

Dear Counsel:

On July 9, 1998, it was represented to me that the above-captioned matter had been settled between the parties, and that the only issue delaying the submission of a Consent Order was the making of certain computations. On this basis, further proceedings in this matter were adjourned and the Consent Order was being awaited.

On October 9, 1998, I received a letter from Mr. Berman indicating that the Neptune Township Board of Education has failed to effectuate a proposed settlement which he thought had been agreed upon by counsel. Mr. Berman requested that this matter be restored to the active list of cases and be set down for hearing on an expedited basis.

This is to advise counsel that if this matter has been settled and one party or the other is refusing to effectuate the terms of this settlement, I expect to receive a motion to establish the terms of the settlement within the next ten days.

Exhibit C.

New Jersey is an Equal Opportunity Employer

If, on the other hand, this matter was not settled, then I have serious concerns about the representations made to me by counsel. If this is the case I may be required to consider the imposition of sanctions because of the resulting delay in the hearing and resolution of this matter. I hope this is not the case and will eagerly await a motion to establish the terms of the settlement between the parties in order that I may issue an initial decision approving these terms.

Very truly yours,

Joseph F. Martone
Administrative Law Judge

/lam
c: Sch. Unit, T-OAL

1998 NOV 30 P 4:30

COLLINS AND BERMAN, P.A.
18A Robbins Street
Toms River, New Jersey 08753
(732) 341-2666
Attorneys for the Petitioner

BARBARA DODD,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, Monmouth County,

Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL Docket No: EDUOR 00082-98S
Agency Ref No: 445-11/97

CONSENT ORDER

Michael B. Berman, Esq., for the Petitioner (Collins & Berman, P.A., attorneys)

James T. Hundley, Esq., for the Respondent (Hundley & Parry, attorneys)

BEFORE JOSEPH F. MARTONE, A.L.J.

This matter concerns the assertion of the petitioner, BARBARA DODD, that the Board of Education of the Township of Neptune, Monmouth County [Board] has failed to pay her full salary without the loss of sick time for the time she was absent due to an injury sustained arising out of and during the course of her employment. The petitioner requested a hearing, and the matter was transmitted to the Office of Administrative Law on January 7, 1998, for a hearing pursuant to N.J.S.A. 52:14F-1 to -15 and N.J.S.A. 52:14 B-1 to -13.

On April 22, 1998, I conducted a telephone status conference with the parties. During the

conference, we discussed the entry of a Consent Order wherein the Board would be ordered to pay the petitioner the sum of $3,834.50 representing the pay on sick days and personal days for the school year 1996-1997 with a like amount for the 1997-1998 subject to the finalization of the 1997-1998 salary schedule between the Neptune Township Education Association and the Board. The parties agreed to such a Consent Order and agreed that the petitioner would prepare the Order and the Board, after appropriate review, note its approval and consent thereto.

Having reviewed the presentations made by the parties, I **FIND** that just cause exists for the entry of a Consent Order directing the Board to pay to the petitioner the sum of $3,834.50 for each of the school years 1996-1997 and 1997-1998 within ten (10) days of the entry of this Consent Order. Therefore, I **CONCLUDE** that a Consent Order be entered memorializing the agreement of the parties.

I hereby **ORDER** the Board to pay to the petitioner the sum of $7,699.00 within ten (10) days of the entry of this Consent Order representing the payment of $3,834.50 for the payment of unused sick days and personal days for the 1996-1997 and 1997-1998 school years, the 1997-1998 school year payment being subject to adjustment upon the finalization of the salary guide for that school year by the Neptune Township Education Association and the Board.

This Consent Order may be reviewed by the Commissioner of the Department of Education either upon interlocutory review, pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

DATE: July 28, 1999

JOSEPH F. MARTONE, A.L.J.

I hereby consent to the entry of the within Order as to form and content.

JAMES T. HUNDLEY, ESQ.
Attorney for the Respondent

OAL DKT. NO. EDU 82-98
AGENCY DKT. NO. 445-11/97

BARBARA DODD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, Consent Order, and initial decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

The Commissioner notes that the parties were advised that this Consent Order was submitted pursuant to New Jersey Court Rule 4:42-1(c), and that unless specific objections to such Order were submitted within 5 days of service, the Order could be signed by the ALJ. The Commissioner further notes that no exceptions to the initial decision were filed.

The Commissioner, therefore, presumes acceptance of the Consent Order by the Board and adopts it as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the Consent Order.*

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

September 13,1999
Date of Mailing, September 13, 1999

D.H., on behalf of minor children, K.G. AND K.G.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF HI-NELLA, CAMDEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parent challenged Board's residency determination.

At the OAL counsel for respondent Board advised the ALJ that K.G. and K.G. had moved to Laurel Springs, New Jersey, and the children were enrolled in that district. Receiving no response from his letter to petitioner requesting notification if she objected to dismissal of this matter, the ALJ concluded that the issues in the petition are moot and dismissed the matter with prejudice.

The Commissioner affirmed the initial decision of the OAL and dismissed the Petition of Appeal.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2656-99

AGENCY DKT. NO. 55-3/99

D.H. ON BEHALF OF MINOR CHILDREN K. G. AND K. G.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF HI-NELLA, CAMDEN COUNTY,

Respondent.

D.H., parent of **K.G.** and **K.G.,** petitioner, *pro se*

James L. Muller, Esq., for respondent

Record Closed: July 1, 1999 Decided: July 27, 1999

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter concerns the appeal of D.H. on behalf of her minor children, K.G. and K.G., (hereinafter petitioner) from the determination of the Board of Education of the Borough of Hi-Nella (hereinafter respondent) that the minor children were not entitled to attend the public schools in respondent's district free of charge pursuant to N.J.S.A. 18A:38-1. The petition of appeal was received by the Commissioner of Education on March 22, 1999. An answer was filed

on behalf of respondent on April 15, 1999, and on April 27, 1999, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 to -13.

A hearing was scheduled for July 22, 1999 at the Trenton office of the Office of Administrative Law. Prior to that time, however, by letter dated June 4, 1999, counsel for respondent wrote to the undersigned with a copy to petitioner, as follows:

> Please be advised that I represent the Board of Education of the Borough of Hi-Nella. In that capacity, I was advised of the filing of this matter by the Board Secretary at the time when the Board itself had taken on itself the filing.
>
> In the meanwhile, the matter has become moot in that, the two children involved, K. G. and K. G., have been transferred and are now residing in Laurel Springs, attending the Laurel Springs Elementary School. In view of this, I believe it is pointless for the matter to continue
>
> I would appreciate confirmation inasmuch I am advising Ms. D. H. by copy of this letter.

By letter dated June 8, 1999, the undersigned replied to counsel for respondent with a copy to petitioner, as follows:

> Before I received your letter dated June 4, 1999, I had scheduled the hearing in the above-captioned matter for 9:00 a.m., July 22, 1999, at the Trenton office of the Office of Administrative Law. It appears from the enclosure in your letter that the family has moved to Laurel Springs, New Jersey, and the two children in question have been transferred out of respondent's district. I see no cross-petition in the file from the Board seeking tuition payments for any period of ineligible attendance, so I agree with you that the matter is moot. Unless I hear from Ms. H. in writing on or before July 1, 1999 that she disagrees, I will enter an order dismissing the case as moot and I will adjourn the July 22, 1999 hearing date.
>
> By copy of this letter I am advising Ms. H. to notify me in writing if she wishes to withdraw her request for a hearing; if she objects to

dismissal, she should set forth her reasons in writing and forward to reach me by July 1, 1999.

The letter to petitioner has not been returned by the post office as undeliverable, and to date no response has been received from petitioner. Accordingly, I **CONCLUDE** that the issues raised in the petition of appeal are moot and this matter is therefore hereby **DISMISSED WITH PREJUDICE.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 27, 1999
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

7/29/99
DATE

Debbie Antaramian /PD
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 30 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cc

OAL DKT. NO. EDU 2656-99
AGENCY DKT. NO. 55-3/99

D.H., on behalf of minor children, K.G. AND K.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HI-NELLA, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions to the initial decision were filed by the parties.

Upon his independent review of the record, the Commissioner concurs with the Administrative Law Judge, for the reasons clearly stated in the decision, that the issues raised in the instant Petition of Appeal are moot and that this matter is, therefore, properly dismissed.

Accordingly, the initial decision of the OAL is affirmed and the within Petition of Appeal is hereby dismissed.*

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

September 13, 1999
Date of Mailing, September 13, 1999

302-99

FURQAN WASI BILAL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the State Board of Examiners' denial of his application for permanent certification as a teacher of skilled trades in New Jersey's public schools based on his conviction for felony murder for a homicide which occurred during the course of a robbery.

At the OAL respondent filed an application for summary decision which was unopposed by petitioner. The ALJ concluded that petitioner failed to sustain his burden of proving the Board abused its discretion in denying petitioner's application for a teaching certificate and granted respondent's application for summary decision.

The Commissioner agreed with the ALJ that summary decision is appropriately granted to respondent in this matter.

September 13, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7069-96

AGENCY DKT. NO. 161-4/96

FURQUAN WASI BILAL,

Petitioner,

v.

STATE BOARD OF EXAMINERS,

STATE OF NEW JERSEY,

Respondent.

Furquan Wasi Bilal, *pro se*

Arlene Goldfus Lutz, Deputy Attorney General, for Respondent
(John J. Farmer, Jr., attorney General of New Jersey, attorney)

Record Closed: June 14, 1999 Decided: July 23, 1999

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

Petitioner is challenging the denial of his application for permanent certification as a teacher of skilled trades in New Jersey's public schools, based on his conviction for homicide, by the State Board of Examiners.

The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case on June 24, 1996, in accordance with *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

Initially, a hearing was scheduled for April 23, 1997. An adjournment was requested and granted. The matter was rescheduled for June 6, 1997 and subsequently adjourned once again. Petitioner requested and Respondent agreed to an Order placing the matter on the Inactive List. The Order was reviewed at the expiration of two six month periods as provided by *N.J.A.C.* 1:1-

The matter was scheduled for hearing on June 18, 1999.

Respondent filed a application for summary decision; once again, the hearing was adjourned to give the Petitioner an opportunity to respond. To date, no response has been received.[1]

Accordingly, I deem the application to be unopposed.

FINDINGS OF FACT

I incorporate the following uncontroverted assertions of fact in Respondent's application for summary decision as factual determinations in this matter.

1. In 1992, Petitioner applied for and received a substandard teaching certificate, an emergency Skilled Trades/Carpentry license, to teacher the carpentry trade only in the Department of Corrections (Corrections). This license did not authorize him to teach in the public schools of New Jersey.

2. Corrections then enrolled him in the Provisional Teacher Program/Alternate Route as a Teacher of Skilled Trades/Carpentry.

[1] Respondent established a return date of June 14, 1999, in the moving papers.

3. At the completion of the professional component, Petitioner submitted his application for permanent certification. This certification would authorize him to teach in any public school in New Jersey.

4. On his application Petitioner advised, as he was required to do by statute, that he had been convicted of felony murder. He also provided additional information regarding the conviction requested by the Board for its review.

5. Petitioner had been convicted in 1973 for a homicide which occurred during the course of a robbery.

6. Petitioner received a life sentence, but was paroled in 1987.

7. By letter dated January 31, 1996, Ida Graham, the Board Secretary advised Petitioner that the State Board was denying his application for certification.

8. Petitioner then filed a petition with the Commissioner of Education challenging the denial.

DISCUSSION AND CONCLUSION

A contested matter before an ALJ may be disposed of by summary decision using the same standard applied in Superior Court for summary judgment. *N.J.A.C.* 1:1-12.5. Recently, the New Jersey Supreme Court adopted the federal standard of review which encourages "trial courts not to refrain from granting summary judgment when the proper circumstances present themselves." *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520, 541 (1995). As a result of this ruling, the party opposing the motion for summary judgment must present a *prima facie* case in keeping with his burden of proof in order to thwart the motion. When, however, the evidence is so one sided that one party must prevail as a matter of law, summary judgment is appropriate. *Id.* at 540 (citation omitted).

In the instant case, the allegations contained in the pleadings are supported by documentary evidence and were disclosed by Petitioner on his application for a permanent certificate. Consequently, with respect to the basis for the denial, the facts are uncontroverted. Petitioner, as the party opposing this motion, had the obligation to present a *prima facie* case that the determination of the State Board was inappropriate.

It is well established that the standard of review in cases such as this, i.e., where the Board has denied an application for a teaching certificate, is whether the Board has properly exercised its discretion or acted in an arbitrary, capricious manner.

Accordingly, as the party opposing the application, Petitioner bore the burden of demonstrating that, in denying his application on account of a conviction for homicide, the Board abused its discretion. Petitioner has failed even to respond to the application for summary decision.

Consequently, I **CONCLUDE** that Petitioner has failed to sustain his burden of proving the Board abused its discretion. The Board, on the other hand, has presented a reasonable basis for its determination, its concern with the protection of children in school as well as the acknowledgment that a higher standard of conduct is expected from teachers, who are in a unique position in our society. Accordingly, I further **CONCLUDE** that summary decision is appropriate.[2]

ORDER

It is, therefore, hereby **ORDERED** that the application for summary decision be and hereby is **GRANTED.** It is further **ORDERED** that the determination of Respondent be and hereby is **AFFIRMED**; it is further **ORDERED** that this petition be and hereby is **DISMISSED WITH PREJUDICE**.

[2] It should be noted that, subsequent to the filing of this petition, the controlling statute, N.J.S.A. 18A:6-7.1, was amended to bar anyone with a conviction for homicide from employment in the public schools of New Jersey. L. 1998, c 153, June 30, 1998.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 23, 1999
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

7/28/99
DATE

Debbie Antanatos/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 2 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

jb

OAL DKT. NO. EDU 7069-96
AGENCY DKT. NO. 161-4/96

FURQAN WASI BILAL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed.[1] The parties filed no exceptions to the initial decision.

Upon his independent review of the record, the Commissioner agrees with the Administrative Law Judge's conclusion that summary decision is appropriately granted to respondent in this matter.

Accordingly, the initial decision of the OAL is affirmed for the reasons stated therein and the instant Petition of Appeal is hereby dismissed.[2]

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

[1]It is noted that, although the initial decision identifies petitioner as *pro se* in these proceedings, the record reflects that he is represented by Melvin A. Jacobs, Esq.

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

September 13,1999
Date of Mailing, September 13,1999

303-99

JOHN O'NEILL, PETITIONER, V. BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

September 13, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10603-98
AGENCY DKT. NO. 499-11/98

JOHN O'NEILL,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,
Respondent.

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

Nicholas Celso, III, Esq., for respondent (Schwartz Simon Edelstein Celso & Kessler, attorneys)

Record Closed: July 27, 1999 Decided: July 27, 1999

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

This matter was transmitted to the Office of Administrative Law on December 9, 1998, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

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

JUL 28 1999
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

Aug 2, 1999
DATE

D. N. Antanaitis/jc
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 3 1999
DATE

Barbara A Harnak
OFFICE OF ADMINISTRATIVE LAW

mamf

SELIKOFF & COHEN, P.A.
307 Fellowship Road, Suite 314
Mt. Laurel, New Jersey 08054-1233
(609) 778-6055
Counsel for Petitioner,
John O'Neill

JOHN O'NEILL, an individual,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL COUNTY OF CAMDEN,

Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL DOCKET NO. EDUOR 10603-98S
AGENCY REF. NO. 499-11/98

STIPULATION OF SETTLEMENT AND RELEASE BETWEEN PETITIONER AND INTERVENOR CALLAGHAN

This Stipulation of Settlement and Release is between John O'Neill ("Petitioner") and Michael Callaghan ("Intervenor Callaghan") (Petitioner and Intervenor Callaghan are referred to jointly as "the Parties" and sometimes severally as a "Party").

In consideration of the mutual promises set forth below, the Parties stipulate and agree as follows:

1. The Parties incorporate by reference the terms of the Stipulation of Settlement between Petitioner, Respondent Cherry Hill Board of Education ("Respondent") and Intervenor Callaghan dated today (the "Main Stipulation").

2. Subject to the conditions set forth in the Main Stipulation, Petitioner hereby specifically releases, now and forever, any and all seniority, tenure or recall claims as to the position currently held by Intervenor Callaghan.

3. Intervenor Callaghan's signature on the Main Stipulation serves as good and valuable consideration for the Petitioner's release of claims as set forth in paragraph 2 of this Stipulation.

4. The Parties agree that this Stipulation may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

John O'Neill

Date: 6/17/99

Attest:

Michael Callaghan

Date: 7/26/99

Attest:

SELIKOFF & COHEN, P.A.
307 Fellowship Road, Suite 314
Mt. Laurel, New Jersey 08054-1233
(609) 778-6055
Counsel for Petitioner,
John O'Neill

JOHN O'NEILL, an individual,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL COUNTY OF CAMDEN,

Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL DOCKET NO. EDUOR 10603-98S
AGENCY REF. NO. 499-11/98

STIPULATION OF SETTLEMENT

1999 JUL 29 A 10:47

This Stipulation of Settlement is between John O'Neill ("Petitioner"), the Cherry Hill Board of Education ("Respondent") and Michael Callaghan ("Intervenor Callaghan") (Petitioner Respondent and Intervenor Callaghan are referred to jointly as "the Parties" and sometimes severally as a "Party").

WHEREAS, on November 12, 1998, Petitioner filed a petition with the Commissioner of Education ("Commissioner") in the above-captioned matter alleging that Respondent's retention and assignment of less senior teachers in positions for which Petitioner possesses the necessary certification and experience violated Petitioner's tenure and seniority rights under N.J.S.A. 18A:28-10 et seq. and N.J.A.C. 6:5-1 et seq.;

WHEREAS, on or about November 30, 1998, Respondent filed an Answer July 30, 1998, denying the material allegations of the Petition and setting forth affirmative defenses;

WHEREAS, the matter was transmitted to the Office of Administrative Law ("OAL") and assigned to Administrative Law Judge Bruce R. Campbell for hearing, discovery was conducted and concluded and the matter scheduled for hearing on June 9 and 10, 1999;

WHEREAS, Petitioner identified Caryn Lipkowitz ("Lipkowitz") and Intervenor Callaghan as teaching staff members whose employment could have been adversely affected by the Petition if successful. Lipkowitz and Intervenor Callaghan were duly noticed of the pendir litigation and Intervenor Callaghan alone moved to intervene, which motion was unopposed and remains pending;

WHEREAS, neither Respondent nor Intervenor Callaghan admits that any violation of Petitioner's tenure and seniority rights occurred;

WHEREAS, the Parties having agreed to a means of resolving this dispute in a manner consonant with the public interest; and

WHEREAS the Parties have entered into this stipulation with a full understanding of their rights, recognizing that this stipulation and their agreement is subject to the review and approval of the Commissioner;

NOW THEREFORE, in consideration of the mutual promises set forth below, the parties stipulate and agree as follows:

1. The above recitals are repeated and made a part of this Stipulation.

2. Petitioner, for and in consideration of the undertakings of Respondent set forth in Paragraph 4 herein, and intending to be legally bound, does hereby remise, release and forever discharge Respondent and its officers, members (in their official and individual capacities), employees and agents, its and their respective successors and assigns, heirs, executors and administrators, of and from any and all manner of actions and causes of actions, suits, debts, claims and demands whatsoever in law or in equity, which he ever had, now has, or hereafter may have, or which his heirs, executors or administrators hereafter may have by reason of any matter, cause or thing whatsoever, from the beginning of his employment with Respondent to the date of these presents, and particularly, but without limitation, of the foregoing general terms, any claims arising from or relating in any way to his employment relationship and/or the termination of his employment relationship and/or affiliation with Respondent, including but not limited to, any claims which have been asserted or could have been asserted or could be asserted now or in the future under any and all federal, state or local laws and any common law claims now or hereafter recognized, and any and all claims arising out of his employment with Respondent, with the following exceptions: claims arising under the Worker's Compensation Act, N.J.S.A. 34:15-1 et seq., the Teachers' Pension and Annuity Fund Act, N.J.S.A. 18A:66-1 et seq. and pension claims arising out of any 403(b) or other pension, retirement or annuity plan. Petitioner represents that as of the date of the execution of this Stipulation there are no such claims pending or presently contemplated.

3. Respondent, for and in consideration of the undertakings of Petitioner set forth herein, and intending to be legally bound does hereby remise, release and forever discharge Petitioner and his heirs, executors and administrators, of and from any and all manner of actions and causes of actions, suits, debts, claims and demands whatsoever in law or in equity, which it ever had, now has, or hereafter may have, or which its officers, members, employees and/or agents, its and their respective successors and assigns, heirs, executors or administrators hereafter may have by reason of any matter, cause or thing whatsoever, from the beginning of his employment with Respondent to the date of these presents, and particularly, but without limitation, of the foregoing general terms, any claims arising from or relating in any way to his employment relationship and/or the termination of his employment relationship and/or affiliation with Respondent, including but not limited to, any claims which have been asserted or could have been asserted or could be asserted now or in the future under any and all federal, state or local laws and any common law claims now or hereafter recognized, and any and all claims arising out of his employment with Respondent.

4. Subject to Respondent's making full and final payment as set forth in Paragraph 5 below, Petitioner agrees that: (a) he shall no longer be employed by Respondent as of July 1, 1999, and (b) that his signature on this Stipulation constitutes his resignation and an acknowledgement that he is relinquishing all present and future rights to employment and reemployment wit Respondent as of that date, including but not limited to any preferred eligible recall rights or any seniority, tenure or recall claims as to the positions currently held by Intervenor Callaghan and Lipkowitz.

5. (a) Respondent agrees to pay Petitioner $60,000.00 in full, final and complete settlement of Petitioner's claims in this matter. Respondent will pay the settlement proceeds to Petitioner in two payments of $30,000 each. The first payment is due on September 1, 1999 or within 10 days of the Commissioner's adoption of the OAL's Initial Decision approving settlement, in the event that the Commissioner's adoption of same does not take place before August 20, 1999. The second payment is due on September 1, 2000. Respondent will make these payments less ordinary and customary payroll deductions. Respondent will not deduct union dues or agency fees, premiums for health, medical or other insurance or pension contributions from the settlement proceeds. Petitioner represents that he has paid dues and pension contributions for the 1998-99 school year as an employee of the Florence Township Board of Education. Attached hereto as Exhibit A is a letter from the NJEA indicating that the NJEA and its affiliates release any claim to the deduction and payment of dues from the payments as provided in this paragraph. Petitioner agrees to indemnify and hold Respondent harmless from any claim by the Teachers' Pension and Annuity Fund that any pension contributions are due and owing c

account of the payments as provided in this paragraph. Subject to the specific exceptions noted in paragraph 2 above, Petitioner waives any claims to any payments that might be due to him from Respondent. In the event of Mr. O'Neill's untimely death, payment shall be made to his estate.

(b) Respondent also agrees to provide Petitioner with a letter verifying his service as an employee of Respondent's, which shall include such information as the period of Petitioner's employment by Respondent, his salary history, positions held, and date of his resignation.

6. The Parties agree that they and their officers, agents, and administrators will be bound by a covenant of good faith and fair dealing with respect to performance under this Stipulation.

7. The Parties agree to waive exceptions.

8. The Parties agree that this document constitutes their full understanding. It is agreed that there are no other understandings or agreements (either written or oral) which would have any impact upon the present action.

9. By signing this Stipulation, the Parties certify that they have had the opportunity to discuss this Stipulation with counsel. They are fully satisfied with the services of their counsel with respect to both this Stipulation and all other aspects of this case and they enter into this Stipulation knowingly, willingly and without any coercion or improper inducements.

10. The Parties further agree that this Stipulation is contingent upon approval by the OAL and the Commissioner. No Party will take any legal action whatsoever that is inconsistent with this Stipulation before the OAL or any other forum.

11. By signing this Stipulation, each signatory represents that she or he is a Party or has been duly authorized by a Party to sign on that Party's behalf. A copy of the minutes reflecting action taken by Respondent at a duly-noticed meeting, held in accordance with law, ratifying this Stipulation is annexed hereto as Exhibit B.

12. The Parties agree that this Stipulation may be signed in counterparts and that facsimiles of signatures will have the sar force and effect as original signatures.

CHERRY HILL BOARD OF EDUCATION

By: _____ Attest: _____
Andrew McIlvaine, President

Date: 7/6/99

_____ Attest: _____
John O'Neill

Date: 6/17/99

_____ Attest: _____
Michael Callaghan

Date: _____

3f

12. The Parties agree that this Stipulation may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

CHERRY HILL BOARD OF EDUCATION

By:_____ Attest:_____
Andrew McIlvaine, President

Date:_____

_____ Attest:_____
John O'Neill

Date: 6/17/99

_____ Attest:_____
Michael Callaghan

Date:_____

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OAL DKT. NO. EDU 10603-98
AGENCY DKT. NO. 499-11/98

JOHN O'NEILL, PETITIONER, V. BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

The record, Stipulation of Settlement, and initial decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

ACTING COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

September 13, 1999
Date of Mailing, September 13, 1999

304-99

ROBERT JAMES,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

September 16, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 196-98
AGENCY DKT. NO. 473-12/97

ROBERT JAMES,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,
Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Thomas W. Sumners, Jr., Esq., for respondent (Sumners, Council, George & Dortch, attorneys)

Record Closed: July 29, 1999 Decided: July 29, 1999

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

This matter was transmitted to the Office of Administrative Law on January 16, 1998, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

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

JUL 29 1999
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

Aug. 2, 1999
DATE

D. N. Centanaitis/fc
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 3 1999
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

mamf

SETTLEMENT AGREEMENT

THIS AGREEMENT made this 15th day of June, 1999 by and between:

TRENTON BOARD OF EDUCATION OF THE CITY OF TRENTON, whose address is 108 North Clinton Avenue, Trenton, New Jersey 08609, hereinafter referred to as "Board," and

ROBERT JAMES, whose address is 36 Humboldt Street, Trenton, New Jersey 08618, hereinafter referred to as "James."

WITNESSETH:

WHEREAS, James was formerly employed by the Board as a Security Officer;

WHEREAS, during his time of employment with the Board, he was suspended without pay for a two week period in November, 1997, resulting in a loss of his wages in the amount of $886.36;

WHEREAS, James filed a Petition of Appeal with the Commissioner of Education, Agency Docket No. 473-12/97 and OAL Docket No. EDU 196-98, seeking to rescind the Board's suspension without pay and to be reimbursed for the lost wages;

NOW, THEREFORE,

In consideration of the mutual covenants and understanding herein contained and for other good and valuable consideration, the sufficiency of which it is hereby acknowledged by each of the parties hereto, ***IT IS HEREBY AGREED***:

1. The Board will pay James $600.00 in lost wages minus appropriate payroll deductions.

2. James will withdraw/dismiss his Petition of Appeal with the Commissioner of Education, Agency Docket No. 473-12/97 and OAL Docket No. EDU 196-98.

3. In consideration of the benefits provided under this agreement, James hereby forever releases and discharges the Board, its predecessors and successors and each of the Board members, officers, employees (including but not limited to the Superintendent of Schools), attorneys, and agents from any and all claims, promises, contracts, damages, debts, liabilities, costs, expenses, actions and causes of actions of any kind or nature which James, his successors, heirs, or executor/administrator of his estate, asserts, or could have asserted arising out of and related solely to his suspension without pay, including but not limited to any claims of any nature and under any legal or equitable theories as a result of said suspension without pay.

The execution of this Agreement and payment by the Board of the amount set forth above shall constitute the final and complete resolution of any and all potential litigation between the Board and James arising out of and related solely to his suspension without pay.

4. This Settlement Agreement constitutes the full, fair, final disposition of the matters presented by James against the Board in the above-mentioned Petition of Appeal, and settlement of all back pay claims which were the subject matter of the Petition of Appeal.

5. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized to sign this Agreement and bind the Board to its terms.

6. The parties recognize that each has been represented by legal counsel of his or its own choosing and that they sign this Agreement as their own voluntary act and deed and that they fully understand the duties and obligations enumerated herein.

7. James further certifies that he has had the opportunity to discuss the terms of this Settlement Agreement with his attorney, Richard A. Friedman, Esq. of the law firm of Zazzali, Zazzali, Fagella & Nowak.

8. This Agreement shall be subject to the laws of the State of New Jersey.

9. All terms of this Agreement are deemed material. This document may not be altered, amended, or modified except by an instrument executed in writing by the parties. In the event that any provision of this Agreement is determined to be illegal or contrary to the spirit of the law, only that provision will be struck and all other provisions to this Agreement are binding between the parties.

Robert James

7/28/99
Date

Richard A. Friedman, Esq.

Abdul-Malik Ali
Abdul-Malik Ali
President
Trenton Board of Education

6/25/99
Date

Charles R. Milewski
Board Secretary
Trenton Board of Education

OAL DKT. NO. EDU 196-98
AGENCY DKT. NO. 473-12/97

ROBERT JAMES,	:	
	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
	:	
RESPONDENT.	:	
	:	

The record, Settlement Agreement, and initial decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

September 16, 1999
Date of Mailing, September 16, 1999

305-99

IN THE MATTER OF THE TENURE	:	
HEARING OF MARY TYSON,	:	
STATE-OPERATED SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF	:	DECISION
NEWARK, ESSEX COUNTY.	:	
_____	:	

September 17, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT

OAL DKT. NO.: EDU 3768-98
AGENCY DKT. NO. 65-3/98

OAL DKT. NO.: EDU 11500-97
AGENCY DKT. NO. 409-11/97

MARY TYSON,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,

Respondent.

Eugene M. Liss, Esq., represented petitioner

Kelly Ann Guariglia, Esq., represented respondent
(Sills Cummis, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: July 23, 1999 Decided: July 28, 1999

BEFORE **JEFFREY A. GERSON**, ALJ

This matter was transmitted to the Office of Administrative Law (OAL) on April 28, 1998, for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.* OAL Dkt. No. EDU 11500-97 (Petitioner contests District's refusal to indemnify her for the cost of her legal fees pursuant to *N.J.S.A.* 18A:60-5) was withdrawn and returned to the Agency on June 19, 1999.

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Voluntary Settlement Agreement, Waiver and Release.

Having reviewed the contents of the attached Voluntary Settlement Agreement, Waiver and Release, I **FIND:** (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, **I CONCLUDE** that the attached Voluntary Settlement Agreement, Waiver and Release meet the requirements of *N.J.A.C. 1:1-19.1.1*, and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with their contents and that these proceedings be (and are hereby) **DISMISSED**.

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

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

7/25/99
DATE

JEFFREY A. GERSON, ALJ

Receipt Acknowledged:

8/5/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 5 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

SILLS CUMMIS RADIN TISCHMAN
EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(973) 643-7000
Attorneys for State Operated
School District of the City of Newark

COMMISSIONER OF EDUCATION
OAL Docket No. EDUTH 03768 -98N
Agency Ref. No. 65-3/98
OAL Docket No. EDUOR 11500 -97N
Agency Ref. No. 409-11/97

In the Matter of the Tenure Hearing of MARY TYSON STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK	**VOLUNTARY SETTLEMENT AGREEMENT, WAIVER AND RELEASE**

The State-Operated School District of the City of Newark ("Newark" or "District") and Mary Tyson ("Tyson"), agree to the following terms in full resolution of this matter:

WHEREAS, Tyson disputes the allegations of the tenure charges; and

WHEREAS, the parties agree that it is in the public interest to enter into this agreement in resolution of said charges in order to avoid the uncertainty and expense of litigation, and

WHEREAS, the parties further agree that the terms of this agreement will not present any risk of harm to students and/or the safe operation of the school district,

NOW, THEREFORE, the parties agree as follows:

1. Tyson agrees to submit to the District, in writing and upon approval of this Agreement, a resignation for her employment effective December 31, 1999.

2. Tyson shall be placed on administrative leave, with pay, for the period from the present through December 31, 1999.

3. The District shall restore to Tyson sixty (60) days' back pay from the 120 day suspension without pay already served by Tyson. The remaining sixty (60) days' suspension without pay shall remain intact.

4. The District shall, upon approval of this Agreement by the State District Superintendent, withdraw the tenure charges filed against Tyson, which charges bear OAL Docket No. EDUTH 03768 -98N and Agency Ref. No. 65-3/98.

5. Tyson shall, upon execution of this agreement, withdraw with prejudice her petition for legal fees, which matter bears OAL Docket No. EDUOR 11500 -97N and Agency Ref. No. 409-11/97.

6. Tyson acknowledges that the payments reflected in this agreement constitute the full financial obligation of the District and that she shall receive no additional payments. In exchange for the above consideration, Tyson, on behalf of herself, her heirs, successors and assigns, hereby fully releases and forever discharges the District, its representatives, agents, officers and employees, for any and all actions, claims and liabilities of whatsoever kind in character, that she has had or may now have against any of them, including without limitation any and all claims related to her employment with the District or the termination of that employment.

7. Tyson acknowledges, as required under *In re Cardonick*, that, despite the approval of this agreement, the issue of possible revocation of her teaching certificate may be considered by the State Board of Examiners.

8. This agreement is subject to the approval of the State District Superintendent and the Commissioner of Education.

9. The parties enter this agreement voluntarily and without coercion, after consultation with their respective counsel.

State-Operated School District of the
City of Newark

Mary Tyson

Mary Tyson

Dated: June 22, 1999

Beatrice C. Colbymore

By:

Dated: 7-13-99

.2C

OAL DKT. NO. EDU 3738-98
AGENCY DKT. NO. 65-3/98

IN THE MATTER OF THE TENURE	:	
HEARING OF MARY TYSON,	:	
STATE-OPERATED SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF	:	DECISION
NEWARK, ESSEX COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) in the form of a Voluntary Settlement Agreement, Waiver and Release have been reviewed. Upon such review, the Commissioner is compelled to reject the agreement as it is currently structured since he cannot be satisfied by the present record that the proposed settlement meets the *Cardonick* standards for settlement of tenure matters.[1] (*In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board of Education April 6, 1983, 1990 *S.L.D.* 842, 846.)

It is well established that, having once taken up the burden of tenure charges, the Board may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges can no longer be pursued or why it is now in the public interest not to pursue them. (*In the Matter of the Tenure Hearing of Kenneth Smith, School District of the City of Orange, Essex County*, decided by the Commissioner March 22, 1982, decision on

[1] The Commissioner notes that although the within matter was apparently consolidated with the matter entitled *Mary Tyson v. State-operated School District of the City of Newark, Essex County*, OAL Dkt. No. 11500-96, Agency Dkt. No. 409-11/97, the matter bearing the OAL Dkt. No. 11500-97 has been withdrawn, notwithstanding

remand June 16, 1983, *aff'd with modification* by the State Board of Education November 2, 1983, *aff'd* Superior Court January 30, 1986.) Not only is such an explanation absent from the agreement itself, *but the record contains no copies of the tenure charges which were initially certified to the Commissioner*, and, further, indicates that such charges were based upon allegations of physical abuse.[2] Based on the record before him, together with the terms of the agreement, the Commissioner cannot be assured that a settlement in this matter is in the public's interest.

Accordingly, the proposed settlement is rejected for the reasons expressed herein. While the Commissioner does not preclude the possibility of settlement in this matter, he stresses that in order for him to meet his own obligation to the schools and children of this State, he must be assured that any settlement is consistent with appropriate standards for setting aside tenure matters as expressed in *Cardonick, supra*. The Commissioner, therefore, remands this matter to the OAL for such further proceedings as are necessary to address the concerns set forth herein. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to a hearing on the merits.[3]

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

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that the within agreement suggests that the withdrawal would take place upon execution of the settlement. Accordingly, these matters are no longer considered consolidated.

[2] The record of this matter includes a Motion to Intervene filed by the Division of Youth and Family Services (DYFS) on February 5, 1999. As the record does not indicate the disposition of such motion, the Commissioner directs that, on remand, as set forth below, this motion either be reflected in the record as granted or denied, or decided as a threshold matter, prior to any further proceedings on settlement or hearing.

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

306-99

H.K., on behalf of minor child, S.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT BEACH, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

September 21, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL - WITH PREJUDICE

OAL DKT. NO. EDU 4626-99

AGENCY DKT. NO. 159-6/99

H.K. ON BEHALF OF MINOR CHILD, S.K.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT BEACH, OCEAN COUNTY,

Respondent.

Harvey H. Rothman, Esq., for petitioner

Seymour J. Kagan, Esq., for respondent (Berry, Kagan, Sahradnik, Kotzas & Riordan, attorneys)

Record Closed: June 30, 1999 Decided: August 10, 1999

BEFORE **KATHRYN A. CLARK**, ALJ:

This matter arises on a motion for emergent relief. It was transmitted to the Office of Administrative Law for hearing and determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13, on June 22, 1999. A hearing was held on June 25, 1999. During the hearing, the parties agreed to pursue avenues for settlement or a mutually acceptable resolution of their dispute.

In a letter, dated June 29, 1999 from counsel to petitioner petitioner agreed to the conferences to resolve this matter so that S.K. may return to school in September, 1999. Petitioner's counsel asked for time to check with S.K.'s mother, who was not present at the hearing.

Upon checking with the mother, H.K., consent to the conferences and also to the dismissal of the petition was given.

Both parties have indicated that they agree to a dismissal with prejudice. This bench does not think it necessary to dismiss with prejudice, so a **DISMISSAL** is **GRANTED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8/10/99

DATE

KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

8-12-99

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 13 1999

DATE

OFFICE OF ADMINISTRATIVE LAW

es

OAL DKT. NO. EDU 4626-99
AGENCY DKT. NO. 159-6/99

H.K., on behalf of minor child, S.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT BEACH, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. It appears that the parties have reached an agreement in this matter, even though the agreement is not on the record. Since the ALJ indicates that the parties are in accord that the within matter be dismissed, the Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, determines that this matter shall be deemed withdrawn as a contested matter before him, in accordance with *N.J.A.C.* 1:1-19.2. The matter is, accordingly, dismissed.*

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

September 21, 1999
Date of Mailing, September 21, 1999

307-99

PAMELA C. SWALLOW,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLLAND, HUNTERDON COUNTY	:	DECISION
RESPONDENT.	:	

September 21, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6012-97
AGENCY DKT. NO. 222-6/97

PAMELA C. SWALLOW,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLLAND, HUNTERDON COUNTY,
Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Michael J. Rogers, Esq., for respondent (McDonald, Rogers & Rizzolo, attorneys)

Record Closed: August 4, 1999 Decided: August 10, 1999

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter was transmitted to the Office of Administrative Law on July 7, 1997, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A prehearing conference was conducted on June 4, 1998, at which time the following were identified as the issues for determination at hearing:

1. Do petitioner's tenure/seniority rights entitle her to the position Teacher-Librarian clerk for 1997-98 school year?

2. If the answer to the previous question is yes, what are the appropriate remedies?

The hearing was scheduled for October 15, 1998, at the Trenton office of the Office of Administrative Law. That date was adjourned and rescheduled a number of times at the request of one or the other party. On March 24, 1999, the last rescheduled date for the hearing, prior to commencement of testimony, the parties advised that they had reached a settlement agreement. Thereafter they prepared a written settlement agreement which was received by the undersigned on August 4, 1999, whereupon the record closed.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Aug. 10, 1999
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

Aug. 13, 1999
DATE

D.N. Antanaitis/jc
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 16 1999
DATE

Barbara A Hannah
OFFICE OF ADMINISTRATIVE LAW

cc

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

1999 AUG -4 A 9:59

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioner

PAMELA C. SWALLOW, Petitioner, v. HOLLAND TOWNSHIP BOARD OF EDUCATION, HUNTERDON COUNTY, Respondent.	:	BEFORE THE OFFICE OF ADMINISTRATIVE LAW OAL Docket No.: EUDOR 06012-97S **SETTLEMENT AGREEMENT AND STIPULATION OF SETTLEMENT**

The parties to the within matter hereby agree to settle and resolve the claims which were asserted by petitioner in the Petition of Appeal with the above docket number, based upon the following terms:

1. The parties recognize that petitioner filed a Petition of Appeal with the Commissioner of Education which asserts that the termination of her employment at the end of the 1996-97 school year and retention and/or employment of other teaching staff members violated petitioner's tenure and seniority rights.

2. The parties recognize that this agreement resolves petitioner's claim for a remedy for the alleged violation of her rights, and that the acceptance and implementation of all of the

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terms of this agreement shall result in the termination of an rights that petitioner may have or have had to reinstatement or re-employment with respondent, whether based upon tenure, seniority, or otherwise, and that the termination of petitioner's tenure and seniority rights and of any other re-employment rights is contingent upon the approval of this agreement in its entirety by the Commissioner of Education, the effectuation of all of its terms by respondent, and its acceptance and implementation by the Teachers' Pension and Annuity Fund.

3. The parties agree that this settlement agreement shall not apply to any claims which are based upon facts not presently known to petitioner. Nor shall it apply to any claims based upon any facts which may arise or occur after the date that petitioner signs this agreement. The parties also agree that any such claim are neither waived nor abandoned by this agreement, and this agreement shall only extinguish those claims which petitioner is aware of as of the date of signing this agreement.

4. The parties agree that this settlement agreement must be approved by the Commissioner of Education, and that if the Commissioner of Education rejects any provision of this settlement agreement, if respondent does not fully implement the terms of this agreement, or if the Teachers' Pension and Annuity Fund does not accept and implement this agreement, all provisions of this agreement shall be deemed null, void, and of no effect, and that the Petition of Appeal, in its entirety, shall be deemed active and shall be remanded to the Administrative Law Judge and the

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Commissioner of Education for proceedings as a contested case, and that in such event, the parties shall retain all legal rights that they had prior to their entering into this agreement.

5. The parties recognize that during the 1997-98 and 1998-99 school years, petitioner was employed as a teaching staff member by the Lebanon Board of Education and had substantial earnings which mitigated her losses, and that such mitigation must be taken into account together with unemployment benefits received in determining the backpay and benefits that the petitioner shall receive. Accordingly, the parties agree that respondent shall pay to petitioner, as back pay, after consideration of mitigation, the sum of $30.000.00 for the 1997-98 and 1998-99 school years, subject to usual and customary deductions. The parties specifically agree and recognize that these payments constitute back pay minus mitigation and are paid as full compensation after deduction for mitigation for the 1997-98 and 1998-99 school years, which sum, together with petitioner's other earnings and unemployment benefits, is substantially the amount petitioner would have earned if employed by the respondent for those school years.

6. Because respondent did not budget for such additional expenditures, the parties agree that the payment shall be made in equal installments, each in the sum of $10,000.00. The first payment shall be due within 30 days of the Commissioner's approval of the settlement agreement. The second payment shall be due on or before January 20, 2000. The third payment shall be due on or

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before January 20, 2001.

7. The parties agree that petitioner shall receive pension credit for the 1997-98 and 1998-99 school years as if she had been employed on a full time basis by respondent. The parties recognize that petitioner has already received partial pension credit as a result of her employment with the Lebanon Board of Education. To provide the additional pension credit required by this agreement, respondent shall deduct from petitioner's backpay the additional employee's share of contributions on those portions of the full salaries that petitioner would have earned for the 1997-98 and 1998-99 school years if employed by respondent (which was not previously remitted to the Division of Pensions) and shall remit those contributions to the Teachers Pension and Annuity Fund. Respondent shall also inform the Division of Pensions o the basis for the deductions, i.e., that said deductions are the additional deductions due based upon the salary petitioner would have earned as if employed full-time by respondent for the 1997-98 and 1998-99 school years, but that pension contributions have already been paid on the portion of salaries for those years, so that the additional pension contributions should be taken only on the amount necessary to result in pension credit being provided for the salaries petitioner would have earned if employed full-time for the 1997-98 and 1998-99 school year.

8. Respondent shall request that the Division of Pensions contribute the employer's share of petitioner's pension contributions for the 1997-98 and 1998-99 school years, but if

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required by the Division of Pensions, respondent shall pay the employer's share of additional pension contributions for petitioner's pension credit for the 1997-98 and 1998-99 school years.

9. The parties agree that if the Division of Pensions refuses to grant or recognize the pension credit required by this agreement, this settlement shall be null and void, petitioner shall not be deemed to have waived, abandoned, or surrendered any tenure, seniority, or other re-employment rights, and petitioner's case shall be returned to active status for determination by the Office of Administrative Law.

10. This agreement constitutes the entire understanding of the parties and may not be altered, amended, modified or otherwise changed except by an instrument in writing executed by the parties.

Pamela C. Swallow — Dated: June 8, 1999
Pamela C. Swallow
Petitioner

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
Attorneys for Petitioner

By: _____ Dated: 6/11/99
Richard A. Friedman, Esq.

Holland Township Board of Education

By: Linda Sullivan Dated: 8/2/99
Superintendent

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McDONALD, ROGERS & RIZZOLO
Attorneys for Respondent

By: _____
Michael J. Rogers, Esq.

Dated: AUG. 03, 1999

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ATTORNEYS AT LAW

OAL DKT. NO. EDU 6012-97
AGENCY DKT. NO. 222-6/97

PAMELA C. SWALLOW,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLLAND, HUNTERDON COUNTY	:	DECISION
RESPONDENT.	:	
	:	

The record, Settlement Agreement and Stipulation of Settlement, and initial decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner is compelled to remand the settlement agreement to the OAL. On its face, the agreement is expressly contingent upon the Division of Pensions and Benefits' recognition of additional pension credit to be attributed to petitioner for the 1997-98 and 1998-99 school years, as if she had been employed full time by the Board for those years. The agreement provides that:

> if the Teachers' Pension and Annuity Fund does not accept and implement this agreement, all provision of this agreement shall be deemed null, void, and of no effect, and *** the Petition of Appeal, in its entirety, shall be deemed active ***. (Settlement Agreement and Stipulation of Settlement at paragraph 4, page 2)

The Commissioner recognizes that any settlement agreement effectuated by parties to a dispute shall, upon his approval, be deemed a final decision. *N.J.A.C.* 1:1-19.1(d).

Therefore, although he does not find objectionable the terms of the agreement which are within his jurisdiction, the Commissioner cannot sanction a settlement which is clearly contingent upon the satisfaction of conditions *by another agency*, namely the Department of Treasury, Division of Pensions and Benefits, and which further provides that if such conditions are not met, the agreement shall be deemed null and void, thereby reactivating the within matter.

Accordingly, the within settlement is rejected. The Commissioner directs that this matter be remanded to the OAL and held in abeyance, pending review by the Division of Pensions and Benefits of the parties' proposal to credit petitioner with additional pension contributions. If the parties obtain the necessary endorsement from the Division of Pensions and Benefits, the within agreement may be modified to so reflect that approval, and may be resubmitted to the Commissioner for review. If, however, the parties cannot obtain from the Division of Pensions and Benefits the cooperation they seek, and they are unable to agree on revised settlement terms, this matter shall proceed to a determination on petitioner's claims.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

September 21, 1999
Date of Mailing, September 21, 1999

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

308-99

MARY TYSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

September 23, 1999

OAL DKT. NO. EDU 11500-97
AGENCY DKT. NO. 409-11/97

MARY TYSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed.[1] The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, is unable to approve the withdrawal because it is predicated upon the Commissioner's approval of the proposed settlement in a tenure hearing matter pending against petitioner.[2] The proposed settlement in the tenure matter was rejected by the Commissioner on September 17, 1999 and remanded to the OAL. Consequently, the instant matter is also remanded to the OAL until such time as it is withdrawn upon the Commissioner's approval of a settlement in *In the Matter of the Tenure Hearing of Tyson, supra,* or for further proceedings, should an approved settlement not be reached in that matter.[3]

IT IS SO ORDERED.

September 23, 1999
Date of Mailing, September 23, 1999

ASSISTANT COMMISSIONER OF EDUCATION

[1] The Commissioner notes that although the within matter was apparently consolidated with the case entitled *In the Matter of the Tenure Hearing of Mary Tyson, State-operated School District of the City of Newark, Essex County,* OAL Dkt. No. 3738-98, Agency Dkt. No. 65-3/98, the record herein does not contain an Order by the Administrative Law Judge severing the matters.

[2] Upon the Commissioner's review of the terms of the proposed Settlement Agreement, Waiver and Release in the above-referenced Tyson tenure matter, it was noted that term 5 predicated the withdrawal of the instant matter upon the approval of the settlement in the tenure matter.

[3] This decision, as the Commissioner's interim determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

308-99 E

ELIGIO CASTRO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION ON MOTION
BOARD OF EDUCATION OF ATLANTIC CITY, ATLANTIC COUNTY,	:	
	:	
RESPONDENT.		

September 22, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING

EMERGENT RELIEF

OAL DKT. NO. EDU 8008-99

AGENCY REF. NO. 267-8/99

ELIGIO CASTRO,

Petitioner,

v.

BOARD OF EDUCATION OF ATLANTIC CITY,

Respondent.

Eligio Castro, petitioner, *pro se*

Michael Epps, Esq., for respondent

Record Closed: September 9, 1999 Decided: September 10, 1999

BEFORE **EDGAR R. HOLMES,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioner, a non-tenured teacher released in 1999, challenged the Atlantic City Board of Education's (Board) determination not to offer him a contract for the school year 1999/2000. He moved for emergent relief on the grounds that he required chemotherapy and the loss of his job meant the loss of his benefits. He alleged he could not afford the Cobra Plan. The Board denied it was responsible for petitioner's medical benefits.

The petitioner requested emergent relief pursuant to *N.J.A.R.* 1:1-2.6. The matter was transmitted to the Office of Administrative Law (OAL) to be heard as a contested case pursuant to the Administrative Procedures Act *N.J.S.A.* 52:14B-1 to -15, and the act creating the OAL *N.J.S.A.* 52:14F-1 to -13.

THE RELIEF REQUESTED

At the emergent hearing the Board was not prepared to file an Answer because the petitioner's motion took a shotgun approach requesting everything from medical relief to Orders sanctioning the Board for discrimination against students, to investigation of teachers and Board members.

At the hearing the petitioner was asked what was the primary basis of his motion. Petitioner replied that medical benefits were his primary interest. He alleged that he was entitled to re-employment and therefore benefits because he was not evaluated pursuant to Rule (*N.J.A.R.* 6:3-4.1).

Unfortunately, petitioner had no medical records to establish that he had cancer or was required to be treated with chemotherapy. It was also unclear from his remarks whether he had filed his request in a timely manner.

Because successful applications for emergent relief require at minimum a finding of irreparable harm and be based on the likelihood that the moving party will prevail, this application cannot succeed because the proofs are deficient in both regards. *N.J.A.R.* 1:1-12.6.

I hereby **DENY** the motion for emergent relief.

I **FURTHER ORDER** the parties to file affidavits reciting the history of this matter with briefs. The Board has ten days to file its Answer, Affidavit and Brief and the petitioner has five days from receipt of the Board's Answer , Affidavit and Brief to respond.

At that time determination shall be made on the merits of the matter, if possible, or a plenary hearing will be ordered.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

9/10/99
DATE

Edgar R Holmes
EDGAR R. HOLMES, ALJ

lmh

OAL DKT. NO. EDU 8008-99
AGENCY DKT. NO. 267-8/99

ELIGIO CASTRO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION ON MOTION
BOARD OF EDUCATION OF ATLANTIC CITY, ATLANTIC COUNTY,	:	
	:	
RESPONDENT.		

The record of this emergent matter, including the audiotape of the hearing conducted at the Office of Administrative Law (OAL), have been reviewed.

Upon such review, the Commissioner affirms the Order of the Administrative Law Judge (ALJ) denying emergent relief since he concurs that petitioner has not satisfied the requirements necessary for the granting of such extraordinary relief.

Accordingly, the within application for emergent relief is hereby denied. This matter shall move forward, consistent with the recommendation of the ALJ, to those proceedings which may be necessary to bring it to resolution.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

September 22, 1999
Date of Mailing, September 22, 1999

310-99

J.B., on behalf of minor children, C.B. AND E.B.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE HOPEWELL VALLEY REGIONAL SCHOOL DISTRICT, MERCER COUNTY.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parent sought order from the Commissioner requiring the Board to permit her children, C.B. and E.B., to continue to attend the Board's public schools free of charge even though her lease on a house in the District had expired and she was evicted, effective February 1, 1998, was homeless and living in a motel in February, and, in March, was allegedly forced to return to the house she owned in Montgomery Township. Petitioner requested an exemption to Board Policy No. 5100 – Enrollment Admission and Eligibility for Free Public Education, which required payment of tuition when domiciliary residence in the District is lost. Board sought payment of tuition for periods of ineligible attendance, the months of April, May and June 1998.

ALJ found that domicile has two elements, both of which are required in order to establish a legal entitlement: a physical residence *and* the intent to remain there. ALJ found that after petitioner left the Hopewell/Pennington area, she never signed a contract to lease, buy, etc., any residence in the District and, accordingly, her children never qualified to attend free of charge as future residents. Also, the fact that other districts may have a different policy concerning free tuition for students whose parents moved out of the district during the school year, does not make the Board's policy arbitrary, capricious or unreasonable. Commissioner may not substitute his judgment for the Board's. Thus, neither of petitioner's children had a right to attend the District's schools free of charge. ALJ ordered petitioner to reimburse the Board for the period of ineligible attendance in accordance with tuition rates calculated pursuant to the formula established by the New Jersey Department of Education for a total of $5,160.

Commissioner adopted findings and determination in initial decision as his own.

September 23, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4487-98

AGENCY DKT. NO. 126-5/98

J. B. ON BEHALF OF MINOR CHILDREN,

C.B. AND E.B.,

Petitioner,

v.

BOARD OF EDUCATION OF THE

HOPEWELL VALLEY REGIONAL

SCHOOL DISTRICT, MERCER

COUNTY,

Respondent.

Sharon Small Amos, Esq., for petitioner (Reed Smith Shaw & McClay, attorneys)

Carol R. Smeltzer, Esq., for respondent (Law Offices of Robert P. Martinez, attorney)

Record Closed: April 6, 1999 Decided: August 5, 1999*

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter commenced on May 4, 1998, when the J.B., mother of minor children C.B. and E.B., (hereinafter petitioner) filed a petition of appeal seeking an order from the

---

* Extensions of time for issuing the initial decision were requested and granted pursuant to N.J.S.A. 52:14B-10(c).

Commissioner of Education requiring the Board of Education of the Hopewell Valley Regional School District (hereinafter respondent) to permit C.B. and E.B. to continue to attend the public schools in respondent's district free of charge. An answer and counter-claim seeking an order requiring petitioner to pay tuition for periods of ineligible attendance were filed on behalf of respondent on May 14, 1998 and on May 27, 1998, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 to -13.

A prehearing conference was conducted on July 23, 1998, at which time the following were identified as the issues for determination at hearing:

1. Are C.B. and E.B. entitled to attend the schools in respondent's district free of charge pursuant to N.J.S.A. 18A:38-1, 18A:38-3 or otherwise?

2. If the answer to question number one is no, what is the amount of tuition payments owed by petitioner to respondent for the time of the students' ineligible attendance?

The hearing was scheduled for September 11, 1998 at the Trenton office of the Office of Administrative Law. On August 10, 1998 respondent filed a motion for summary decision together with supporting papers, including a certification of John Nemeth, Business Administrator and Board Secretary for respondent. The hearing date was adjourned at petitioner's request in order to permit additional time for her to prepare responding papers since at the time she was representing herself in this matter. In addition, both children had been enrolled in September 1998, in the Montgomery Township public schools, and accordingly, the issue in the within matter had become a question of what tuition payments, if any, were owed by petitioner to respondent. On November 12, 1998, petitioner filed responding papers to the motion for summary decision and her own cross-motion for an order granting her children a tuition-free education in respondent's district. Respondent filed a reply and a response to petitioner's cross-motion on November 17, 1998, and petitioner filed a reply on November 24, 1998. By letter order entered January 7, 1999, the undersigned granted respondent's motion in part and scheduled a hearing to

receive evidence on the limited issues articulated in the letter order. The January 7, 1999 letter order is attached hereto and made a part hereof as if set forth herein at length. Thereafter, petitioner sought interlocutory review of the January 7, 1999 letter order and on February 4, 1999, Leo Klagholz, then the Commissioner of Education, issued an order reversing the January 7, 1999 order and remanding the matter for a plenary hearing. Commissioner Klagholz's February 4, 1999 order is also attached hereto. On February 26, 1999, I issued another order indicating the issues which would be addressed with testimony and/or admissible documentary evidence on March 12, 1999:

1) What educational services, if any, did respondent provide to petitioner's older child between April 1 and June 30, 1982;

2) What period of time did petitioner and her children live in a motel or hotel and where was the motel or hotel located;

3) Did petitioner ever qualify during the time period here in issue as "homeless" under N.J.S.A. 18A:38-1(f) and N.J.A.C. 6:3-8.1 to 8.10; if so when and for how long; and

4) Does petitioner intend to return to Pennington/Hopewell and if so, does that intent establish her as a domiciliary of the district entitling her children to a free appropriate education at respondent's expense notwithstanding the fact that she currently resides in Montgomery.

Prior to the scheduled hearing date petitioner retained the services of counsel as indicated hereinabove and the hearing date was adjourned to April 6, 1999 in order to permit counsel time to become familiar with the case. The hearing was conducted on April 6, 1999, at the Trenton office of the Office of Administrative Law, whereupon the record closed.

FINDINGS OF FACT

Most of the facts relevant to a determination of this matter are not in dispute; they appear as uncontested facts from the verified petition of appeal, certifications submitted in support of the

motion for summary decision and testimony on the record on April 6, 1999. Accordingly, I **FIND** the following as uncontested facts.

Commencing in 1985, petitioner and her family resided at 28 M. Avenue, Belle Mead, New Jersey. Sometime after petitioner and her husband were divorced in 1993, petitioner left the home in Montgomery in order to rent it out, and she moved with her two sons to a rental property in Hopewell. The children attended elementary school in the Hopewell Valley Regional School District and during the 1997-98 school year the older boy attended the middle school in the district. In early 1998, the house petitioner was renting in Hopewell was sold by the owner. Petitioner's lease on that house had expired, and she was evicted, effective February 1, 1998. Petitioner searched for alternative housing in the Hopewell/Pennington area, but her efforts were unsuccessful. Although she did not wish to return to the house which she owned in Montgomery Township, when she was unsuccessful in finding housing in respondent's district, she notified her tenants in Montgomery that she required the use of the property herself and requested that they vacate the premises prior to the expiration of their lease in September 1998.

There are conflicting statements in the record concerning when exactly petitioner's tenants vacated the house at 28 M. Avenue. In her March 8, 1998 letter to the members of the Hopewell Valley Regional School Board (attached to the verified petition of appeal), petitioner wrote:

> The home in Belle Mead was our home since 1985. After the divorce in 1993, I left the home in Montgomery to rent it, in order to save it from foreclosure and this year, the sale of the home was to commence April 1, 1998, but the renters occupying the property moved out March 1, forcing my family and me to return to Montgomery, once again, or face foreclosure. The costs involved in two moves, costs of care for my children in a temporary setting in Hopewell, and yet a third move to come, have been prohibitive, and all this stress while maintaining a new position, and raising two children, has cost me in my own set of physical problems.
>
> Our mandatory force out of Hopewell/Pennington, the existing home in Belle Mead, the termination of a lease prematurely by my

> tenants have all contributed to an involuntary situation that was not mine to make. If it were my choosing, the home in Belle Mead Montgomery would have been sold while I remained in the home in Hopewell until I could sell it and buy a home in Pennington. Apart from the force out of the home in Hopewell and the desire to return to our neighborhood in Pennington, I now turn to the "best interests of the children" scenario and perhaps the most important issue of all. . . .

A letter from petitioner's tenants, Drs. Gheuens and Snoeks, dated February 15, 1998, which was marked into evidence as exhibit P-2 at the hearing, reads:

Dear Ms. B.:

> We have received your letter in which you inform us that you want to prematurely terminate the rental lease which ends on August 31, 1998.
>
> We can commit to vacate the house by March 31, 1998.
>
> We hope this will accommodate your needs so that we can solve this problem in mutual agreement.

A note (R-2 in evidence) which was given to C's classroom teacher at the middle school sometime before April 1998 states:

> Regarding the B. family (E. and C.)
> Our new numbers as of Monday March 2, 1998 will be
> Home: 908 904 ----
> Work: 609 987 ---- (Princeton)
> Cellular: will keep on in car on weekends for emergencies is:
> 609 558 ----
> Our new address based on a force move out of our Hopewell home will be:
>
> 28 M. Ave.
> Belle Mead,
> New Jersey
> 08502
>
> If I remain in this home, I want the children regardless of our years there, to remain at the Hopewell schools. This is for consistency which is important for

> their welfare at this time. If I relocate a distance and for a job, then there I have no choice but to take them out of the school system but I want them to remain constant in a very significant area while so much is going on around them that never ceases to be dynamic.

The parties stipulated at the commencement of the April 6, 1999 hearing that petitioner and her sons resided at the Stage Depot Motel, which is located in Pennington, within respondent's school district, from February 1, 1998 to March 2, 1998. Petitioner testified that they did not move into the home at 28 M. Avenue in Belle Mead until the very end of March 1998 or the beginning of April 1998. She testified that from the time she was forced by the manager of the Stage Depot Motel to remove her family and her possessions at the beginning of March, she did not remember exactly where she stayed during the month of March, perhaps with one friend or another and possibly even in her car for periods of time. Commencing April 1, 1998, however, and continuing to date, she and the boys resided at 28 M. Avenue, Belle Mead, New Jersey. In any event, the cross-petition filed by respondent seeks tuition only for the months of April, May and June 1998, so it really does not matter for purposes of the within action where petitioner resided during March 1998.

During March 1998, petitioner appeared before respondent's Board of Education and requested an exemption to Board Policy Number 5100-Enrollment Admission and Eligibility for Free Public Education. That policy provides in pertinent part:

. . .

> b. Eligibility of Former Residents
>
> Regularly enrolled students whose parents or legal guardians move out of the school district may be permitted to complete their schooling in the Hopewell Valley Regional Schools with payment of tuition, which payment shall commence upon the date domiciliary residence in the district is lost.
>
> Students who are required to relocate outside the district as a result of a call to active duty of a parent member of the National Guard of New Jersey or of a reserve unit of the United States Armed Forces

> in time of war or National Emergency shall be eligible to continue as a student in the district on a tuition free basis until the end of the current school year following the return of the military parent, although the district in such situation shall not be obligated for transportation costs.
>
> No former resident will be required to pay tuition for any period during which he/she pays school taxes on his/her unoccupied former residence.

Respondent declined petitioner's request for an exemption to the policy and formally advised petitioner of its determination by letter dated April 2, 1998. The within matter followed.

Petitioner's older child, who was not well during the last few months of school, was ultimately diagnosed with neurologic Lyme Disease. The parties stipulate that he was in attendance at school in respondent's district as follows:

15 days in April 1998

15 days in May 1998

2 days in June 1998.

This concludes the recitation of the uncontested facts.

At the hearing in the within matter, petitioner testified that commencing with her eviction from her house in Hopewell in February 1998, it was her intention to remain in the Hopewell/Pennington area. She testified that it was important to her to have her children remain in the school system for their emotional health and for consistency of learning, especially since their lives outside of school were in such a state of disruption, with the eviction, the move to the motel, the move to Montgomery, etc. She testified that the family maintains strong ties to Pennington/Hopewell: both her sons were in Pennington Cub Scouts and Boy Scout troops; they attended St. James Church on Sunday in Pennington and St. Alfonsus in Hopewell. Both boys played in the Hopewell Valley Baseball Association League. In an effort to find another rental property, petitioner looked in the local newspapers and consulted real estate agents; she consulted

friends and made every effort to find housing in Hopewell or Pennington, she testified. At the same time she was trying to sell her residence in Montgomery so that she would then be able to purchase a home in Pennington or Hopewell. She testified that in April when she moved in she put a for-sale-by-owner sign on the Montgomery house and advertised the house for sale in the local newspaper. Most of the family's belongings remained in boxes in the garage. Only the bare necessities were moved into the Belle Mead house, she testified, because they hoped to sell the house soon and move back to Pennington/Hopewell. Starting in June 1998, she listed the house for sale with a real estate broker. The listing shows an asking price of $429,000 for the five-bedroom house. Sometime after September 1998, after she had enrolled her children in the Montgomery Township schools, it ceased to be her intention to return the children to respondent's school district, in part because of the animosity she felt the within action was generating. She also testified that the boys were adjusting to the schools in Montgomery and were making new friends.

Based upon petitioner's testimony, I **FIND** that it was her intention, at least until September 1998, to return to Pennington/Hopewell as soon as she could find an affordable property to lease or purchase in the district.

EXPERT'S OPINION

Connie Mercer Myers, the Executive Director of Home Front, an organization which works with homeless families in Mercer County and which Ms. Mercer founded nine years ago, testified on petitioner's behalf as an expert in the area of homelessness. Ms. Mercer testified that although her organization does not use a formal legal definition of homelessness, in general, someone is considered to be homeless if they are without a fixed, regular and adequate night-time shelter. Ms. Mercer testified that in her opinion petitioner and her family were homeless for a period of time after they were evicted from their home in Hopewell in February 1998. It was also Ms. Mercer's opinion that petitioner's children should have continued attendance at school in respondent's district, the district of their last residence, during the time period when they were homeless. Ms. Mercer specifically testified that she was not offering any opinion about any time

period after petitioner had moved into her house in Belle Mead. She testified that if petitioner had said to her on April 15, 1998, "I'm homeless," "I would say no you're not." She repeated that if petitioner and her children were currently homeless at the times in question, her recommendation would have been for the children to remain in the district where they had been attending school. She acknowledged that her recommendations were not binding on anybody and that her organization has no legal authority. Finally, she offered that it was her understanding of the policies of the Lawrence Township Public Schools, the Washington Township Public Schools and the West Windsor Public Schools that if a student moved out of the district after February 1 of a school year, they were permitted to remain for the rest of the year.

APPLICABLE LAW AND DISCUSSION

N.J.S.A. 18A:38-1, the statute relevant to a determination of this matter, provides in pertinent part, as follows:

> Public schools shall be free to the following persons over five and under 20 years of age:
>
> a. Any person who is domiciled within the school district.
>
> . . .
>
> f. Any person whose parent or guardian moves from one school district to another school district as a result of being homeless and whose district of residence is determined pursuant to section 19 of P.L. 1979, c.207 (C. 18A:7B-12).

The concept of "domicile" was discussed at length in an Appellate Division opinion in Matter of Unanue, 255 N.J. Super. 362, 374-376 (App. Div. 1991):

> "In a strict legal sense, the domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving." . . . This identification of domicile with the concept of home continues to have vitality in New

> Jersey. . . . "Home is the place where a person dwells and which is the center of his domestic, social and civil life." . . . In that case[Citizens Bank & Trust Co. v. Glaser, 70 N.J. at 81], the court stated that "the overwhelming proportion of the indicia as to what the decedent regarded as her real, principal and permanent home . . . as well as the central fulcrum of her life must here be found to converage . . ." in that location found to be her domicile. . . . Thus, the concepts of home and domicile mean more than physical residence. They also embody the subject's objective and subjective relationship to that residence.
>
> A person may establish a domicile in one place and then acquire a second residence. This does not lead to multiple domiciles, for it "is everywhere conceded that a person can have only one true domicile, which is synonymous with the common understanding of the word 'home'". . . . If a person maintains multiple residences it may become necessary to determine which one is the true domicile. Various approaches to this problem have been used by New Jersey courts.
>
> Establishing a domicile involves an act of volition. "A person has the right to choose his own domicil, and his motive in doing so is immaterial." . . . In accordance with this principle it has been held that one does not relinquish his domicile by having another residence based on reasons of health, society, business or employment. . . . Additionally, it has been held that a change of domicile "may be made to avoid taxation . . . [or some other motive], so long as the necessary ingredients for establishment of the new domicil are present." . . . Even a change of domicile predicated on a desire to avoid a forced heirship statute has been upheld when the change was supported by other indicia of a new domicile. . . .
>
> It is clear, therefore, that a choice of domicile by a person, irrespective of his motive, will be honored by the court, provided there are sufficient objective indicia, by way of proofs, supporting the actual existence of that domicile.
>
> Thus, a person may not arbitrarily designate a given residence as his domicile. It is necessary that the requisite

> subjective intent be present since domicile is "very much a matter of the mind - of intention." "Where there are multiple residences . . . domicile is that place which the subject regards as his true and permanent home." (Emphasis added) [Citations omitted].

It is clear from the evidence presented in this matter that petitioner considered Hopewell to be her home. Although she owned a large, relatively expensive home in Montgomery, she did not wish to live there. A combination of circumstances in early 1998, however, forced petitioner out of the house she had been renting in Hopewell when her lease expired and the owner sold the property. She could find no affordable substitute rental property and her financial situation left her no option but to move back into the Montgomery house until such time as it was sold. Even after she moved back into the Montgomery residence in April 1998, she intended to return to the Pennington/Hopewell area. Acting upon her intention, however, was conditioned upon the sale of the Montgomery residence, a condition precedent which has yet to be accomplished. The unfortunate but absolute impediment to a conclusion that petitioner remained domiciled in Hopewell after April 1, 1998, is the total absence of any physical residence, abode, dwelling or real property interest at all. The lease on the house which petitioner had occupied in Hopewell had expired and petitioner was thereafter evicted. The Stage Depot refused to allow petitioner to stay there after the end of February 1998. Domicile has two elements, both of which are required in order to establish a legal entitlement: a physical residence and the intent to remain there. Intent is only relevant to the determination when there are multiple residences. Here there was always only one residence at a time. After April 1, 1998, petitioner intended to maintain her home in Hopewell. However, there was no residence in Hopewell (or Pennington) in which petitioner held any interest to which her intent could attach. Neither petitioner's attorney nor Commissioner Klagholz has cited any case where domicile was found to exist without some sort of a physical residence, abode or dwelling. Although not every residence is a domicile, every domicile, by definition, is a residence. Accordingly, I **CONCLUDE** that during the time period

here in issue, April, May and June 1998, petitioner's children were not domiciled within the district and therefore were not entitled to attend respondent's schools free of charge pursuant to N.J.S.A. 18A:38-1(a).

With respect to what rights petitioner's children might have to continue to attend the schools in respondent's district free of charge under statutory and regulatory provisions for the education of homeless children, N.J.A.C. 6:3-8.3 provides in pertinent part:

> (a) A child or youth shall be considered homeless for purposes of this program if he or she resides in any of the following:
>
> 1. A supervised publicly or privately operated shelter designed to provide temporary living accommodations, including:
>
> i. Welfare hotels:
>
> ii. Congregate shelters:
>
> iii. Transitional housing for families; and
>
> iv. Transitional housing for the mentally ill;
>
> 2. An institution that provides a temporary residence for individuals intended to be institutionalized; or
>
> 3. A public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings.
>
> (b) Additionally, a child or youth shall be considered homeless if he or she is:
>
> 1. Living with a parent in a domestic violence shelter;
>
> 2. A runaway living in a shelter;
>
> 3. A school-age mother residing in a home for adolescent mothers;
>
> 4. Sick or abandoned and residing in a hospital and would otherwise be released if he or she had a permanent residence:
>
> 5. Abandoned and therefore has no permanent residence;

6. The child of a homeless family which is out of necessity living with relatives or friends; or

7. The child of a migrant family which lacks adequate housing.

. . .

The definition section of the same regulatory provisions, N.J.A.C. 6:3-8.2, defines "homeless" child or youth to mean "one who lacks a fixed, regular, and adequate residence." I **CONCLUDE** that, under these definitions, petitioner's children qualified as homeless during the period of time that she and the children resided at the Stage Depot Motel. N.J.S.A. 18A:7B-12.1 specifies that "the district of residence" is responsible for the education of a homeless child. The district of residence for children whose parent temporarily moves from one school district to another as the result of being homeless is the district in which the parent last resided prior to becoming homeless. N.J.S.A. 18A:7B-12(c). Under these provisions respondent was responsible for the education, tuition free, of petitioner's children as long as they remained "homeless." In fact, the Stage Depot Motel is located physically within the confines of respondent's district. Even if that had not been the case, however, so long as petitioner's children were deemed "homeless," respondent's district would have been responsible for their education. Once petitioner and her children moved back into the home which petitioner owns at 28 M. Avenue in Belle Mead, New Jersey, however, there is no way the family could be considered to remain "homeless." Try as she might, petitioner's attorney could not get the expert witness to say that petitioner's children should continue to attend the schools in respondent's district free of charge after April 1, 1998, because they were "homeless." After April 1, 1998, petitioner and her children were living in their own five-bedroom house which was listed for sale at $429,000; it was petitioner's desire to sell the house quickly so that she could use the proceeds to purchase a residence in respondent's district. Despite petitioner's efforts, however, that desire remained unfulfilled; she and her children currently remain in the house, unsold, and petitioner even acknowledges that at some point after September 1998 her desire to move back to respondent's district ceased. It would be clearly absurd to condition respondent's obligation to provide a tuition-free education solely upon any

petitioner's desire or intention to move back into the district.* During the time the children were "homeless," respondent was required to consider what was in the "best interest of the child" (N.J.A.C. 6:3-8.6) and to provide accordingly. Even after petitioner and the children relocated to Montgomery in April 1998 and were no longer "homeless," it probably was, as petitioner has repeatedly argued, in the best interest of the children to finish the school year in the familiar surroundings of respondent's district; that proposition, standing alone, however, does not place a legal obligation upon respondent to pay for that education.

---

* Respondent's written policy concerning those who plan to move into the district provides:

> a. Eligibility of Future Residents
>
> Students whose parents or legal guardians have signed a contract to buy, build, rent, or lease a residence in the school district, with the intent to occupy the same as their domicile, may be enrolled during the period of 60 calendar days prior to moving into the district.
>
> If the written proof of intent to establish a domicile in the district indicates that the residence will not be occupied within the 60 day grace period, the parents may enroll the students by paying tuition in advance for the length of time between the date of enrollment and the start of the anticipated 60 calendar day grace period.
>
> If the family's move is delayed beyond the 60 calendar day grace period, tuition shall be charged for the 61st day to the date on which domiciliary residence is established.
>
> However, no future resident will be required to pay tuition for any attendance period during which full school taxes on his/her unoccupied future residence are paid by the future resident.
>
> Acceptable written proof, such as a copy of the building contract or lease, must be provided at the time of registration for school enrollment.

After petitioner left the Hopewell/Pennington area she never signed a contract to lease, buy, etc., any residence in the district and accordingly, her children never qualified to attend free of charge as future residents.

I have already expressed my opinion concerning whether the district's policy on tuition could be considered arbitrary, capricious or unreasonable in my January 7, 1999 letter order attached hereto and made a part hereof, and I hereby reiterate that same opinion. The fact that some other school districts may have a different policy concerning free tuition for students whose parents moved out of the district during the school year, if that is in fact the case as Ms. Mercer testified, does not make respondent's policy arbitrary, capricious or unreasonable. The Commissioner may not substitute his judgment for respondent's. For all of the foregoing reasons, I **CONCLUDE** that after April 1, 1998, neither of petitioner's children had a right to attend the schools in the district free of charge, and since they continued to be enrolled in respondent's district and to attend class (even though the older child attended only two days during June because of his illness) it is hereby **ORDERED** that petitioner reimburse respondent in accordance with tuition rates calculated pursuant to the formula as established by the New Jersey Department of Education and as set forth in the certification of John Nemeth, Business Administrator and Board Secretary for the district, i.e., $850 per month for E.B. and $870 per month for C.B. for a total amount of $5,160.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P. O. Box 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 5, 1999
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

8/9/99
DATE

Debbie Antonaitis/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 10 1999
DATE

Barbara A Hannah
OFFICE OF ADMINISTRATIVE LAW

cc

DOCUMENTS IN EVIDENCE

For petitioner:

P-1 Letter from David L. Nathan, M.D. to Barbara Marroccoli, dated July 29, 1998

P-2 Letter from Drs. Gheuens and Snoeks to petitioner, dated February 15, 1998

For respondent:

R-1 Letter from petitioner to Joe (manager of Stage Depot Motel), dated February 7, 1998

R-2 Typewritten note, unsigned, given to classroom teacher of C.B.

R-3 Computer print-out of real estate broker listing (2 pages)

For the judge:

C-1 Typewritten note from Joe Perry, Manager Stage Depot Motel, to petitioner, dated February 7, 1998

WITNESSES

For petitioner:

J. L. B.

Connie Mercer Myers

For respondent:

Sandra B. Cane

Toni B. Simzak

OAL DKT. NO. EDU 4487-98
AGENCY DKT. NO. 126-5/98

J.B., on behalf of minor children, C.B. AND E.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HOPEWELL VALLEY REGIONAL SCHOOL DISTRICT, MERCER COUNTY.	:	DECISION

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner submitted exceptions[1] which were duly considered by the Commissioner in rendering the within decision.[2]

Upon careful and independent review of the record in this matter, the Commissioner concurs with the ALJ's conclusion that for April, May and June of 1998, petitioner and her children were not domiciled within respondent's District and, therefore, her children were not entitled to a free education in the District for that time period.[3]

[1] Although petitioner was represented by an attorney at the OAL, *N.J.A.C.* 1:1-5.1, said counsel withdrew her appearance on behalf of petitioner as of August 23, 1999. Accordingly, petitioner submitted exception arguments on her own behalf.

[2] To the extent petitioner raises allegations in her exceptions concerning respondent's failure to develop an Individualized Education Program (IEP) for her son during the 1997-98 school year, the Commissioner notes that this issue was not included in the Petition of Appeal, and does not appear to have been presented at the hearing. *N.J.A.C.* 1:1-18.4(c). Further, the Commissioner is without jurisdiction to hear and determine such a claim, and, therefore, he does not address this issue in his decision.

[3] In so affirming, the Commissioner adds only that, with respect to the ALJ's observation that "every domicile, by definition, is a residence" (Initial Decision at p. 11), such a residence, must be actual and accompanied by an intention to remain, but "[i]t may be a nursing home, a hotel [or] a boarding house; a home in a particular building is not necessary. ***" (*O'Hara v. Glaser*, 60 *N.J.* 239, 248)

The Commissioner further agrees that the record supports the conclusion that petitioner was homeless as of February 1, 1998; "[o]nce petitioner and her children moved back into the home which petitioner owns at 28 M. Avenue in Belle Mead, New Jersey [as of April 1, 1998], however, there is no way the family could be considered to remain 'homeless.'" (Initial Decision at p. 13) Although petitioner argues in her exceptions that the Board failed to act in accordance with *N.J.A.C.* 6:3-8.1 *et seq.* to ensure that her children had access to a free public education for the two-month period of their homelessness,[4] the Board specifically disputes that it had timely notice of her homelessness. As Toni Simzak, Vice Principal of the Timberlane Middle School, affirmed:

> I initially learned that Petitioner and her children were residing at the State Depot Motel from Ms. Sonnie Kane, a teacher at the Timberlane Middle School. Ms. Kane advised me that she had learned that Petitioner was residing at the motel from student C.B., Petitioner's oldest child, not from Petitioner herself.
>
> At no point during the 1997-1998 school year did Petitioner advise me that she considered herself to be homeless, nor did it appear to me at any point in the 1997-1998 school year that Petitioner and her children were homeless. (Certification of Toni Simzak, January 25, 1999 at pp. 1, 2)

Additionally, the Business Administrator/Board Secretary averred:

> Petitioner notified the Respondent that she and her two children would be moving back to Montgomery Township as of April 1, 1998. During the 1997-98 school year, one of Petitioner's children was enrolled in second grade and her other child was enrolled in sixth grade. (Certification of John Nemeth at p. 3)

[4] Although petitioner testified that she resided at the Stage Depot Motel in Pennington from February 1, 1998 until March 2, 1998, and indicated that "she did not remember exactly where she stayed during the month of March***" (Initial Decision at p. 6), in her exceptions, petitioner affirms that she "was able to remain in the hotel searching for rentals until the second week of March ***" and she "stayed with friends who did not want to be identified during the remaining week in March.***" (Petitioner's Exceptions at p. 9) In any event, as the ALJ indicated, determining where petitioner lived in March of 1998 is not necessary to the resolution of this matter, since the Board does not seek tuition for this period of time.

This issue was not, according to the Prehearing Order, before the ALJ; therefore, the record is insufficient to make findings or conclusions in this regard. However, notwithstanding petitioner's contention, the Commissioner notes that petitioner's children were not denied admittance to the very district she desired them to attend during their period of homelessness, and the Board does not seek reimbursement of tuition for this period. Moreover, although petitioner protests the Board's failure, in its letter of April 2, 1998, to advise her of "mediation procedures or the possibility of working with a homeless liaison," (Petitioner's Exceptions at p. 7), she does not dispute that, as of April 1, 1998, she *was no longer homeless.*[5]

Accordingly, the initial decision is adopted for the reasons expressed therein. The Petition of Appeal is hereby dismissed and petitioner is directed to reimburse the Board for $5,160.[6]

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

[5] Petitioner avers, "There was never any dispute that I was not homeless while living in Montgomery under a roof of my own." (Petitioner's Exceptions at p. 12)

[6] It is noted that petitioner's children have been enrolled in the Montgomery Township schools since September of 1998. The assessment of tuition covers the children's admission to respondent's District April, May and June of 1998.

[7] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

September 23, 1999
Date of Mailing, September 24, 1999

310-99

EDU #4487-98
C # 310-99
SB # 5-00

J.B., on behalf of minor children, C.B. and E.B.,	:	
PETITIONER-APPELLANT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE HOPEWELL VALLEY REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, September 23, 1999

For the Petitioner-Appellant, J.B., pro se

For the Respondent-Respondent, Law Offices of Robert P. Martinez
(Purificacion V. Flores, Esq., of Counsel)

On September 23, 1999, the Commissioner of Education determined that the petitioner's children had not been entitled to a free public education in the Hopewell Valley Regional School District. He therefore directed the petitioner to reimburse the Hopewell Valley Regional Board for tuition in the amount of $5,160 for the period of her children's ineligible attendance.

The petitioner filed the instant appeal to the State Board of Education.

On February 7, 2001, the parties submitted a proposed settlement agreement in which the Regional Board agreed to accept $2,500 from the petitioner in full satisfaction

3/7/01

of the tuition assessed against her by the Commissioner and the petitioner agreed to pay $25 per month in 100 monthly installments.

We have reviewed the proposed settlement and find it to be in accord with the principles expressed in In re Cardonick, decided by the State Board of Education, April 6, 1983. We therefore approve the settlement in this matter.

March 7, 2001

Date of mailing MAR 09 2001

311-99 R

IN THE MATTER OF THE TENURE	:	
HEARING OF CYNTHIA PULLIN,	:	
SCHOOL DISTRICT OF THE CITY	:	COMMISSIONER OF EDUCATION
OF CAMDEN, CAMDEN COUNTY.	:	DECISION ON REMAND
	:	

September 27, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2552-99

(REMAND EDU 6660-98)

AGENCY DKT. NO. 208-6/98

IN THE MATTER OF THE TENURE HEARING OF CYNTHIA PULLEN, BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,

---

Karen A. Murray, Esq., for the Camden Board of Education (Murray, Murray & Corrigan, attorneys)

Keith Waldman, Esq., for Cynthia Pullen (Selikoff and Cohen, attorneys)

Record Closed: August 11, 1999 Decided: August 11, 1999

BEFORE **BEATRICE S. TYLUTKI**, ALJ:

This matter was initially transmitted to the Office of Administrative Law (OAL) on August 10, 1998, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties agreed to a settlement and prepared a written stipulation of settlement. I incorporated this settlement into an initial decision dated March 3, 1999.

The Commissioner of Education remanded the matter to the OAL by final decision dated April 19, 1999.

I had a telephone conference call with the parties on May 5, 1999. The parties resumed settlement discussions and agreed to an addendum to the original settlement agreement. This signed addendum and the original settlement agreement are attached and incorporated herein.

I have reviewed the record and the settlement terms and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1, and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 16, 1999
DATE

BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

8/13/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 16 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

None

For the Respondent:

None

WITNESSES:

For the Petitioner:

None

For the Respondent:

None

MURRAY, MURRAY & CORRIGAN
25 Sycamore Avenue
Little Silver, New Jersey 07739
Attorneys for the Petitioner
Camden Board of Education
(732) 747-2300

1999 AUG 11 A 9:55

IN THE MATTER OF THE TENURE HEARING OF CYNTHIA PULLIN, BOARD OF EDUCATION OF THE CITY OF CAMDEN CAMDEN COUNTY.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY DOCKET NO. 208-6/98 **ADDENDUM TO SETTLEMENT AGREEMENT**

1. (This section replaces Section 1 of the original settlement.) PULLIN tenders her resignation effective March 1, 1999. A copy of the letter of resignation is attached as Exhibit A to this Stipulation. The BOARD accepts PULLIN'S resignation effective on the resignation date. The BOARD will pay PULLIN h salary and all customary benefits and emoluments of employment from November 19, 1998 until the resignation date.

2. (This section replaces the Section 2 of the original settlement). In consideration of this resignation the BOARD will withdraw the tenure charges that it has filed against PULLIN. This settlement best serves the BOARD's interest while being consonant with the public interest for the following reasons: (a) Such settlement causes the least disruption to the Camden School District in that employees who were scheduled to testify as witnesses, such as the Building Principal, various teachers, and administrators, will not have to be away from their normal responsibilities within the district providing teaching and/or educational support;

(b) Such settlement avoids a lengthy, expensive hearing at the Office of Administrative Law and possible appeals taken thereafter while accomplishing the goal of terminating the employee's status within the district; (c) If tenure charges were to proceed, the crux of the issue to be presented at such hearing would be the viability of Ms. Pullin's drug rehabilitation. In order to prevail, the BOARD would be required to hire an expert[s] in this area (thus incurring further expense), make a determination as to whether such rehabilitation was successful on a long term basis, and then assume the risk at the hearing that the BOARD'S expert would be more credible than Respondent's expert. Since Respondent is seeking to put this aspect of her life behind her and move forward in a positive fashion, a lengthy hearing would only serve to delay and make more difficult her continuing rehabilitation.

5. (This section replaces section 5 of the original agreement.) The Parties further agree that this Agreement is contingent upon approval by the Office of Administrative Law and the Commissioner of Education. Nothing in this Agreement is intended to discourage or prevent the Commissioner of Education from executing his exclusive authority to decide tenure matters and his corresponding duty to refer such determination to the State Board of Examiners for possible revocation of respondent's certification. Nor is this Agreement intended to thwart the State Board of Examiners' responsibility to make a determination as to revocation of a teaching certification. Finally, this Agreement is not intended to avoid the obligation of the Camden

Board of Education to cooperate in any proceedings or action which may be initiated by the Commissioner of Education.

DATED: 8/6/99

KAREN A. MURRAY, ESQ.

DATED: 7/29/99

CYNTHIA PULLIN

Murray, Murray & Corrigan
25 Sycamore Avenue
Little Silver, New Jersey 07739
Attorneys for the Petitioner
Camden Board of Education
(732) 747-2300

IN THE MATTER OF THE TENURE HEARING OF CYNTHIA PULLIN, BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDUOTH 06660-98S AGENCY REF. NO. 208-6/98 **STIPULATION OF SETTLEMENT**

THIS STIPULATION OF SETTLEMENT is entered into by and between the Petitioner, Board of Education of the City of Camden (hereinafter "BOARD") and Respondent, CYNTHIA PULLIN (hereinafter referred as "PULLIN") (the BOARD and PULLIN are hereinafter referred to jointly as the "Parties" and each may be referred to severally as a "Party");

WHEREAS, PULLIN has been continuously employed by the Board as a teaching staff member since September 1, 1985;

WHEREAS, on or about June 22, 1998, the BOARD certified to the Commissioner of Education charges against PULLIN which it felt under the circumstances, if true, were sufficient to warrant her dismissal;

WHEREAS, on or about July 30, 1998, PULLIN filed an Answer to the charges denying the allegations as stated;

WHEREAS, this matter was listed for hearing before the Honorable Jeff Masin, ALJ, on February 23, 1999 and March 2, 1999 and the Parties having agreed to a means of resolving this dispute in a manner consonant with the public interest; and

WHEREAS PULLIN and the BOARD have entered into this stipulation with ıll understanding of their rights, recognizing that this stipulation and their agreement is subject to the review and approval of the Commissioner of Education, and with PULLIN's further understanding that pursuant to N.J.A.C. 6:11-3.6(a)1 any determination made by the Commissioner resulting in a loss of tenure or dismissal may be referred to the State Board of Examiners for determination of possible revocation or suspension of teaching certificate;

NOW, THEREFORE, the matter in difference having been amicably adjusted by and between the parties,

IT IS HEREBY STIPULATED AND AGREED AS FOLLOWS:

1. PULLIN tenders her resignation effective the date that this agreement is fully executed. A copy of the letter of resignation is attached as Exhibit A to this stipulation. The BOARD accepts PULLIN's resignation effective on the resignation date and hereby agrees that all of its official records shall reflect that the reason for PULLIN's leaving the BOARD's employ was that she resigned "in good standing." The BOARD will pay PULLIN her salary and all customary benefits and emoluments of employment from November 19, 1998 until the resignation date. The BOARD hereby withdraws with prejudice the tenure charges that it has filed against PULLIN.

2. The BOARD will immediately provide PULLIN with a neutral letter of reference setting forth her dates of employment, the job titles held by her and noting that PULLIN resigned from the Camden schools in good standing. The letter will be in the form attached hereto as Exhibit B. The Board agrees that all inquiries it receives regarding PULLIN will be

directed to the Department of Human Resources and parties with such inquiries will be informed that PULLIN resigned as an employee in good standing.

3. The BOARD will provide PULLIN with all salary, benefits and emoluments to which she would otherwise be entitled under the collectively negotiated agreement, federal law and/or state law from November 19, 1998 to the resignation date.

4. The Parties enter into this agreement with the mutual understanding that a formal record will be made of PULLIN's acceptance of the terms of this settlement at the Office of Administrative Law and that, as part of that record, she will have an opportunity to present proofs as to: (a) the knowing and voluntary waiver of her tenure rights; (b) her capacity to make such a waiver and (c) the efforts she has made to rehabilitate herself.

5. The Order adopting this Stipulation: (a) may, in the Administrative Law Judge's discretion, make findings with respect to those proofs and (b) will provide that the BOARD will not refer this matter to the State Board of Examiners for revocation of PULLIN's teaching certificate. The Parties further agree that this agreement is contingent upon approval by the Office of Administrative Law and the Commissioner of Education. Neither party will take any legal action whatsoever that is inconsistent with this Agreement before the Office of Administrative Law or any other forum. Provided, however, that nothing in this agreement is intended to restrict the State Board of Examiners from taking any action it deems appropriate.

6. In consideration of the savings of time, effort and legal expense that this settlement will create, the BOARD agrees to immediately take all steps necessary to convert PULLIN's suspension from June 19, 1998 to November 19, 1998 to an approved leave of

absence without pay. The Board will not be responsible for making any contribution to the Teachers' Pension and Annuity Fund ("TPAF") for this leave period, but Pullin is free to do so should TPAF permit her to.

7. PULLIN agrees that she will not hereafter apply to the BOARD for employment.

8. The BOARD will allow PULLIN to remove personal items from the Cream Elementary School and will not interfere with or impede her from doing so.

9. The Parties agree that they and their officers, agents, and administrators will be bound by a covenant of good faith and fair dealing with respect to performance under this Stipulation.

10. This Stipulation constitutes a full release of any and all claims of either Party against the other. Specifically, PULLIN forever releases the BOARD from any and all complaints, charges, liabilities, demands, debts, accounts, obligations, promises, suits, actions, causes of action, demands in law or equity, including claims for damages (including but not limited to back pay and front pay), equitable relief, and attorney fees or costs, which PULLIN now has, or claims to have, or which PULLIN at any time hereafter may have, or claim to have, whether presently known or unknown, arising at any time, up to and including the date on which she signs the document. PULLIN specifically releases the BOARD from any claims she has or may have had under New Jersey Law Against Discrimination or the federal Americans with Disabilities Act. Nothing in this paragraph is intended to operate as a release, waiver, or forfeiture of PULLIN's rights, and the BOARD's

obligations under: (a) any state worker's compensation act or statute, or (b) any State of New Jersey retirement, pension, savings, or 401(k) plan in which PULLIN is a participant;

11. The PARTIES forever releases each other from any and all complaints, charges, liabilities, demands, debts, accounts, obligations, promises, suits, actions, causes of action, demands in law or equity, including, but not limited to, claims for damages, equitable relief, attorney fees or costs, which the BOARD now has, or claims to have, or which the BOARD at any time may have had or claimed to have had, or which the BOARD at any time hereafter may have, or claim to have, whether presently known or unknown, arising at any time, up to and including the date on which this document is signed on its behalf.

13. The Parties agree to waive exceptions.

14. The Parties agree that this document constitutes their full understanding. It is agreed that there are no other understandings or agreements (either written or oral) which would have any impact upon the present action.

15. By signing this agreement, the Parties certify that they have had the opportunity to discuss this Stipulation with counsel. They are fully satisfied with the services of their counsel with respect to both this Stipulation and all other aspects of this case and they enter into this Stipulation knowingly, willingly and without any coercion or improper inducements.

16. The Parties further agree that this agreement is contingent upon approval by the Office of Administrative Law and the Commissioner. Neither Party will take any legal action whatsoever that is inconsistent with this agreement before the Office of Administrative Law or any other forum.

17. By signing this agreement, each signatory represents that she or he is a ' ty or has been duly authorized by a Party to sign on that Party's behalf.

18. The Parties agree that this Stipulation may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

FOR THE CITY OF CAMDEN BOARD OF EDUCATION

DATED: 3/1/99

By: Karen Murray
KAREN A. MURRAY, ESQ.

DATED: 2/17/99

By: Cynthia Y. Pullin
CYNTHIA PULLIN

OAL DKT. NOS. EDU 2552-99 AND EDU 6660-98 (ON REMAND)
AGENCY DKT. NO. 208-6/98

IN THE MATTER OF THE TENURE	:	
HEARING OF CYNTHIA PULLIN,	:	
SCHOOL DISTRICT OF THE CITY	:	COMMISSIONER OF EDUCATION
OF CAMDEN, CAMDEN COUNTY.	:	DECISION ON REMAND
	:	

The record, Stipulation of Settlement, Addendum to Settlement Agreement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.[1]

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement.[2] A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

COMMISSIONER OF EDUCATION

[1] By letter dated September 15, 1999, the Board attorney confirmed the Board's approval of settlement parameters, including the issues addressed in the Addendum developed in response to remand.

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

September 27, 1999
Date of Mailing, September 28, 1999

312-99

M.J.K.D. AND A.W.D., on behalf of minor child, A.K.D.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parents challenged the Board's decision, in accordance with its revised policy, to deny subscription busing to their daughter, A.K.D., who attended a nonpublic school. Petitioners sought subscription busing and a safe and reasonable bus stop. Board's revised policy limited subscription busing to its public school students.

ALJ found that the Board amended its subscription busing policy by resolution and that this action was within the sound discretion of the Board. *N.J.S.A.* 18A:39-1.3 gives boards of education the *option* of offering courtesy busing to nonpublic pupils. Thus, the Board opted to drop the subscription busing for nonpublic school pupils. Petitioners were not treated differently from other parents of nonpublic pupils; therefore, the Board did not misapply the statute. ALJ found no violation of Article I, Section 1 of the New Jersey Constitution, of the First Amendment of the U.S. Constitution, of the New Jersey Law Against Discrimination, of the Equal Protection Clause, of the school laws or any failure to provide safe and adequate transportation. ALJ granted Board's motion for summary judgment. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

September 29, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 661-99

AGENCY DKT. NO. 6-1/99

M.J.K.D. AND A.W.D. ON BEHALF OF MINOR CHILD, A.K.D.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY,

Respondent.

M.J.K.D. and A.W.D., petitioners, *pro se*

David B. Rubin, Esq., for respondent

Record Closed: June 28, 1999 Decided: August 11, 1999

BEFORE **BRUCE R. CAMPBELL,** ALJ:

In this matter, the petitioners claim the respondent Board should provide subscription busing to all pupils and should be required to provide their daughter with a safe and reasonable bus stop. The petitioners allege that the Board's failure to do so constitutes violation of Article I, ¶1 of the New Jersey Constitution, the First Amendment of the United States Constitution proscription against interference with freedom of religion, the New Jersey Law Against

Discrimination, the equal protection clauses of the federal and State constitutions, and New Jersey school law. A sixth count alleges failure to provide safe and adequate transportation.

The Board generally denies the allegations, says it has acted lawfully herein and that the petitioners are not now and never have been entitled to the transportation arrangements sought.

The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law pursuant to *N.J.S.A.* 52:14F-1 through -13. After notice, a prehearing conference was held by telephone. Among other things, it was determined that the matter would proceed on cross-motions for summary judgment.

THE ARGUMENTS

Petitioners

The petitioners assert the Board's recently amended policy limiting subscription busing to public school students, while not offering the same to students attending not for profit non-public schools violates *N.J.S.A.* 18A:39-1.1, constitutional equal protection clauses and due process.

The petitioners believe that the Board's position, demonstrated in its October 9, 1998 policy on subscription busing, is that the statute provides it with the discretion to offer subscription busing to public school pupils and not to similarly situated pupils attending not for profit non-public schools.

The petitioners concede there is no single reported determination on the issue. However, principles of constitutional law and related case law demonstrate that *N.J.S.A.* 18A:39-1.1 and -1.3 require the Board to provide subscription busing to all pupils if it is going to provide subscription busing to any. The Board may not exclude non-public school pupils. Its interpretation and application of the statute violates the State Constitution, the State and federal constitutional right to equal protection and the right to due process of law.

Article VIII, §4, ¶3 of the New Jersey Constitution of 1947 provides

> The Legislature may, within reasonable limitations as to distance to be prescribed, provide for the transportation of children within the ages of five to eighteen years inclusive to and from any school.

This constitutional provisions continued statutes already enacted. The New Jersey Supreme Court and the United States Supreme Court had already determined that the policy of transportation of pupils, regardless of the public or non-public nature of their schools, was not prohibited by constitutional principles of anti-establishment and freedom of religion.

Despite the fact that the statute authorizes public funds to be used to transport pupils attending religious-based schools of choice, in the landmark case of *Everson v. Board of Education of Ewing Tp.*, 133 *N.J.L.* 350 (E.&A. 1945), aff'd 330 *U.S.* 1, 18 (1947), the U.S. Supreme Court observed that the precursor to New Jersey's transportation statute, "as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." Accord, *Board of Ed. of Central Regional High School Dist. of Ocean County v. State Bd. of Ed.*, 27 *N.J.* 76, 78-79 (1958).

The legislation was intended to extend to the private school pupil a right to transportation on the same basis upon which that transportation would be available if he attended a public school in his district, that is, remoteness from the school. In that way, the public and parochial pupil within a district are dealt with evenly. *West Morris Reg. Bd. of Ed. v. Sills*, 58 *N.J.* 464, 479 (1971).

Similar pronouncements have come from all levels of the system in the intervening years. The petitioners point out that *N.J.S.A.* 18A:39-1.1 clearly authorizes districts where transportation is not mandated nevertheless to provide transportation and the statute makes no distinction between public and non-public school pupils.

While the present issue is not that A.K.D. lives remote from her school, the mandatory transportation statute and cases examining the Legislature's policy requiring equal treatment among students in the same district demonstrates that the Board's actions implementing a subscription busing policy under *N.J.S.A.* 18A:39-1.3 is impermissible because it fails to acknowledge the State constitutional and legislative policy of dealing with students in the same district evenly.

The Legislature has enacted *N.J.S.A.* 18A:39-1.3 authorizing district boards of education to charge parents for the cost of busing pupils who live less than two miles from elementary schools. The statute does not distinguish between public and non-public schools. It merely states that if a board of education must provide transportation pursuant to *N.J.S.A.* 18A:39-1, then it may provide transportation to elementary pupils who live less than two miles from school. The statute also provides that a board may enter into a contract for the transportation of pupils who live less than the prescribed distances and who attend a not for profit school within the maximum distance requirement in *N.J.S.A.* 18A:39-1. If the board elects to do this, it may require that if the parent, guardian or other person having legal custody of the child elects to have the pupil transported, then the parent, guardian or other person having legal custody of the child shall pay all or part of the costs of that transportation.

In *West Morris Regional,* above, the plaintiffs sought a declaration that *N.J.S.A.* 18A:39-1 was unconstitutional because it provided free transportation of children to private schools. A central attack, accepted by the trial court and rejected by the New Jersey Supreme Court, was that the statute discriminated arbitrarily among pupils attending private schools, in violation of the equal protection clause of the Fourteenth Amendment because not all private school pupils were treated equally. In a thorough analysis, the *West Morris* Court recognized that *N.J.S.A.* 18A:39-1.1 allows that "a school district may, but need not, provide transportation to pupils who do not live 'remote' from a school house, but the cost is not included in calculating the amount of State aid for transportation of pupils." *Id.* at 475. This statute, with minor modifications, is still effective and must be considered in conjunction with *N.J.S.A.* 18A:39-1.3 and 39-1. *N.J.S.A.* 18A:39-1.3 was not adopted until 1995, more than twenty-five years after *West Morris Regional* was decided.

The important difference between the two is that the Legislature in the latter statute has given authorization for the local school board to charge the parents of pupils who do live under two miles with all or part of the transportation cost. *N.J.S.A.* 18A:39-1.1 did not authorize districts to seek payment from parents for "courtesy busing" and made it quite clear that there would be no State reimbursement for costs associated with transportation pursuant to the statute. Nonetheless, *N.J.S.A.* 18A:39-1.1 does not enable a district to distinguish between public and non-public school pupils and is in accordance with the long held policy the Legislature has employed regarding the issue of school transportation for pupils, the State Constitution and the cases interpreting the statutes.

Further, in *West Morris Regional*, above, the Court wrote, "Here the Legislature chose to extend to the private school student a right to transportation on the same basis upon which transportation would have been available if he attended public school in his district, *i.e.*, remoteness from the school, and in that way to deal evenly with him and the public school student within that district. We see nothing irrational or invidious in this legislative concept and the legislative choice is not made intolerable merely because another choice might also be reasonable." *Id.* at 479.

The Piscataway Board's actions in this matter, in enacting a policy of subscription busing that denies the non-public school pupil the same right to transportation within the district as her public school peers is irrational and invidious.

It has been noted that A.K.D. attends a Catholic school and the petitioners, in their choice of that school, are asserting their fundamental right to the free exercise of religion. As such, the statute as applied and interpreted by the Board impinges on the petitioners' fundamental rights and must be examined using strict judicial scrutiny. *See*, *San Antonio School District v. Rodriguez*, 411 *U.S.* 1, 17 (1973) and *Sanchez v. Dept. of Human Services*, 314 *N.J. Super.* 11, 18 (App. Div. 1998). Where a fundamental right is involved, the statute is subject to strict scrutiny. *Barone v. Dept. of Human Services*, 107 *N.J.* 355, 364-65 (1987). Under strict

scrutiny, the statute must be found to further a compelling State interest and there must be no less restrictive means of accomplishing that objective. *Id.* at 365.

New Jersey courts have viewed State constitutional challenges in a different manner, yet one that still yields a finding that the Board's application and interpretation of the subscription busing statute is unconstitutional. New Jersey courts favor a balancing test. *Greenberg v. Kimmelman*, 99 *N.J.* 552, 567 (1985). The factors to be considered include "the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." *Id.* at 567.

The Board's interpretation and application of the statute impinges on the petitioners' right to free exercise of religion. However, there is a permissible interpretation of *N.J.S.A.* 18A:39-1.3 that does not impinge on any fundamental rights and that interpretation must be used.

Under New Jersey law, a challenged statute will be construed to avoid constitutional defects if the statute is "reasonably susceptible" of such construction. *New Jersey State Bd. of Higher Educ. v. Board of Directors of Shelton College*, 90 *N.J.* 470, 478 (1982). Even though a statute may be open to a construction that would render it unconstitutional or permit its unconstitutional application, it is the duty of this tribunal to construe the statute so as to render it constitutional if it is reasonably susceptible of such interpretation. *State v. Profaci*, 56 *N.J.* 346, 350 (1970).

The Board had a policy that provided subscription busing to all pupils, including those who attend non-public not for profit schools. The petitioners took advantage of this policy and relied upon the availability of such busing when they enrolled A.K.D. in her present school. The Board's current policy was adopted specifically to remove the provisions permitting non-public pupils to avail themselves of the subscription busing program. The Board's actions, misinterpreting *N.J.S.A.* 18A:39-1.3 and avoiding *N.J.S.A.* 18A:39-1.1, violate not only the statute, but the petitioners' fundamental rights.

Respondent

The Board urges that the narrow issue presented is whether subscription busing may be offered exclusively to public school pupils without infringing the petitioners' constitutional right to free exercise of religion or equal protection of the laws. The Board argues that the answer is yes.

N.J.S.A. 18A:39-1.3 provides that a board of education transporting pupils "may" provide subscription busing for "pupils" not living remote enough to qualify for State-mandated transportation pursuant to *N.J.S.A.* 18A:39-1, and "may also" provide it to "pupils" attending "any not for profit non-public school." By addressing private school pupils in a separate sentence and using the phrase "may also," the Legislature by its plain language intended to allow school districts discretion as to whether to include private school pupils in subscription busing programs. This interpretation is inescapable when one compares *N.J.S.A.* 18A:39-1.3 with *N.J.S.A.* 18A:39-1, which provides that school districts "shall" provide transportation to private school pupils living remote from their schools whenever it provides such transportation to public school pupils. Because the statute on its face plainly allows what petitioners are challenging, they may only prevail by establishing that the statute itself is unconstitutional.

Preliminarily, the respondent expresses doubt as to the Commissioner's jurisdiction to adjudicate such a claim. The Commissioner may decide controversies and disputes arising under Title 18A requiring application of educational expertise, even the resolution of those issues implicates constitutional claims. *Desilets on behalf of Desilets v. Clearview Regional Bd. of Educ.*, 137 *N.J.* 585, 595-96 (1994). The respondent is unaware of any case holding that the Commissioner may declare a statute unconstitutional on its face, especially when disposition of the abstract constitutional issues involved does not require educational expertise. *Cf.*, *Abbott v. Burke*, 100 *N.J.* 269, 301 (1985).

Here, the petitioners seek a ruling that *N.J.S.A.* 18A:39-1.3 is unconstitutional on its face. They do not merely seek a limiting construction of the statute, but one that is at odds with its

plain meaning. The Commissioner is without jurisdiction to decide the question and any relief on that ground must be pursued in another forum.

On the merits, the petitioners contend that the exclusion of private school pupils from the Board's subscription busing program violates their rights of free exercise of religion under the First Amendment, equal protection under the Fourteenth Amendment, and corresponding provisions of the New Jersey Constitution.

Free exercise claims are governed by *Employment Div. v. Smith*, 494 *U.S.* 872, 885 (1990). In that case, the United States Supreme Court discarded the compelling State interest test of *Sherbert v. Verner*, 374 *U.S.* 398 (1963) and held that a generally applicable and otherwise valid regulatory law which is not specifically intended to regulate religious conduct or belief and which incidentally burdens the free exercise of religion does not violate the Free Exercise clause. 494 *U.S.* at 878. The Court retained the compelling interest test, however, for instances in which the regulatory law affects the Free Exercise clause in conjunction with another constitutional protection, such as freedom of speech and of the press, or the right of parents to direct the education of their children. 494 *U.S.* at 881-82. The standard of review under Equal Protection is somewhat similar: strict scrutiny when an act involves a fundamental right or a suspect class, intermediate scrutiny when an act involves a semi-suspect class, and minimal rational-basis scrutiny in all other cases. *Drew Associates of N.J., L.P. v. Travisano,* 122 *N.J.* 249, 258-59 (1991).

The Board's subscription busing policy is a generally applicable and otherwise valid regulation not specifically intended to regulate religious conduct or belief. It applies to all private schools, religious and secular, and was promoted by legitimate budgetary and operational concerns. As noted in the certification of the Transportation Supervisor for the Board, subscription busing was intended as an affordable service-for-fee alternative to courtesy busing. Taking into account the economics of the pupil transportation industry and the New Jersey Department of Education's reimbursement and other regulatory standards, the modest cost per family was maintainable only so long as the routes and stops previously in place for courtesy busing remained intact. By expanding the user base beyond the population previously served by

courtesy busing, limited to public school pupils, or tinkering with bus stops, the cost per family would be driven up to an unacceptable level.

While the petitioners' situation was admittedly a factor in the Board's decision to amend the policy when it did, the insertion of the phrase "public school" merely clarified the policy's original intent to limit the program to the same non-remote public school population previously served by courtesy busing, to avoid unjustified expectations on the part of private school parents such as the petitioners unfamiliar with the policy's history. The fact that only three private school families had requested subscription busing over a three-year period in this sprawling municipality demonstrates that the intended limitation to public school pupils was widely known among those living in town when the program was initiated. Thus, it is clear that the policy is sufficiently related to a legitimate government objective to pass rational-basis scrutiny under the Equal Protection rubric, and is sufficiently religion-neutral not to trigger the Free Exercise compelling State interest analysis under *Smith*.

The petitioners' arguments reflect a basic misconception of the U.S. Supreme Court's jurisprudence in this area. There is no contention in this case that the Board is interfering with the petitioners' right to follow the dictates of their religion or depriving them of their right to educate their child in a secular or religious private school of their choosing. Instead, the petitioners seek a government subsidy in the form of transportation to more conveniently enjoy these rights.

What the petitioners fail to appreciate is that the Bill of Rights is not a government entitlement program. The various rights set forth in the First Amendment in particular are freedoms from government interference--in essence, the right to be left alone. "The Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can expect from the government." *Sherbert,* above, 374 *U.S.* 398, 412 (Douglas, J., concurring). That the Legislature has chosen to subsidize free public education has never been held to infringe on the constitutional right of parents to send their children to schools of their choice, or to require government to subsidize the individual's election to attend the chosen school. To translate the First Amendment's limitation on governmental power into an affirmative obligation to provide benefits is an unprecedented result. *See, Maher v. Roe*, 432 *U.S.*

467 (1977). It is well settled that the government's decision not to subsidize the exercise even of fundamental rights does not infringe those rights. *Regan v. Taxation Without Representation of Wash.*, 461 *U.S.* 540, 549 (1983).

Nor can the petitioners trigger application of the compelling State interest test under *Smith* merely by mentioning their constitutional right to direct their child's education at a private school, a right recognized since *Pierce v. Society of Sisters*, 268 *U.S.* 510 (1925) and codified in New Jersey at *N.J.S.A.* 18A:38-25. The Supreme Court has been extremely hesitant to suggest that private school pupils have a constitutional entitlement to the same benefits that are given to public school pupils by government. *Peter v. Wedl*, 155 *F.*3rd 992, 1002 (8th Cir. 1998).

The petitioners rely heavily on *West Morris Regional Bd. of Ed. v. Sills*, 58 *N.J.* 464 (1971), although for what proposition, the respondent is not sure. The issue in that case was whether the Establishment Clause and Equal Protection were violated by *N.J.S.A.* 18A:39-1's requirement of transportation to certain private schools including religious schools, but not others. Unlike our case, the question before the court there was not whether transportation must be provided to private school pupils, but whether it may be provided. In rejecting the plaintiffs' challenge, the Court stated:

> Plaintiffs contend that if the legislative purpose [of *N.J.S.A.* 18A:39-1] is to aid the child by getting him to school, on time, and safely . . . then there is no rational basis for conferring that benefit upon some students and not others. Plaintiffs do not go to the length of suggesting that this benefit could not be conferred solely upon public school students. Rather their aim is to bar transportation of all private school students[.] 58 *N.J.* at 475.

Since it appears that the Court, and even the plaintiffs in that case, saw no constitutional problem with excluding private schools from State-mandated transportation entirely, nothing in that decision can be said to disapprove of the Legislature's election to give school districts the choice of providing, or not, subscription busing to private school pupils under *N.J.S.A.* 18A:39-1.3.

The respondent stresses the Court's observation that

> the Equal Protection clause does not require that a State must choose between attacking every aspect of a program or not attacking the problem at all. . . .
>
> The area within which the State may act to advance the public welfare is vast. The Legislature must have leeway in deciding whether to act, and if so, how far to go. It would disserve the public interest to say that the Legislature may take no step unless it goes the whole distance which constitutionally could be traveled. Especially is this true when the subject involves the expenditure of public moneys. The competing demands are such that modest objectives must be allowed even though more pervasive ones would be welcome. So long as the limited objective is not invidious in design or effect, a statute may not be invalidated merely because it would also be reasonable to do more. 58 *N.J.* at 480-81.

Given the budgetary, operational and administrative concerns implicated by including private school pupils in a subscription busing program, the Legislature was surely within its rights to give local school districts the option.

The Board's subscription busing policy in this case is explicitly authorized by *N.J.S.A.* 18A:39-1.3 and the petitioners have failed to establish any constitutional infirmity in the statute or in the Board's application of it.

DETERMINATION

The Board submitted a certification of its Transportation Supervisor giving background of its transportation policies, particularly as they relate to transportation of pupils less than remote. Among other things, the Supervisor states that there is typically only one bus route to each non-public school because non-public school transportation route costs may not exceed the number of pupils multiplied by an annual amount fixed by the State, which is currently $702. No such limitation is imposed for public school pupils. Second, the New Jersey Department of Education, Bureau of Pupil Transportation, imposes a maximum time limit on bus routes, currently ninety

minutes. The combination of cost and time limits has created enormous pressures on school districts to maximize efficiency in non-public school transportation.

In the case of Piscataway, these rules have made it virtually impossible to add additional routes to the non-public schools, thereby limiting the number of additional stops that the route can absorb and remain within the Department's time constraints. Further and importantly, applications for pupils not eligible to receive transportation to their non-public schools cannot be considered when approving a contract for a bus route, since *N.J.S.A.* 18A:39-1.1 clearly states that only eligible pupils are used to determine route costs.

Although Piscataway, like many districts in New Jersey, provided so-called courtesy busing at no cost, that busing was provided exclusively to pupils enrolled in the Piscataway School District. Courtesy busing was never extended to private school pupils. Faced with the same sort of budgetary constraints every district faces, Piscataway eliminated courtesy busing entirely and put in its place subscription busing to be paid for by the families who benefited from the service. Subscription busing was allowed by the Legislature in 1995 in *L.*1995, *c.*106, *N.J.S.A.* 18A:39-1.3.

The Board adopted a policy in 1997 authorizing the Business Administrator to establish subscription busing guidelines for eligibility, bus stops, deadlines for applications and related matters. These guidelines explicitly stated that pupils would be assigned to the "closest existing bus stop" on an "existing route (No additional routes will be added)." The Piscataway busing program, like the courtesy busing program before it, was intended to serve only public school pupils.

Because *N.J.S.A.* 18A:39-1.3 states that a school district may enter into a contract to provide services to public and non-public schools, Piscataway exercised its option and decided not to provide services to non-public pupils. In Piscataway, contracts are entered into through bidding of all public school routes for three or more years at a time. The current three-year contract allows for public school subscription busing only. This is because routes and stops that were used for courtesy busing of district public school pupils were already in place when

subscription busing was substituted. The district has never provided courtesy busing for private school pupils and, therefore, these routes were never designed with private schools or their pupils in mind.

Nevertheless, even though subscription busing did not officially contemplate use by private school pupils until the 1998-99 school year, on two occasions, private school pupils were allowed to register for reasons of hardship, provided they were picked up at the closest existing bus stop as stated in the guidelines.

The petitioner contacted the Supervisor to request an application for subscription busing for her daughter in June 1998. She did not at that time inform the staff that her daughter attended a private school. The Supervisor was on vacation at the time. Unaware that the pupil was a private school pupil, a staff member sent the petitioners an application which the Supervisor received on June 19. Once it was determined that the child was enrolled at a private school, the petitioners were made aware of the policy on existing bus routes and stops and advised that the nearest existing stop was 425 Patton Avenue.

Correspondence between Mrs. W. and the School Business Administrator ensued. There were many similar requests from parents over that summer. On August 19, 1998, the Supervisor wrote a memorandum to the Administrator advising that over thirty applications had been received and advising the Administrator of the budgetary and equitable implications of granting these. At the beginning of the 1998-99 school year, the number of requests had grown to over one hundred. If these requests had been granted, the Board would have faced an added cost of approximately $32,000 from adding two new route packages to accommodate the increased time of making over one hundred new stops while maintaining the ability to arrived at school on time.

Mrs. W. was advised in a letter dated September 11, 1998 that the matter of changing bus stops and bus routes for subscription pupils had been referred to the Board's Policy Committee for consideration. The Policy Committee meeting took place on October 5, 1998 where the issue of what to do about the numerous requests was discussed. The subscription busing program was initially intended as a pay-as-you-go replacement for courtesy busing, a program limited to public

school pupils, using the same routes and stops. In an attempt to accommodate private school parents, the Supervisor's office had allowed them on two occasions to register on the theory that it would not cost the district any extra money or limit the district's flexibility. If there were empty seats on a subscription bus and the routes and stops remained unchanged, there seemed to be no reason why the district should not help these Piscataway residents, even though the program was not designed for them. This accommodation was made administratively, with no formal consideration by the Board. Once Mrs. W., as well as other parents, started applying pressure to change routes and stops, thus driving up the cost to the district and limiting its flexibility to re-route those buses in the future, the district had to step back and re-evaluate the essential nature of the program.

As a result of those deliberations, it was determined not to change the existing routes or stops for any pupil, public or private, and because of a misunderstanding on Mrs. W.'s part, to clarify district policy going forward so that there would be no question that subscription busing was limited to public school pupils. On October 9, 1998, the Business Administrator advised Mrs. W. of the Policy Committee's deliberations.

The petitioners submit a certification that differs on some points with that of the Transportation Supervisor. Initially, the petitioners point out that the policy, before they ever inquired about subscription busing, stated explicitly, "Children whose parents have opted for a school of choice may be eligible for the subscription bussing program based on available space on an existing route after all other riders have been assigned." Respondent's Exhibit 1, attached to certification of Patricia Bye. To the petitioners, this language makes it obvious that the subscription busing program was not intended to serve only public school pupils. The petitioners emphatically deny they are seeking any form of government subsidy. Nor did they fail to disclose that their child was attending a parochial school. To the contrary, Mrs. W. claims she gave full information to the person answering her first telephone call.

The petitioners are not content with the location of the existing designated bus stop. They believe it to be between .8 and .9 miles from their home and would require the child to walk "through several intersections without any sidewalks." Petitioner's certification, ¶7.

Approximately thirty other pupils were assigned bus stops unacceptable to parents. These parents, including the petitioners, called and then wrote to express concern and to request a change in the bus stop. Mrs. W. also appeared at a Board meeting and spoke during the public portion of the meeting about the situation.

Mrs. W. states she asked for a change in the location of the bus stop. Mrs. W. also states that the other parents who asked for a change in their children's bus stops were told that the bus stops would remain where they were. However, Mrs. W. not only received a negative reply to the request for a bus stop relocation, but revocation of bus privileges altogether.

The petitioners assert there is no additional cost to the Board for their child to ride what they assert is a half-empty bus to her school. They also claim there would be no extra cost if the bus picked up the child on the same street as her home.

The petitioners agreed that they do not have a handicapped child. They do, however, have after-school care issues. The family will live in Piscataway for at least two more years and both parents will continue to be employed in full-time positions during that time. They assert they relied on the respondent's subscription busing program when they enrolled their child in a parochial school.

Having carefully read the well-craft arguments of each party, I observe that administrative agencies have only the power to pass upon certain constitutional questions. Facial attacks, for example, are generally beyond the purview of administrative agencies and, therefore, the Office of Administrative Law. According to the New Jersey Supreme Court in *Abbott v. Burke,* above, "facial constitutional challenges to statutes should be judicially resolved, even where an as-applied challenge to a statute may strongly suggest initial agency adjudication." 100 *N.J.* at 299. However, it is appropriate for an administrative tribunal to review a constitutional issue "to develop a fully informed factual record and maximize the soundness of determinations through the agency's expertise." *Ibid.* An agency may therefore "base its decision on constitutional considerations." *Id.* at 298-99.

Administrative agencies can hear challenges to statutes and rules "as applied" so long as the constitutional issue is "relevant and necessary to the resolution of a question concededly within [its] . . . jurisdiction." *Christian Bros. Inst. v. N.J. Interscholastic League*, 86 *N.J.* 409, 415 (1981).

In addition, cases in which the constitutionality of a statute or other rule of law is not at stake, an administrative agency "does not exceed its jurisdiction merely because it applies relevant law," even if that law is the United States Constitution. *Hunterdon Central High School Board of Education v. Hunterdon Central Teachers' Association,* 174 *N.J. Super.* 468, 475 (App. Div. 1980), aff'd *per curiam*, 86 *N.J.* 43 (1981). "Administrative agencies are competent to pass upon constitutional issues germane to proceedings before them." *Ibid.*

In general, the equal protection clause requires that similarly situated individuals be treated alike. *Salem Blue Collar Workers' Ass'n v. City of Salem*, 33 *F.*3rd 265 (1994). The outcomes of cases brought under the equal protection clause, however, hinge largely on what level of scrutiny they trigger: strict scrutiny, intermediate scrutiny, or rational basis. *Barone v. Dept. of Human Services*, 107 *N.J.* 355, 364-65 (1987). For purposes of equal protection, the petitioners' status as parents of a non-public school pupil does not render them a member of a suspect or quasi-suspect class thereby triggering strict or intermediate scrutiny. *State v. Fernandez*, 209 *N.J. Super.* 37 (App. Div. 1986).

Only classifications based on "immutable human attributes" trigger a more exacting standard than rational basis. *Id.* at 48, citing *Parham v. Hughes,* 405 *U.S.* 330, 335 (1972).

However, the resolution of today's matter rests on much more simple and less controversial grounds. The statute in question, *N.J.S.A.* 18A:39-1.3, is two sentences long, albeit the sentences are long. The first says

> Any board of education which transports pupils to and from school pursuant to *N.J.S.* 18A:39-1 may enter into a contract for the transportation of elementary school pupils who live less than two

> miles from school and secondary school pupils who live less than two and a half miles from school, and may require that if the parent, guardian or other person having legal custody of the child elects to have the pupil transported pursuant to the contract, then the parent, guardian or other person having legal custody of the child shall pay all or a part of the cost of that transportation, including but not limited to the cost of fuel, driver salaries and insurance.

In one long but clear sentence, the Legislature has stated what it allows boards to do, if they chose. They may enter into a contract for that transportation. The second sentence states

> A board of education may also enter into a contract for the transportation of elementary school pupils who live less than two miles and secondary school pupils who live less than two and a half miles from any not for profit nonpublic school which satisfies the maximum distance requirements set forth in *N.J.S.* 18A:39-1 and may require that if the parent, guardian or other person having legal custody of the child elects to have the pupil transported pursuant to the contract, then the parent, guardian or other person having legal custody of the child shall pay all or a part of the cost of that transportation, including but not limited to the cost of fuel, driver salaries and insurance.

The rest of the statute provides that the local board of education may determine the time and manner of payment and shall notify the Department of Education when it elects to provide transportation for pupils under the provisions of the statute.

The words may and shall are, perhaps, the two most important words in statutory construction. It is well settled that may is permissive and shall is mandatory. *N.J.S.A.* 18A:39-1.3 invests in local boards of education the discretion to provide subscription busing to non-public school pupils, or not. If a local board of education decides not to offer such busing, it is not offered and will not be offered until and unless the board acts by appropriate resolution to initiate it. What a board has done, a board may undo. The same board could, at a later date, decide to discontinue such busing.

The Board concedes that, even though its subscription busing program did not initially contemplate use by private school pupils, until the 1998-99 school year, on only two occasions were private school pupils allowed to register for reasons of hardship, provided they were picked up at the closest existing stop. One of these cases involved a seriously handicapped pupil who probably would have been entitled to certain accommodations under laws addressing accommodation of the handicapped. In the other case, the system accommodated what seemed to be a legitimate request by a family to coordinate after-school child care. Thus, the door was opened.

The parties seemed to agree that Mrs. W. contacted the transportation office in or about June 1998 and requested an application for subscription busing. The parties differ as to what information was offered and received. However, it seems clear that the Transportation Supervisor did advise Mrs. W. that the nearest existing stop was at 425 Patton Avenue. On July 7, 1998, Mrs. W. wrote to the district's Business Administrator complaining that 425 Patton Avenue was .9 miles from their home and expressing concern that the walking route to the stop was unsafe. Mrs. W. requested that a new bus stop be created closer to her home. The district disputes the distance between Mrs. W.'s home and the bus stop.

Importantly, Mrs. W.'s request was one of many received during the summer of 1998. By August 19, there were more than thirty applications and the Supervisor became concerned with budgetary and other implications. At the start of the 1998-99 school year, the requests had grown to over one hundred. In her certification, the Transportation Supervisor states that this would have added approximately $32,000 to transportation costs.

In early September 1998, Mrs. W. and, presumably, others who had applied were advised that the matter of changing bus stops and bus routes for subscription busing pupils had been referred to the Board's Policy Committee. A Policy Committee meeting took place on October 5 and the issue appears to have been discussed thoroughly.

The district considered, among other things, that the subscription busing program was intended to be a pay-as-you-go replacement for courtesy busing, that it was intended to be limited

to public school pupils and was intended to use existing bus routes and bus stops. The Board considered the fact that it had accommodated two private school pupils in the belief that it would not cost the district any extra money or limit its flexibility. This accommodation was made administratively, and no formal Board of Education action is recorded that touches upon it. The Policy Committee also considered the growing calls to change routes and stops to accommodate courtesy-bussed pupils. This, in turn, led to consideration of costs to the district and limits on its flexibility to re-route those buses in the future.

As a result of the Policy Committee's deliberations, it was determined not to change existing routes or stops for any pupil, public or private, and to clarify Board policy from that point forward so that there would be no question that subscription busing was limited to public school pupils. On October 9, 1998, the Business Administrator wrote to Mrs. W., saying

> After deliberation on the evening of October 5, 1998, the Policy Committee determined that it was never the intent of the Piscataway Board of Education in establishing its subscription busing program to provide subscription busing services to private and parochial school students. In order to clarify the intent of this policy, the wording was changed to specifically include *public school* students only. The Board of Education unanimously approved this amendment at its Board meeting on October 8, 1998.
>
> In its deliberation, however, the Policy Committee did concur that you may receive subscription busing services for the balance of the current school year in accordance with previously established regulations with your bus stop being 425 Patton Avenue. Should you not be satisfied with this arrangement, I have been authorized to grant you a full refund of any moneys you have paid for this service. Respondent's Exhibit 8.

In consideration of the foregoing, I **FIND** and **CONCLUDE** that the Piscataway Board of Education amended its subscription busing policy by resolution of October 8, 1998. I further **FIND** and **CONCLUDE** that this was an action within the sound discretion of the Board. A political subdivision of the State may do no more than the Legislature authorizes it to do. Here, *N.J.S.A.* 18A:39-1.3 gives to boards of education the option of offering courtesy busing to non-

public school pupils. Option means precisely that. It is the power or right to choose. In short, the Board got out of the non-public school pupil subscription busing business.

The petitioners have not been treated differently from other parents of non-public school pupils. Therefore, the Board has not misapplied the statute.

I am offered no compelling argument that either the Board's action or the statute under which it was taken suffers a constitutional infirmity. I **FIND** no violation of Article I, ¶1 of the New Jersey Constitution, of the First Amendment of the U.S. Constitution, of the New Jersey Law Against Discrimination, of the Equal Protection Clause, of the school laws or any failure to provide safe and adequate transportation. Having carefully balanced all arguments, I **CONCLUDE** that the motion for summary judgment of the Piscataway Board of Education must be **GRANTED** and the petition of appeal **DISMISSED**. It is so **ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 11, 1999
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

8/16/99
DATE

Debbie Antanitis pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 17 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

ml

EXHIBITS

For petitioners:

P-1 Piscataway Township Board of Education Policy 8681, Subscription Busing, adopted May 15, 1997

P-2 Certified copy of Resolution, Piscataway Township Board of Education, October 8, 1998

For respondent:

R-1 Piscataway Township Board of Education Policy 8681, Subscription Busing, May 15, 1997

R-2 Piscataway Township Schools Subscription Busing Guidelines

R-3 Letter, Mr. and Mrs. W. to Saragnese, July 7, 1998, 2 pp.

R-5 Memorandum, Bye to Saragnese, re: Subscription Bus Stop Change Requests, August 19, 1998

R-6 Letter, Saragnese to Mrs. W., September 11, 1998

R-8 Letter, Saragnese to Mrs. W., October 9, 1998

OAL DKT. NO. EDU 661-99
AGENCY DKT. NO. 6-1/99

M.J.K.D. AND A.W.D., on behalf of minor child, A.K.D.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision issued by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon independent and careful review of the record, the Commissioner agrees with and adopts the recommendation of the Administrative Law Judge (ALJ) to deny petitioners' motion for summary decision and dismiss the Petition of Appeal. Initially, the Commissioner emphasizes that the ALJ is correct in determining at page 15 of the Initial Decision that while administrative agencies may base their decisions on constitutional considerations, they have only the power to pass upon certain constitutional questions. Of this, the ALJ states:

> According to the New Jersey Supreme Court in *Abbott v. Burke,* above, "facial constitutional challenges to statutes should be judicially resolved, even where an as-applied challenge to a statute may strongly suggest initial agency jurisdiction." 100 *N.J.* at 299. However, it is appropriate for an administrative tribunal to review a constitutional issue "to develop a fully informed factual record and maximize the soundness of determinations through the agency's expertise." *Ibid.* ***

Secondly, the Commissioner is in full agreement with the ALJ that resolution of the instant matter essentially rests upon the clear wording of the statute which permits subscription busing of pupils who are not remote from school. The portion of *N.J.S.A.* 18A:39-1.3 relevant to the controversy herein unequivocally states that a board of education "*may* also enter into a contract for the transportation of ***pupils who live less than two and a half miles from any not for profit nonpublic school***and *may* require that ***[the individual] having legal custody of the child shall pay all or a part of the costs of that transportation***." (emphasis supplied) As recognized by the ALJ,

> [t]he words may and shall are, perhaps, the two most important words in statutory construction. It is well settled that may is permissive and shall is mandatory. *N.J.S.A.* 18A:39-1.3 invests in local boards of education the discretion to provide subscription busing to non-public school pupils, or not. If a local board of education decides not to offer such busing, it is not offered and will not be offered until and unless the board acts by appropriate resolution to initiate it. What a board has done, a board may undo. The same board could, at a later date, decide to discontinue such busing. (Initial Decision at p. 17)

Review of this matter persuades the Commissioner that the ALJ carefully balanced the arguments of the parties and that his findings and conclusions are supported by the record. Further, the Commissioner believes that the holding in this matter is consistent with the decisions of the State Board of Education and the New Jersey Superior Court in *Parents for Student Safety, Inc. v. Board of Education of Morris School District, Morris County*, decided by the Commissioner August 24, 1984, *rev'd* State Board, February 5, 1986, *aff'd* Appellate Division, unreported opinion Docket No. A-3257–T7, decided February 17, 1987, *cert. denied* 108 N.J. 180 (1987), a case which challenged the action of the Morris Board of Education to provide courtesy busing only to public school students. Like the statute being challenged herein, the statute authorizing courtesy busing of students who do not live remote from school,

N.J.S.A. 18A:39-1.1, is permissive. The State Board and court holdings in *Parents for Student Safety, supra,* determined that *N.J.S.A.* 18A:39-1.1 permits, but does not require, a board of education to provide courtesy busing to private school students *even when* it provides such transportation to public school students. The same conclusion, the Commissioner believes, results from examination of the record and legal arguments of the parties in this matter.

Accordingly for the reasons well expressed in the initial decision, the Petition of Appeal is hereby dismissed.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

313-99

MONTCLAIR EDUCATION ASSOCATION, on behalf of itself and the member named herein, MOIRA PALISITS,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY, DEPARTMENT OF HEALTH OF THE TOWNSHIP OF MONTCLAIR, AND THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY,	:	
RESPONDENTS.	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
CYNTHIA SAMUEL,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY, DEPARTMENT OF HEALTH OF THE TOWNSHIP OF MONTCLAIR, AND THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY,	:	
RESPONDENTS.	:	

SYNOPSIS

In consolidated matter, petitioning Association and two school nurses asserted the Board terminated their employment pursuant to a RIF and retained other nursing professionals who were noncertified and/or nontenured. Petitioners alleged these individuals were hired under unlawful contract arrangements. The Board sought summary decision on the grounds that 1) it performed a lawful RIF to eliminate the school nurse positions held by petitioners, and 2) it entered into a contract with the Department of Health of Montclair (DOH) for the provision of certain nursing services to the school district which was legal pursuant to both *N.J.S.A.* 18A:40-3.1 and the Interlocal Services Act (Act), *N.J.S.A.* 40:8A-1 *et seq.* Petitioners likewise moved for summary decision.

ALJ concluded that petitioners suffered no injury by virtue of the Board's action and they were entitled to no relief in this matter. The Board could legally abolish their positions as part of a reduction in force and legally contract out those services that are not restricted to certificated nurses to the DOH. Moreover, the

ALJ concluded that the Association is not entitled to compel the Board to provide all health-related services in the school district through the employment of certificated nurses, and that the Board's contract comports with the Interlocal Services Act. Since petitioners only raised the general issue that no school nursing duties could be contracted out and since the contracts in question have already been performed, the ALJ concluded that no relief may be granted to the Association as a result of this appeal. ALJ granted the Board's motion for summary decision and denied petitioners' motion for summary decision. ALJ ordered petitioners' appeals dismissed with prejudice.

Commissioner affirmed finding that, although the DOH contract did not violate school laws or the Interlocal Services Act, the Board's assignment of duties to these contracted nurses, as evidenced by the contract, did not appear to consistently comport with the holdings in *Old Bridge* and *Dover*. To the extent that a contract exists for the current school year, the Commissioner ordered the Board to review such contract to ensure that the duties performed by the contracted nurses do not conflict with the duties specifically reserved for certificated school nurses who must be employed by the District, to make revisions as necessary, and to submit results of the revisions, within 120 days, to the Essex County Superintendent of Schools for review and approval.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION

MONTCLAIR EDUCATION ASSOCIATION, on behalf of itself and the member named herein, MOIRA PALISITS,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, DEPARTMENT OF HEALTH OF MONTCLAIR, AND THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY,
Respondents.

OAL DKT. NO. EDU 9511-97
AGENCY DKT. NO. 269-7/97

CYNTHIA SAMUEL,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, DEPARTMENT OF HEALTH OF MONTCLAIR, AND THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY,
Respondents.

OAL DKT. NO. EDU 9512-97
AGENCY DKT. NO. 276-7/97
(CONSOLIDATED)

Aileen M. O'Driscoll, Esq., for petitioners (Zazzali, Zazzali, Fagella & Nowak, attorneys

Richard H. Bauch, Esq., for respondent Board of Education of Montclair (DeMaria, Ellis & Bauch, attorneys)

Robert A. Hoonhout, Esq., for respondents Department of Health of Montclair and the Township of Montclair

Record Closed: May 18, 1999 Decided: June 30, 1999

BEFORE **EDITH KLINGER**, ALJ:

On July 23, 1997, petitioners Montclair Education Association and Moira Palisits filed a petition with the Department of Education, Bureau of Controversies and Disputes, seeking relief from the action of respondent Montclair Board of Education (Board). Petitioners allege that the Board abolished the position of Palisits as a school nurse and contracted with respondents Department of Health of Montclair and the Township of Montclair for the provision of certain nursing services in violation of the tenure rights of petitioner Palisits. On July 29, 1997, petitioner Cynthia Samuel filed a petition alleging the same violation of her tenure rights. On October 1, 1997, both appeals were transmitted to the Office of Administrative Law (OAL) as contested cases pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The matters were consolidated at the request of the parties.

On June 5, 1998, an order was issued by the undersigned dismissing both petitions with respect to the Department of Health of the Township of Montclair because the Commissioner of Education has no jurisdiction to grant relief against this respondent. The order failed to mention that the appeals were also dismissed against the Township of Montclair for the same reason. This omission is corrected at this time, and it is **ORDERED** that the consolidated appeals are hereby **DISMISSED WITH PREJUDICE** with respect to the Township.

Following a series of conference calls with the parties, it was determined that the material facts in this matter could be stipulated and the appeals heard upon the papers in the form of cross-motions for summary decision. The parties prepared a joint stipulation of facts and a briefing schedule was established. The record closed on May 18, 1999, when the final submission was received from the parties.

JOINT STIPULATION OF FACTS

1. Petitioner Montclair Education Association is the majority representative of all certified non-administrative staff employed by respondent Board of Education of the Township of Montclair (Board).

2. The Board is obligated to provide school nursing services in accordance with the laws and regulations of the State of New Jersey.

3. A job description issued by the Board for the position of School Nurse exists (J-1).

4. Petitioner Moira Roberts Palisits began employment as a school nurse in the Montclair School District (District) on February 1, 1992. Palisits holds an Educational Services Certificate with an Endorsement as a School Nurse (J-2).

5. Petitioner Cynthia Samuel began employment as a school nurse in the District on September 8, 1992. Samuel holds an Educational Services Certificate with an Endorsement as a School Nurse (J-3).

6. By resolution passed on June 3, 1996, the Board resolved to authorize the Board President and the Board Secretary to execute a contract with the Township of Montclair Department of Health (DOH) to provide health services to certain schools within the District (J-4).

7. The Board entered into a contract with the DOH, effective September 1, 1996 through June 30, 1997, for the provision of nursing services (96-97 Agreement, J-5).

8. In accordance with the terms of the 96-97 Agreement, the Board agreed to engage the DOH for the provision of registered nurses to fill the equivalent of three and one-

half (3.5) nursing positions at the following schools: Bradford, .5; Edgemont, 1.0; Northeast, 1.0; Rand, .5; and Watchung, .5.

9. Each of the nurses who serviced the various schools identified in the 96-97 Agreement were fully licensed and registered in accordance with the guidelines set forth by the State of New Jersey, Board of Nursing.

10. A job description exists for the nurses retained by the DOH and who have been assigned to the District (J-6).

11. In or about April 1997, the Board of School Estimate (BSE) decreased the District budget by $700,000.

12. In anticipation of discussion concerning Palisits' employment with the District and as required by the Open Public Meetings Act, *N.J.S.A.* 10:4-6 *et seq.* (OPMA), the Board notified Palisits of a public meeting scheduled for May 5, 1997 (J-7).

13. In anticipation of discussion concerning Samuel's employment with the District and as required by the OPMA, the Board notified Samuel of a public meeting scheduled for May 5, 1997 (J-8).

14. For reasons of economy, the Board abolished two school nursing positions effective following June 30, 1997. Although petitioners stipulate to this fact, petitioners do not stipulate that respondent had or has the legal authority to provide school health-related services through a contract with the DOH.

15. Because Palisits and Samuel had the least amount of seniority among the tenured school nurses at the time the reduction in force was effectuated, their employment in the District was terminated effective following June 30, 1997.

16. By resolution passed on June 23, 1997, the Board resolved to authorize the Board President and the Board Secretary to execute a new contract with the DOH to continue providing health services to certain schools within the District (J-9).

17. The Board entered into a new contract with the DOH, effective September 1, 1997 through June 30, 1998, for the provision of nursing services (the 97-98 Agreement, J-10).

18. In accordance with the terms of the 97-98 Agreement, the Board agreed to engage the DOH for the provision of registered nurses to fill the equivalent of eight (8) nursing positions at the following schools: Bradford, Edgemont, Hillside, Mount Hebron, Northeast, Rand, Watchung, George Inness and Immaculate Conception/St. James.

19. Each of the nurses who serviced the various schools identified in the 97-98 Agreement were fully licensed and registered in accordance with the guidelines set forth by the State of New Jersey Board of Nursing.

20. By resolution passed on June 1, 1998, the Board resolved to authorize the Board President and the Board Secretary to execute a new contract with the DOH to continue providing health services to certain schools within the District (J-11).

21. The Board entered into a new contract with the DOH, effective September 1, 1998 through June 30, 1999, for the provision of nursing services (98-99 Agreement, J-12).

22. In accordance with the terms of the 98-99 Agreement, the Board agreed to engage the DOH for the provision of registered nurses to fill the equivalent of eight (8) nursing positions at the following schools: Bradford, Edgemont, Hillside, Mount Hebron, Northeast, Rand, Watchung, George Inness and Renaissance.

23. Each of the nurses who serviced the various schools identified in the 98-99 Agreement are fully licensed and registered in accordance with the guidelines set forth by the State of New Jersey Board of Nursing.

24. The following individuals were employed by the DOH for the 1997-98 school year to provide nursing services to the school district.

EMPLOYEE	ASSIGNED SCHOOL	HOURS/WEEK
Laurrene Babalinardo	Edgemont	17 1/2
Pamela Barnes	Renaissance	20
	Transitional	
	St. James	
Mary Ellen Collins	Northeast	17 1/2
Lydia DeLuca	Rand	17 1/2
Kim Fusaro	Hillside	17 1/2
Barbara Good	Northeast	17 1/2
Susan Marro	Mt. Hebron	17 1/2
Eva McGory	Bradford	17 1/2
Nancy Otsky	Bradford	17 1/2
Linda Ryan	Edgemont	17 1/2
Mary Saltis	Hillside	17 1/2
Abby Smith	Mt. Hebron	17 1/2
Betty Strauss	Annex	20
Janet Traettino	Rand	17 1/2
Joan Walto-Nemergut	Watchung	17 1/2
Marilyn Weinberger	Watchung	17 1/2

25. In addition to the nursing services provided by the DOH, as described in Paragraph 24 above, the Board has directly employed the following school nurses at all times pertinent:

EMPLOYEE	ASSIGNED SCHOOL	HOURS/WEEK
Catherine Rolandelli	Glenfield	Full time
Dorothy Lorent	High School	Full time (on leave)
JoAnn McClear	Nishuane	Full Time
Theresa Harbour	High School	Full Time

26. Catherine Rolandelli was employed by the Board on September 1, 1974, and holds an Educational Services Certificate with an Endorsement as a School Nurse.

27. Dorothy Lorent was employed by the Board on September 12, 1979, and holds an Educational Services Certificate with an Endorsement as a School Nurse.

28. JoAnn McClear was employed by the Board on September 2, 1986, and holds an Educational Services Certificate with an Endorsement as a School Nurse.

29. The following represents a seniority chart of school nurses as of June 30, 1997:

EMPLOYEE	SENIORITY
Dorothy Lorent	19 years
Catherine Rolandelli	18 years
JoAnn McClear	11 years
Moira Roberts Palisits	6 years
Cynthia Samuel	4.68 years

30. Theresa Harbour commenced employment with the Board on January 5, 1998 to temporarily replace Dorothy Lorent. Theresa Harbour holds an Educational Services Certificate with an Endorsement as a School Nurse.

31. The following individuals who were and/or are exclusively employed by the DOH hold a teaching certificate:

a) Lydia DeLuca holds a Substitute Teacher's Certificate with an Endorsement as a School Nurse.

b) Betty Strauss holds an Educational Services Certificate with an Endorsement as a School Nurse.

c) Joan Walto-Nemergut holds an Educational Services Certificate with an Endorsement as a School Nurse.

d) Marilyn Weinberger holds a Substitute Teacher's Certificate with an Endorsement as a School Nurse.

32. None of the other individuals employed in the District by the DOH hold a teaching certificate.

33. The DOH exercises exclusive control over the retention and assignment of nurses to the District.

34. On July 22, 1997, petitioners filed a Petition of Appeal with the Commissioner of Education.

35. On September 11, 1997, the Township of Montclair and the DOH filed an Answer and Affirmative Defenses.

36. On September 11, 1997, the Board filed an Answer to Petition of Appeal.

37. On or about October 1, 1997, the matter was transferred to the Office of Administrative Law as a contested matter.

38. On June 5, 1998, the Honorable Edith Klinger, ALJ, *sua sponte* dismissed the Township of Montclair and the DOH as parties to this matter.

THE POSITIONS OF THE PARTIES

The parties agree that the central question in this matter is whether a school board may provide for school nursing services required by *N.J.S.A.* 18A:40-3.1 through a contract with a local governmental agency, in this case the Montclair DOH.

Petitioners argue that the agreement between the Board and the DOH is illegal because *N.J.S.A.* 18A:40-3.1 mandates that the Board must employ and manage its own school nurses. They further argue that the contract is also illegal because it is in violation of the Interlocal Services Act (Act), *N.J.S.A.* 40:8A-1 *et seq.* Consequently,

the implementation of the contract with the DOH violates the tenure and seniority rights of Palisits and Samuel.

The Board seeks summary decision on the grounds that (1) it performed a lawful reduction in force to eliminate the school nurse positions held by Palisits and Samuel; and (2) it entered into a contract with the DOH for the provision of certain nursing services to the school district which was legal pursuant to both *N.J.S.A.* 18A:40-3.1 and the Act. As a result, the tenure and seniority rights of Palisits and Samuel were not violated and the petitioners are entitled to no relief in this matter.

THE APPLICABLE LAW

In their brief and in the joint stipulation of facts, petitioners did not challenge the authority of the Board to effectuate a reduction in force for reasons of economy and efficiency, whether or not the employees who are affected by the reduction are tenured. They also do not claim that there must be a certificated nurse employed for each school in the district since that was not the case even before the positions of Palisits and Samuel were abolished. Rather, they argue that the rights of Palisits and Samuel were violated because the two tenured employees were replaced by "school nurses" supplied by the DOH under an illegal contract with the Board. Moreover, the alleged school nurse positions were filled by contract nurses who are not necessarily qualified to hold them under the education statutes and regulations.

The two reasons given by petitioners for declaring the contract illegal are interrelated. The first part of the question to be addressed will be the claim that the contract is in violation of the Interlocal Services Act, *N.J.S.A.* 40:8A-1 *et seq.*

This Act was designed to

> facilitate and promote interlocal and regional service agreements, and therefore the grant of power under this act is intended to be as broad as is consistent with general law relating to local government.
>
> [*N.J.S.A.* 40:8A-10.]

N.J.S.A. 40:8A-3 permits any local unit of the State to enter into a contract with any other local unit or units to provide any services jointly which "any party to the agreement is empowered to render within its own jurisdiction." Since both a school district and a municipality are "local units" as defined by *N.J.S.A.* 40:8A-2(a), I **CONCLUDE** that any purported illegality in the present contract can only be based upon the nature of the services to be provided under the contract.

Within *N.J.S.A.* 18A, and the regulations promulgated pursuant to it, specifically *N.J.A.C.* 6:11-11.7, school nurses must be certificated and the requirements for certification are set forth therein. In order to avoid confusion, for the remainder of this initial decision, these nurses will henceforth be referred to as certificated nurses. Duly licensed but noncertificated nurses will be referred to simply as contract nurses or DOH nurses.

Petitioners argue that the DOH nurses cannot legally provide any nursing services to the District, not just those services that by law can only be provided by certificated nurses. Consequently, the DOH cannot enter into a contract with the school district to provide such services. *N.J.S.A.* 40:8A-5. In support of this argument, they rely upon *United Water Resources v. North Jersey Water Supply Commission*, 295 *N.J. Super.* 305 (App. Div. 1996), *aff'd*, 151 *N.J.* 497 (1997).

In *United Water Resources*, 295 *N.J. Super.* at 317, the Appellate Division determined that North Jersey Water, a regional supply commission, did not have the authority pursuant to its enabling legislation to provide retail municipal water service and, therefore, could not enter into a contract with the City of Bayonne to operate its municipal water system. North Jersey only had statutory authorization for the wholesale provision and transmission of water. As a result, the court held that its contract with Bayonne was in violation of the Act, since North Jersey was not empowered to render the contracted services within its own jurisdiction, *N.J.S.A.* 40:8A-3, and could not legally perform them for itself, *N.J.S.A.* 40:8A-5.

In the present matter, petitioners do not dispute that the DOH is authorized to provide nursing services. Petitioners' argument is that the DOH cannot provide the school district with services that must be provided by certificated nurses who must be

> appointed by the board of education having charge of the school or schools in which the services are to be rendered and shall be under the direction of said board or an officer or employee of the board designated by it and the salary of such person shall be fixed by, and paid from the funds of said board . . . .
>
> [*N.J.S.A.* 18A:40-3.1.]

Petitioners, citing *Dover Education Association v. Board of Education of Dover*, EDU 11164-96 (Oct. 24, 1997) <http://lawlibrary.rutgers.edu/>, *modified*, *Comm'r of Educ.* # 637-97 (Dec. 12, 1997) <http://www.state.nj.us/njded/legal/>, interpret this statute to mean that any contracting out of nursing services performed for school districts is violative of *N.J.S.A.* 18A:40-1 and *N.J.S.A.* 18A:40-3.1.

This interpretation is contrary to the Commissioner's final decision in *Dover*. He recognized that each school district is required to employ at least one school nurse who

> must be appropriately certified by the State Board of Examiners and who is considered a teaching staff member for purposes of salary, tenure and evaluation and to perform duties expressly reserved to school nurses.
>
> [C # 637-97 at 9 <http://www.state.nj.us/njded/legal/>.]

However, he relied upon the prior Commissioner's decision in *Old Bridge Township Education Association v. Board of Education of the Township of Old Bridge, Middlesex County*, Comm'r of Educ. # 621-97 (Nov. 26, 1997), *clarified*, State Bd. of Educ. # 101-97 (April 1, 1998) <http://www.state.nj.us/njded/legal/>, to rule that nothing can prevent a Board from determining for reasons of economy and efficiency that duly licensed health professionals may provide those nursing services that do not require educational certification.

> Additionally, so long as noncertificated nurses do not perform nursing functions requiring a certificate except as delegated by the school nurse, and so long as professionals practicing under authority of a license are supervised in accordance with any conditions specified by the terms of that license, there is nothing to prevent duly qualified persons from assisting certificated school nurses in the performance of duties reserved by law to such nurses.
>
> [*Id.* at 10.]

He concluded that

> nothing in the controlling statute would act to preclude a board from contracting for the services of *noncertificated* nurses, performing duties consistent with the dictates of *Old Bridge, supra.*
>
> [*Id.* at 10.]

The Commissioner deemed this to be a matter of managerial prerogative, limited only where the board's action conflicts with specific rights established under the school law. He then ordered the Dover Board of Education to

> review its assignments to determine whether the duties performed by the noncertificated nurses employed by contract conflict with duties specifically reserved for certificated nurses and to adjust its staffing as necessary.
>
> [*Id.* at 11.]

The State Board, in *Old Bridge*, clarified the Commissioner's decision to stress that

> duties which may be performed only by a staff member possessing certification as a school nurse, *N.J.A.C.* 6:11-11.7, may not be delegated to an individual who does not possess such certification.
>
> [SB # 101-97 <http://www.state.nj.us/njded/legal/>.]

Based upon the above, I **CONCLUDE** that Montclair can legally contract to have nurses performing duties not reserved for certificated nurses as long as the contract nurses are duly licensed and the duties are ones that are delegable under the education statutes and regulations. I **CONCLUDE** that such contracts are not in violation of *N.J.S.A.* 18A:40-1 and *N.J.S.A.* 18A:40-3.1.

Petitioners nowhere deny that DOH is able to provide the services of duly licensed, noncertificated nurses for itself in its own jurisdiction. *See also N.J.S.A.* 26:3-1, -19; *N.J.A.C.* 8:52-2.3(a), -7.8(a). The education laws and regulations require only that certain nursing functions that require certification be performed by certificated nurses. Other functions, not reserved for certificated nurses, may legally be performed by "duly qualified persons," such as the contract nurses provided by the DOH (*Dover, supra*, C # 637-97 at 10 <http://www.state.nj.us/njded/legal/>).

Consequently, as long as the nurses provided by the DOH render services to the District that are not restricted to certificated nurses and as long as the DOH is empowered to render the contracted services within its own jurisdiction, *N.J.S.A.* 40:8A-3, and can legally perform them for itself, *N.J.S.A.* 40:8A-5, I **CONCLUDE** that the contract between the Board and the DOH was not in violation of the Interlocal Services Act. *United Water Resources, supra*, 295 *N.J. Super.* 305.

I **FIND** no evidence in the contract between the Board and the DOH that some duties to be assumed by the contract nurses are restricted to certificated nurses. Petitioners' argument that there is overlap between items in the job description of a "school nurse" and the nursing services enumerated in the contract is not persuasive. Not all items listed in the job description are restricted duties. Screening for scoliosis may be performed by physical education teachers, *N.J.S.A.* 18A:40-4.3, and audiometric screening of students may be performed by other licensed medical and health care personnel, *N.J.S.A.* 18A:40-4.3; *N.J.A.C.* 6:29-5.1. Nothing precludes a contract nurse from carrying them out.

For all of the reasons mentioned above, I **CONCLUDE** that petitioners Palisits and Samuel have suffered no injury by virtue of the Board's action and they are entitled to no relief in this matter. The Board could legally abolish their positions as part of a reduction in force, and legally contract out those services that are not restricted to certificated nurses to the DOH.

With respect to petitioner Montclair Education Association, I **CONCLUDE** that it is not entitled to compel the Board to provide all health-related services in the school district through the employment of certificated nurses. I further **CONCLUDE** that the Association is only entitled to ensure for the future, if there is no change in the law, that contract nurses are not performing duties reserved to certificated nurses under the school laws and regulations.

Petitioners only raised the general issue that no school nursing duties could be contracted out and did not point to any specific duties assigned to contract nurses that should have been reserved for certificated nurses. In addition, the contracts in question were in effect for the 1996-97, 1997-98, and 1998-99 schools years and have already been performed. As a result, I **CONCLUDE** that no relief may be granted to the Association as a result of this appeal.

ORDER

Based upon the above, I **ORDER** that the motion of the Board for summary decision is hereby **GRANTED**. It is further **ORDERED** that the motion of petitioners for summary decision is hereby **DENIED**.

Since I **FIND** that this decision disposes of all matters in issue, it is **ORDERED** that the appeals of petitioners are hereby **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 30, 1999
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

July 2, 1999
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 15 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

md

JUL 15 1999 11:22 FR C&D 609 292 4333 TO 919736486124 P.02/02

MONTCLAIR EDUCATION ASSOCATION, on behalf of itself and the member named herein, MOIRA PALISITS,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY, DEPARTMENT OF HEALTH OF THE TOWNSHIP OF MONTCLAIR, AND THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY,	:	
RESPONDENTS.	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
CYNTHIA SAMUEL,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY, DEPARTMENT OF HEALTH OF THE TOWNSHIP OF MONTCLAIR, AND THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY,	:	
RESPONDENTS.	:	

The record of this consolidated matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions and the Board's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in rendering the within decision.

Upon careful and independent review of the record in this matter, the Commissioner determines to affirm in part, and modify in part, the Initial Decision of the Administrative Law Judge

(ALJ). Initially, the Commissioner notes that the parties stipulate that, "[f]or reasons of economy, the Board abolished two school nursing positions [belonging to Petitioners Palisits and Samuel] effective following June 30, 1997." (Joint Stipulation of Facts at paragraph 14) Thus, while they do not challenge the propriety of the RIF, petitioners do contend that the Board is without the legal authority to provide school health-related services through a contract with the Montclair Township Department of Health (DOH), which it established prior to the RIF, and has maintained since then. (*Id.*) They argue that *N.J.S.A.* 18A:40-3.1 mandates that the Board "employ and manage" its own school nurses, and, therefore, the contract between the Board and the DOH is unlawful. (Petitioners' Brief in Support of Motion for Summary Decision at p. 5) Petitioners further assert that the Interlocal Services Act, *N.J.S.A.* 40:8A-1 *et seq.*, "does not permit the DOH to provide to the Board services which it is otherwise unauthorized to provide to itself, namely school nursing services." (*Id.*)

With regard to the first argument, the Commissioner observes that *N.J.S.A.* 18A:40-3.1 does *not* mandate, as petitioners claim, that *all* nurses performing services in the District be *employees* of the Board. That statute provides, in pertinent part, that

> [e]very person employed as a school nurse, school nurse supervisor, head school nurse, chief school nurse or school nurse coordinator, or performing any school nursing service, in the public schools of this state shall be appointed by the board of education having charge of the school or schools in which the services are to be rendered and shall be under the direction of said board***. *N.J.S.A.* 18A:40-3.1.

This law has now been read to require each school district to employ at least one school nurse, who must be appropriately certified by the State Board of Examiners and who is considered a teaching staff member for purposes of salary, tenure and evaluation, to perform duties expressly reserved to school nurses, and to oblige a local board to employ a sufficient number of school nurses to ensure the adequate provision of the duties specifically reserved for certified school nurses. *Dover, supra*, at pp. 9, 10.

In *Old Bridge, supra*, the Commissioner held that while "school nursing services" must be provided by certificated school nurses, other nursing services in the school setting may be provided by any qualified person, licensed and supervised, where the duties so require, in accordance with nursing

law. *N.J.S.A.* 45:11-23. In *Dover*, the Commissioner found that although *school nurses* must be employees of the district, there is nothing in the controlling statute that would preclude a board from contracting for the services of *noncertificated* nurses, to perform other health-related services, consistent with the dictates of *Old Bridge, supra.*[1] *Dover, supra,* at p. 10. To the extent the parties weigh the effect of a recently enacted statute, *P.L.* 1999, *c.* 168, on the provision of health services in this matter, the Commissioner notes that this law is explicitly applicable only to persons "who are initially employed to provide nursing services on and *after the effective date of [the] act,"* which was July 1, 1999. (emphasis supplied) Therefore, this statute does not control the outcome of the present matter.

The Board herein has contracted with the DOH, a governmental agency, for nursing services. Each of the nurses identified in the Board's 1998-99 contract is fully licensed and registered in accordance with the guidelines set forth by the State of New Jersey Board of Nursing. (Joint Stipulation of Facts at paragraph 23) Accordingly, each of those contracted nurses may perform services *other than* "school nursing services." Additionally, although they may not perform school nursing functions requiring a standard certificate, as long as they are duly licensed professionals who are supervised in accordance with any conditions specified by the terms of that license, these contracted nurses may *assist* certificated school nurses in the performance of duties reserved by law to such nurses. *Dover, supra,* at p. 10; *Old Bridge, supra*, State Board of Education, April 1, 1998.

Further, the Board's 1998-99 contract with the DOH specifically states that the services to be provided by the contracted nurses will include, but not be limited to, the following: "1. Maintaining student health records. 2. Assisting with medical examination, including dental screening. 3. Conducting hearing screenings. 4. Conducting scoliosis screenings of pupils between the ages of 10 and 18." (*Id.* at Exhibit J-12) Given the provisions of the Board's contract with the DOH, as well as other documents on

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[1] "[W]here education law is silent on the provision of specific nursing services and support functions related to them, and such services do not otherwise require educational certification, there is nothing to prevent a board of education from duly determining, for reasons of economy or efficiency, that these nursing services will be provided by health professionals who hold the requisite license from, and are supervised in accordance with the requirements of, the Board of Nursing pursuant to *N.J.S.A.* 45:11-23 *et. seq.****" *(Old Bridge, supra*, at p. 14*)*

record which indicate an overlap in functions between the District's "school nurses" (Exhibit J-1) and the contracted nurses (Exhibit J-6), the strictures of *Old Bridge, supra*, bear repeating:

> [t]he duties expressly reserved to "school nurses" are recognized as "school nursing services" pursuant to *N.J.S.A.* 18A:40-3.1, and include lecturing to teachers on recognition and prevention of communicable disease and other health concerns (*N.J.S.A.* 18A:40-3; *N.J.A.C.* 6:29-1.2(b)1vi), maintaining pupil health records and assisting the medical inspector with physical examinations, including vision and hearing exams (*N.J.S.A.* 18A:40-4; *N.J.A.C.* 6:29-1.2(b)1i, 6:29-1.2(b)1iv, 6:29-2.1), examining pupils for the presence of scoliosis (18A:40-4.3; *N.J.A.C.* 6:29-1.2(b)1ii), recommending exclusion from school due to illness or exposure to disease (18A:40-7/8; *N.J.A.C.* 6:29-1.2(b)1v), reporting, receipt of reports and examinations in instances of suspected substance abuse (18A:40A-12, *N.J.A.C.* 6:29-6.5), vision screenings, health appraisals and various consultative functions with respect to evaluation for and provision of special education services (*N.J.A.C.* 6:28-3.2 *et seq.*, 6:28-11.3 *et seq.*), audiometric screening (*N.J.S.A.* 18A:40-4; *N.J.A.C.* 6:29-1.2(b)iii, 6:29-5.1), maintaining awareness of safe procedures for handling of body fluids (*N.J.A.C.* 6:29-2.5), accessing employee health records when permitted by the employee (*N.J.A.C.* 6:29-7.4), serving as liaison to the local board of health on issues relating to pregnancy and prenatal health (*N.J.A.C.* 8:52-5.3), administration of Snellen vision screenings for special learner's permits for obtaining a driver's license (*N.J.A.C.* 13:21-7.1 *et seq.*), testing for tuberculosis infection (*N.J.A.C.* 6:29-2.3), and completion or approval, as designated thereon, of health forms required to be submitted to the State. Additionally, where so assigned, the school nurse will provide instruction to students within the limitations of the school nurse endorsement (*N.J.S.A.* 18A:26-2; *N.J.A.C.* 6:11-11.7, 6:29-4.2).[2] *Old Bridge, supra,* at pp. 13, 14, emphasis added.

The within matter differs from the circumstances in *Dover, supra,* insofar as two of the nurses employed by the DOH hold a standard educational services certificate with a school nurse endorsement. (Joint Stipulation of Facts at paragraph 31) However, given the language of *N.J.S.A.* 18A:40-3.1, and the holding in *Dover*, those contracted nurses holding educational services certificates with endorsements as school nurses may *not* perform the above-delineated *school nurse* services. Nor may contract nurses holding county substitute's certificates substitute for certified school nurses; any such substitutes must be employed by the District.

[2]It is noted that noncertificated nurses may serve as resource persons for family life programs pursuant to *N.J.A.C.*6:29-4.2(h), but may not actually instruct pupils.

Therefore, because the Board is permitted to contract for nursing services within the limitations set forth by the *Dover* and *Old Bridge* decisions, having an agreement with the DOH is not, in itself, violative of applicable school law. However, the Board *may not* have noncertificated and/or certificated contracted nurses *independently performing functions reserved to the school nurse* and then simply have the school nurse review and approve the results; the role of noncertificated and contract nurses in such functions must be clearly limited to provision of *assistance*. *Old Bridge, supra,* at p. 16; *Dover, supra,* at pp. 10, 11.

With regard to petitioners' second argument, that the Interlocal Services Act permits local government agencies which share like responsibilities to provide joint services, but precludes a local agency which lacks experience and power in a particular field from providing those services to another local unit (Petitioners' Exceptions at p. 4), the Commissioner finds that so long as contract nurses are not providing *school nursing services* as set forth in *Old Bridge, supra,* and *Dover, supra*, there is nothing in the Act that would prevent local entities which are not school districts from providing other types of nursing services to a school district. Therefore, the Commissioner concurs with the ALJ that no violation of the Interlocal Services Act occurs as a result of the respondent Board's contracting with DOH consistent with the parameters of *Old Bridge, supra,* and *Dover, supra.*

Accordingly, the Commissioner affirms the Initial Decision of the ALJ for the reasons expressed therein as amplified above. However, although the Commissioner concurs with the ALJ that petitioners are entitled to no relief based on the within claim, the Commissioner does direct that the Board, to the extent that it may have a contract with DOH in place for the current school year, review such contract and its attendant job descriptions to ensure that the nursing duties performed pursuant to that contract do not conflict with duties specifically reserved for certificated school nurses employed by the District, *supra;* to make such revisions as may be necessary in these documents and in District staffing patterns; and, within 120 days of the date of this decision, to submit the results of its revisions to the Essex County Superintendent of Schools for review and approval. Finally, pursuant to *N.J.A.C.* 1:1-14.10(j), the Commissioner affirms the ALJ's Interlocutory Order of June 5, 1998, as modified in her

Initial Decision on page two, dismissing with prejudice these consolidated matters with respect to respondents Department of Health of the Township of Montclair, Essex County, and the Township of Montclair.[3] A copy of this decision shall be forwarded to the Essex County Superintendent of Schools.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[3] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

September 30, 1999
Date of Mailing, September 30, 1999

314-99

MARY MC ALEER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, teacher/guidance counselor, alleged the Board violated her tenure and seniority rights when it removed her from her guidance position and employed her full time as a teacher for the 1998-99 school year. Petitioner sought reinstatement with compensation.

The ALJ determined that petitioner was entitled to relief. The ALJ noted that adoption of the Board's position would be tantamount to not recognizing separate tenure rights under Educational Service Certificates and Instructional Certificates, a principle upheld in *Childs*. Citing *Kartan*, the ALJ stated even a partial diminution of tenured guidance service and its replacement with teaching service triggers the right to assert tenure. ALJ concluded that the Board's action assigning petitioner as a teacher during the 1998-99 school year violated her tenure rights as a guidance counselor. ALJ ordered the Board to credit petitioner with seniority as a guidance counselor for her teaching assignment during the 1998-99 school year and to provide her with a calculation of her seniority in that title at the current time.

Commissioner adopted findings and determination in Initial Decision as his own. Commissioner directed the Board to credit petitioner as a guidance counselor for the period of her teaching assignment during the 1998-99 school year.

October 1, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7879-98
AGENCY DKT. NO. 216-6/98

MARY MCALEER,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF BOONTON,

Respondent.

Louis P. Bucceri, Esq., for petitioner (Bucceri & Pincus, attorneys)

James S. Rothschild, Jr., Esq., for respondent (Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

Record Closed: July 7, 1999 Decided: August 13, 1999

BEFORE **DIANA C. SUKOVICH,** ALJ:

PROCEDURAL HISTORY

Mary McAleer (McAleer or petitioner) filed a petition with the New Jersey Department of Education (DOE) on June 29, 1998, seeking relief from the Board of Education of the Town of Boonton (Board or respondent). Respondent filed an answer on August 20, 1998, and the DOE transmitted the matter to the Office of Administrative Law on September 3, 1998 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to 13.

Telephone conferences were conducted on November 19, 1998 and March 2, 1999. The parties agreed that the matter could be resolved based upon stipulated facts and documents.

Stipulations and initial and reply briefs were filed in April and May 1999. The parties thereafter filed copies of subsequently issued decisions and supplemental letter memoranda. The record was closed on July 7, 1999, the date of receipt of the last document.

NATURE OF THE CASE

Petitioner is a tenured employee of respondent. Prior to the 1995/96 school year, she was assigned full-time as a teacher in the district's high school. (High School). During the 1995-96, 1996-97, and 1997-98 school years, she was assigned as both a teacher and guidance counselor at the High School and the district's middle school (Middle School) and elementary school (Elementary School). She was subsequently advised by respondent that she would be employed full-time as a teacher for the 1998-99 school year.

McAleer avered in her petition that she had achieved tenure as a guidance counselor in September 1997; respondent would employ less senior and non-tenured guidance counselors for the 1998-99 school year; and its action in "removing" her from her guidance position violated her tenure and seniority rights. (Petition, p.3.) McAleer requested that the Commissioner of the DOE (Commissioner) order that respondent "reinstate" her to a guidance position, commensurate with her tenure and seniority rights, effective September 1, 1998; retroactively compensate her for any salary, benefits, or emoluments lost to her by virtue of respondent's actions; and "acknowledge" petitioner's tenure as a guidance counselor and provide her with a list regarding her accumulated seniority. (*Ibid.*) [1] The issue, broadly, is whether petitioner has demonstrated, by a preponderance of the credible evidence, that she is entitled to the relief.

[1] McAleer's schedule was subsequently changed. She taught one class during the 1998-99 school year.

STIPULATIONS

The parties stipulated to the following facts:

1. Petitioner's employment history in respondent's district is as follows:

YEAR	POSITION	GRADES
1981-82	Full-time English Teacher	High School
1982-83	Full-time English Teacher	High School
1983-84	Full-time English Teacher	High School
1984-85	Full-time English Teacher	High School
1985-86	Full-time English Teacher	High School
1986-87	Full-time English Teacher	High School
1987-88	Full-time English Teacher	High School
1988-89	Full-time English Teacher	High School
1989-90	Full-time English Teacher	High School
1990-91	Full-time English Teacher	High School
1991-92	Full-time English Teacher	High School
1992-93	Full-time English Teacher	High School
1993-94	Full-time English Teacher	High School
1994-95	Full-time Social Studies Teacher	High School
1995-96	.2 Guidance Counselor	Middle School
	.8 History Teacher	High School
1996-97	.8 Guidance Counselor	Middle School
	.2 Guidance Counselor	Elementary School
1997-98	.8 Guidance Counselor	Middle School
	.2 Guidance Counselor	Elementary School
1998-99	Schedule as stated in Exhibit 1.	

2. Petitioner holds the following New Jersey education certificates and endorsements:

INSTRUCTIONAL:

English
Social Studies
Elementary

EDUCATIONAL SERVICES:

Student Personnel Services
Substance Awareness Coordinator

3. Throughout her employment, petitioner has held a valid certificate as to the work she has performed.

4. By letter of April 21, 1998, petitioner was informed that her employment as a Guidance Counselor would not be renewed for the 1998-99 school year.

5. By letter of May 4, 1998, petitioner was informed that she would be employed as a full-time teacher for 1998-99. Subsequently, petitioner was reassigned to her current schedule, including services as a Guidance Counselor and as a Teacher for 1998-99.

6. Johanne DeFilippo (DeFilippo) is an employee of the Board whose employment history in the district is as follows:

YEAR	POSITION	GRADES
1996-97	Part-time employee	.5 Guidance .4 Teacher
1997-98	Full-time employee	Guidance/Teacher
1998-99	Full-time employee	Guidance/Teacher

7. DeFilippo is certified as a Guidance Counselor and as a Teacher.

8. Exhibit 10 is a true copy of respondent's job description for High School Guidance Counselor. It was adopted as of October 30, 1984 and remains in present effect.

9. Exhibit 11 is a true copy of respondent's current job description for Primary School Guidance Counselor.

10. Exhibit 12 is an historical summary of teaching/guidance assignments in the district as to individuals employed to perform guidance work during the 1997-98 and/or 1998-99 school years.

11. In the Spring of 1998, the Board's budget was overwhelmingly defeated by the voters of Boonton. A total of $1,051,578 was then cut from the $9,691,999 tax levy. Shortly thereafter, Richard Kaplan (Kaplan) began his tenure as Superintendent of Schools. Kaplan, with the approval of the Board, made the final decision as to how to utilize the Board's guidance counselors. His reasoning is set forth in Certifications in Lieu of Affidavit dated September 29, 1998 and April 20, 1999.

12. Petitioner suffered no loss in salary as a result of her mixed guidance/teaching assignment for 1998-99 and claims no monetary damages.

FINDINGS OF FACT

Petitioner did not stipulate to the accuracy of the contents of Kaplan's certifications. However, there is nothing in the record discrediting Kaplan's certifications. I therefore accept them at face value.

Based upon a review of the entire record, I **FIND** the following to be additional facts.

The defeated tax levy amount for respondent's budget for the 1998-99 school year was $9,681,999. That amount was reduced by the Town Alderman to $8,640,421, resulting in a reduction of $1,051,578, 10.8%, of the tax levy amount.

The percentage of the $1,051,578 reduction, compared to the defeated total general fund budget, without grant revenue included, constituted a 7.8% reduction. The percentage of the pertinent reduction compared to the defeated total operating budget, including grant revenue, constituted a 7.5% reduction.

Kaplan assumed the position of respondent's Superintendent of Schools approximately seven months prior to September 1998. At that time, he considered questions regarding organization of respondent's educational services during the 1998-99 school year, because of a "financial crisis", *i.e.*, a "loss" of the Board's budget and a subsequent decrease of more than $1 million in the 1998-99 school year operating budget (Kaplan's Certification, p.2.) Kaplan's goal was to insure " . . . that the necessary programs and services offered our students district-wide should not be compromised." (*Ibid.*)

Kaplan recommended that all guidance counselors also teach. Such was consistent with past practices in the district as early as 1960. Kaplan's

recommendation reflected his beliefs that such a system is efficient and also results in the benefits of "direct interaction between guidance counselors and pupils." (*Ibid.*)

Respondent's entire staff was reduced in force; the Board utilized and paid less staff members during the 1998-99 school year than it did during the 1997-98 school year. More specifically, respondent utilized one less guidance counselor, "Mr. Schleinger". (Shleinger). (Kaplan's Supplemental Certification, p.1.)

If guidance counselors had not been required to teach during the 1998-99 school year, teachers already on staff would have had to teach an additional period, at a cost of approximately $2500 per period. Alternatively, the Board would have had to hire a full-time teacher, at a total cost, including benefits, of approximately $40,000 to $45,000. A requirement that guidance counselors also teach courses was " . . . the least costly alternative." (*Id.* at 2.)

Every guidance counselor in respondent's district, including petitioner, serves simultaneously as a teacher and counselor. Seven individuals were assigned to guidance during the 1997-98 school year. They served a total of 33 years as guidance counselors/teachers. Most of those years accrued after they had achieved tenure.

However, guidance counselors have not always simultaneously taught courses. Employee "Branch" was exclusively assigned to guidance duties during the periods 1966-1973 and 1982 to the current time; Schleinger was exclusively assigned to guidance duties from 1989 until 1998; employee "Krouse" performed only guidance functions from 1989 until 1992; employee "Kacur" served as a guidance counselor exclusively from 1991 to 1998; and petitioner served exclusively as a guidance counselor from 1996 through 1998. (Exh. 12.)

The April 21, 1998 letter was sent to petitioner by Maryann C. Peifly, then respondent's interim Superintendent of Schools. The letter advised McAleer that she would not be "recommended for renewal for the 1998-1999 School Year, as a Guidance

Counselor" and informed her of her rights pursuant to *N.J.S.A.* 18A:27-3.2 and 4.1 (Exh. 6.) The May 4, 1998 letter, from Peifly, read as follows:

> The Boonton Board of Education recognizes its obligation to maintain certain educational standards to meet the needs of the pupils.
>
> The Board has requested the best utilization of certified staff, therefore you will be placed back in the classroom sector. (Exh. 7.)

During the 1998-99 school year, petitioner, on an "A Day", was assigned, during all four "blocks", as a guidance counselor; and on a "B Day", to three "blocks" as a guidance counselor and one "block" as a Social Studies teacher. (Exh. 1.) Such is the schedule to which she was subsequently reassigned during the school year.

The job description for a High School Guidance Counselor in respondent's district requires a State Student Personnel Services Certificate. The stated major duties and responsibilities include the performance of other duties which may be within the scope of the individual's employment and certifications as may be assigned by supervisors. The job description for a Primary School Guidance Counselor requires a Masters Degree in Student Personnel Services.

DISCUSSION

The Commissioner of the DOE (Commissioner) generally has jurisdiction to hear and determine all controversies and disputes arising under the school laws. *N.J.S.A.* 18A:6-9 (Supp. 1999).

No teaching staff member shall be employed in the public schools unless he/she is the holder of a valid certificate. *N.J.S.A.* 18A:26-2. The requirement of certification applies to any individual employed by a local board of education to perform duties that are regulated through certification regulations. *N.J.A.C.* 6:11-3.1(a). Every newly employed or reassigned teaching staff member shall have an appropriate certificate

before such member assumes responsibility for the performance of regulated duties. *Id.* at § (b).

Applicable regulations provide for three types of regular certificates; Instructional, Administrative, and Educational Services. *Id.* at §2.3. A standard certificate is a permanent certificate issued to candidates who have met all requirements for certification. *Id.* at §4.1. Teaching staff members holding Educational Services and/or Instructional certifications are authorized and qualified to serve in assignments and positions for which they hold the requisite endorsements. A teaching staff member asserting a tenure right under a certification must obtain the pertinent endorsement. *Ellicott v. Bd. of Educ.*, 251 *N.J. Super.* 342 (App. Div. 1991).

The services of teaching staff members, as well as other employees in positions requiring appropriate certificates issued by the State Board of Examiners, shall be under tenure during good behavior and efficiency. *N.J.S.A.* 18A:28-5 (Supp. 1999). Tenure attaches after employment in a district by a local board for three consecutive calendar years, or any shorter period which may be affixed by the employing board for such purpose; three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or the equivalent of more than three academic years within a period of any four consecutive years. *Ibid.* All teaching staff members who work in positions for which a certificate is required, who hold valid certificates, and who have worked the required number of years are eligible for tenure unless they fall within an explicit statutory exception. *Bednar v. Westwood Bd. of Ed.*, 221 *N.J. Super.* 239 (App. Div. 1987), *certif. denied*, 110 *N.J.* 512 (1988) (*Bednar*). *Spiewak v. Rutherford Bd. of Ed.*, 90 *N.J.* 63 (1982). (*Spiewak).* Even individuals reimbursed on an hourly basis are afforded tenure pursuant to *N.J.S.A.* 18A:28-5. *Spiewak, supra.*

Teaching staff members having tenure shall not be dismissed nor reduced in compensation except for inefficiency, incapacity, unbecoming conduct, or other good cause. *N.J.S.A.* 18A:28-5 (Supp. 1999). However, a local board of education can reduce the number of teaching staff members employed in a district whenever, in its

judgment, it is advisable to abolish such positions for reasons of economy, a reduction in the number of pupils or a change in the administrative or supervisory organization of the district, or other good cause. *N.J.S.A.* 18A:28-9. Any such reduction in force (RIF) shall be made on the basis of seniority, *Id.* at § 10, which shall be determined by the local board of education, *Id.* at § 11.

Seniority is determined according to the number of academic or calendar years of employment, or a fraction thereof, in a school district in specific categories. *N.J.A.C.* 6:3-5.1(b). Full recognition shall be given to previous years of service within a district. *Id.* at § (c). Whenever a person holds employment simultaneously under two or more subject area endorsements, or in two or more categories, seniority shall be counted in all subject area endorsements and categories in which he/she is or has been employed. For purposes of calculating seniority entitlement, there are no distinctions between academic and calendar years. *Id.* at § (f).

However, seniority cannot limit a tenured employee's rights over non-tenured individuals. Seniority does not create employment rights for non-tenured employees and cannot justify retaining a non-tenured teacher in a position within the certificate of a dismissed tenured teacher. Seniority does not create employment rights. *Bednar, supra.* A tenured teacher seeking reinstatement within the endorsement of his/her certificate is entitled to preference in a RIF vis-à-vis a non-tenured applicant with the same certification. *Capodilupo v. W. Orange Tp. Ed. Bd.*, 218 *N.J. Super.* 510 (App. Div. 1987), *certif. denied*, 109 *N.J.* 514 (1987) (*Capodilupo*).

An individual dismissed as a result of a RIF shall remain on a preferred eligibility list in the order of seniority for reemployment whenever a vacancy occurs in a position for which he/she is qualified. Such individual shall be reemployed only if and when such vacancy occurs. In determining seniority and computing length of service for reemployment, full recognition shall be given to prior years of service. *N.J.S.A.* 18A:28-12. (Supp. 1999). A tenured individual has the ultimate burden, when contesting an action by a board of education, of demonstrating that his/her seniority rights were violated and that he/she suffered harm so as to entitle him/her to redress. *James*

Parker and Joseph Pellegrino v. Bd. of Ed. of the Matawan-Aberdeen Regional School Dist., 1990 *S.L.D.*, 778.

Whenever an individual's particular employment is abolished in a category, he/she shall be given that employment in the same category to which he/she is entitled by seniority. *N.J.A.C.* 6:3-5.1(I). If the individual has insufficient seniority for employment in the same category, he/she shall revert to the category in which employment was held prior to employment in the same category and shall be placed, and remain, upon a preferred eligibility list of the category from which he/she reverted until a vacancy occurs in such category to which the individual's seniority entitles him/her. (*Ibid.*) *See also*, *N.J.A.C.* 6:3-5.1(j) & (k).

Although tenure and seniority rights are protected by statute, local boards of education also have managerial discretion regarding the assignment of staff members. A local board of education can appoint, transfer, or remove a certificated or non-certificated employee, or renew the employment contract of a certificated or non-certificated employee, upon the recommendation of the chief school administrator and by a recorded roll-call majority vote of the full membership of the board. The board shall not withhold its approval because of "arbitrary and capricious reasons". *N.J.S.A.* 18A:27-4.1(a) & (b). (Supp. 1999). A teaching staff member receiving notice that a teaching contract for the next school year shall not be offered may, within fifteen days thereafter, request a written statement of the reasons for such non-employment. Such statement shall be provided within thirty days after the request. *N.J.S.A.* 18A:27-3.2.

Petitioner argues that in the absence of a "legitimate seniority-based" RIF, she was entitled to remain as a full-time Guidance Counselor. (Initial brief, p.3.) McAleer also argues, more specifically, that the fact that respondent continued to employ DeFilippo, a non-tenured Guidance Counselor, for the 1998-99 school year, demonstrates that there was guidance work being performed by a less senior individual, which work could have been reassigned to McAleer, instead of a teaching assignment. Respondent argues that *N.J.S.A.* 18A:28-5 does not apply when a teaching staff member is neither reduced in compensation nor dismissed. The Board

characterizes the current case as a "direct attack" on the ability of public schools to "efficiently operate." (Initial brief, p.4.)

The Commissioner has previously held that seniority only applies to certain rights of tenured personnel and has meaning only when a RIF is necessary. *Philip Howley and Dewey Bookhold v. Ewing Twp. Bd. of Ed.*, 1982 *S.L.D.* 1328 *aff'd* 1983 *S.L.D.* 1954 (Howley); *Mueller v. Hunterdon Central Regional High School Dist. Bd. of Ed.*, 93 *N.J.A.R.* 2d. (Vol. 4A) (419) Dept. of Ed. (*Mueller*). Respondent relies, in that respect in part, on the Appellate Division's decision in *Stegmann v. Board of Education of the Twp. of Union*, 1980 *S.L.D.* 303 (App. Div. 1980) 1980 *S.L.D.* 307 (Comm'r 1980); 1980 *S.L.D.* 309 (St. Bd. 1980); 1981 *S.L.D.* 1499 (App. Div. 1981), *certif. den.* 89 *N.J.* 437 (1982) (*Stegmann*). Respondent also cites *Dallmeyer v. Union Board of Education*, 93 *N.J.A.R.* 2d (EDU 125) (1992) (*Dallmeyer*) and *Gargano v. Union Twp. Board of Education*, 93 *N.J.A.R.* 2d (EDU 670) (1993) (*Gargano*). The Board argues that those cases, consistent with *Stegmann*, hold that *N.J.S.A.* 18A:28-5 does not apply when a teaching staff member's compensation is not reduced and he/she is not dismissed.

Stegmann had been properly certified as a Teacher of Industrial Arts since July 1967; and as a Coordinator of Cooperative Industrial Education (CIE), since May 1973. He was employed continuously by the local board as a Teacher of Industrial Arts from September 1997; and as a CIE Coordinator, from September 1974 through June 1979. No additional compensation was associated with his responsibilities and assignment as CIE Coordinator. The position of CIE Coordinator continued to be an existing one in the school district and continued to exist subsequent to petitioner's transfer. Stegmann alleged that he was improperly transferred from the position of CIE Coordinator to a teacher of Industrial Arts and also argued that he had tenure in his former position. The CIE Coordinator position remained an existing position. 1980 *S.L.D.* at 303-304.

The presiding Administrative Law Judge (ALJ), finding that Stegmann had tenure as Coordinator of CIE, concluded that, although financial security was not at issue, ". . . the protection of rank or status of a tenured professional employee . . ." had to be

considered pursuant to applicable statutory provisions. The judge concluded that Stegmann was improperly transferred from his position as CIE Coordinator because he " . . . was stripped of his responsibilities to coordinate the program of Cooperative Industrial Education by his transfer from his position that carried with it the status of one which required a special certificate." *Id.* at 306. The Commissioner affirmed the ALJ's decision; and the State Board of Education (State Board), that of the Commissioner. *Id* at 307-309.

However, the Appellate Division reversed the State Board's holding. The court held that the transfer of Stegmann was not a dismissal nor a reduction in compensation because it resulted in no change in his compensation. The transfer therefore did not violate *N.J.S.A.* 18A:28-5. 1981 *S.L.D.* 1499 (App. Div. 1981), *certif. denied* 89 *N.J.* 439.

Dallmeyer was a tenured employee of the local board of education, having been employed by it since 1967. She was certified as a teacher of English (grades 7 through 12) and Speech (grades K through 12) and held Supervisor's and Principal's certificates. Dallmeyer had been employed as a Supervisor of English for grades 10 through 12, exclusively, since the 1982-83 school year, and she received her Supervisor's Certificate during the prior school year. In June 1991, Dallmeyer was advised that she would teach two English classes during the next school year. In early September 1991, her assignment was changed. Dallmeyer was required to teach two English classes and to supervise all English teachers for grades 9 through 12. The supervisor assignment increased the number of teachers Dallmeyer supervised because of a reorganization of the local high school to also include grade 9. Dallmeyer was given the choice of teaching two classes of high school English or proctoring an SAT review program, in addition to supervising English at the high school for grades 9 through 12. No other supervisor was added to the high school English staff. Another employee of the local district, Barbara Lombardi, had six years seniority as a supervisor as of the 1991-92 school year; petitioner had ten years of seniority as a supervisor. Lombardi, in addition to other supervisors, was not given a teaching assignment in the 1991-92 academic year. (*Dallmeyer* at 126.)

Dallmeyer initially claimed a violation of her seniority and tenure rights pursuant to *N.J.S.A.* 18A:28-1 to 14. However, it was subsequently determined that the case was not a "classic seniority case" because no RIF occurred. Dallmeyer argued that it was inequitable, even considering the local school board's prerogative to make assignments, for Lombardi, who had less seniority, to not have been the one assigned to teach the two classes. *Id.* at 127.

The ALJ concluded that Dallmeyer's tenure and seniority rights had not been violated and that there was no equitable basis for relief. The ALJ set forth her reasoning in that regard with specificity:

> . . . The proposition standing alone without a RIF or other violation of seniority or tenure rights may have some appeal on a purely human level. Notwithstanding this, however, the logic of it would make assignment of supervisors to teaching positions dependent solely and exclusively on the amount of seniority which they possessed and not upon considerations such as ease and convenience in delivering services as well as continuity of program and other integral facts which go into a determination of whom should be assigned to what appropriate task. This of course may not extend beyond those situations where the individual is asked to perform in a capacity which may be assigned to them rightfully under their contract. In this case it is clear that the petitioner was not treated in a manner inferior to that of Lombardi but in a manner different from that of Lombardi. That difference is credibly accounted for by the considerations which Bergen enunciated at the time of the hearing. While the two individuals' certificates made them interchangeable for this assignment their physical location as well as their responsibilities did not make them identical. A good faith determination was made that it would be most useful to assign the teaching positions to Dallmeyer based upon all the facts and circumstances.
>
> It is clear that no specific violation of the petitioner's seniority and tenure rights have occurred in this case by the respondent. It is also clear that while petitioner wishes she were extended the courtesy of having been given a choice of the assignments offered, or the position of Lombardi in the alternative, there is no statutory obligation upon the respondent to do this. Beyond the question of whether or not a statutory obligation existed comes the question of equity. In this case the petitioner was not treated in a manner inferior to that of an identically situated teacher with less seniority, and therefore no inequity is

> found to exist. While Dallmeyer's reaction to being assigned the teaching classes instead of someone with less seniority is understandable it is within managerial prerogative to do so and it was done in good faith by the respondent. *Ibid.*

The Commissioner adopted the ALJ's findings and conclusions. *Id.* at 127-128.

Gargano involved a similar situation. Gargano had initially been employed by the local school district in 1959 as a Mathematics Teacher. The next year, he became a Department Supervisor of Mathematics and served as a Supervisor/Teacher until March 1988, when he was appointed as 'Supervisor of Mathematics, grades K-9.' He thereby became responsible, for the first time, for supervising mathematics teachers in the district's two junior high schools. Previously, he had been Department Supervisor for only one school. Gargano had no teaching assignments in addition to his supervisory duties during the 1988-89 and 1989-90 school years. In early June 1990, he was advised that he would be assigned three daily teaching periods, in addition to his supervisory duties, for the next school year. Except for the 1988-89 and 1989-90 school years, Gargano previously had one or two teaching periods, in addition to his supervisory duties, but never three. Gargano alleged that as a tenured Supervisor of Mathematics employed by the district for more than thirty years, his assignment in the 1990-91 school year to teach three mathematics classes daily, in addition to his supervisory responsibilities in two junior high schools, violated his seniority rights as a tenured Supervisor and/or was arbitrary, capricious and unreasonable. *Gargano* at 671.

Citing *Dallmeyer*, the ALJ held that the action in question regarding Gargano for the 1990-91 school year was not a RIF in the 'classic', "or any other sense", because Gargano retained his employment for that school year at his full rate of pay and because he also received full seniority credit for that service. *Id.* at 672. Relying in part on *Dallmeyer,* as well as the principle that assignment of teaching staff members is a matter traditionally vested in the managerial discretion of boards of education, the ALJ also held that the local board's determination to assign Gargano to three teaching periods, in addition to his supervisory duties, was not 'unfair', and therefore not

arbitrary, capricious, or unreasonable. *Ibid.* The ALJ concluded that no cause of action existed and dismissed Gargano's petition. The Commissioner adopted the ALJ's findings and conclusions. *Ibid.*

Edward Carpenito v. Board of Education of the Borough of Rumson, A-3731-973, (*Carpenito*) addressed the issue of a tenured teacher's seniority and tenure rights when a local board of education hires a non-tenured teacher to fill a position previously held by the tenured teacher before the position was abolished. Carpenito was a tenured teaching staff member employed by the local board of education since January 22, 1974. He had an Instructional Certificate with endorsements to hold a position as a principal and to teach English, Social Studies, and Sciences from kindergarten through grade twelve. In the 1981-86 school years, Carpenito taught Social Studies and Computers for grades six through eight. In the 1987-1993 school years, he taught seventh grade Social Studies. Carpenito also taught English in the 1989-90 school year and Health in the 1992-93 school year. In the 1987-1993 school years, he taught seventh grade Social Studies. Prior to commencement of the 1993-94 school year, his seventh grade Social Studies position was eliminated because of declining enrollment. Carpenito was assigned to teach Computer Applications to seventh and eighth grade students, in addition to Health and Basic Skills courses, on a full-time basis during the 1993-94 school years. During the 1994-95 and 1995-96 school years, Carpenito was assigned to teach Computer Applications to grades four through eight and a Basic Skills course. He suffered no loss of salary nor reduction of "tangible employment benefits". In April 1995, the board posted a number of positions, including a reinstated seventh-grade Social Studies teaching position, for which Carpenito applied. In May 1995, a non-tenured teacher from outside the district was appointed to the position. Carpenito alleged that his seniority rights had been violated when the board failed to assign him to the reinstated Social Studies teaching position. *Carpenito* at 2.

The Commissioner held that because Carpenito's employment was not terminated, he did not suffer a reduction in salary, and because he was transferred to a teaching position for which he was properly certified, a RIF did not occur and seniority

regulations pursuant to *N.J.S.A.* 18A:28-12 were not implicated. The Commissioner found that the board had acted pursuant to "managerial prerogatives" to transfer teaching staff members and that Carpenito had failed to establish that the transfer was "otherwise improper." *Ibid.*

On appeal by Carpenito to the State Board, the State Board's Legal Committee (Committee) issued a decision initially disagreeing with the Commissioner's decision that Carpenito had not been subject to a RIF but agreeing with the Commissioner's ultimate determination to dismiss the petition. The Committee concluded that Carpenito was not entitled to the re-created position vis-à-vis the non-tenured teacher because, even in the absence of a RIF, the local board could have reassigned him without his consent from his Social Studies assignment to any other teaching assignment within the scope of his Instructional Certificate. The Committee subsequently recommended that the Commissioner's decision be reversed, reasoning that the local board could not appoint a tenured teacher to the position who had less seniority that Carpenito in the applicable category and could not "delete" Carpenito's tenure rights by affording a non-tenured teacher's 'seniority' in the position. (*Ibid.*)

The State Board agreed with the Committee's revised report and reversed the decision of the Commissioner, directing the local board to reassign Carpenito to the position of seventh-grade Social Studies teacher. The State Board determined that a RIF occurred when the local board eliminated Carpenito's seventh-grade Social Studies teaching position prior to the 1993-94 school year. The State Board noted that the case was not one in which the local board 'simply transferred [petitioner] from one teaching position to another teaching position . . .' but that the board acted to eliminate one Social Studies teacher, pursuant to *N.J.S.A.* 18A:28-9, prior to the commencement of the school year.' The fact that Carpenito's employment was ultimately continued in another full-time assignment without a reduction in compensation did not "nullify" the action, although it might affect the relief to which he was entitled. *Id.* at 2-3. The State Board concluded that the local board's failure to place Carpenito on a preferred eligibility list in the order of seniority and reassign him to the reinstated Social Studies position violated his tenure and seniority rights and that the board could not appoint a

tenured teacher, who had less seniority than Carpenito, to a position in the applicable category. *Id.* at 3.

The Appellate Division held that, in the absence of allegations of bad faith, a tenured teacher's security rights are not "triggered" when a board of education abolishes the teacher's position and assigns him/her to teach different subjects within his or her certification without reducing the teacher's salary or other employment benefits. *Ibid.* Noting that a transfer refers to a Board's right to assign a teacher to a position within the scope of his/her certification, the court held that a tenured teacher may be involuntarily transferred to another position within his or her certification if there is no loss of salary nor other reduction in employment " . . . and the teacher is not singled out for the transfer on a prohibited basis." *Id.* at 3-4. (citations omitted). The transfer of Carpenito to teach Computer Applications was within the scope of his certification. *Id.* at 4.

The court also held that seniority is applicable only if tenure rights are reduced by way of a dismissal or reduction in "tangible employment benefits." *Ibid.* The reason for the elimination of Carpenito's position was declining enrollment, a permissible one, pursuant to applicable statutory provisions. *Ibid.* The court referenced, in that respect, *N.J.A.C.* 6:3-5.1. *Id.* at 5. The court determined that the triggering of the seniority regulations should occur when the tenured teaching staff member is transferred to another position and also suffers a loss of tangible employment benefits, for example, a loss of salary or reduction in work hours, even if the actual number of teachers employed in the district is not reduced. In addition, the triggering event for preference based on seniority is a dismissal or transfer with a loss of a tangible employment benefits. *Ibid.*

The court distinguished the facts in *Carpenito* from those of *Bednar* and *Capodilupo,* noting that in those cases, tenured teachers suffered a loss of employment as a result of a RIF. Carpenito's seniority, relative to non-tenured or tenured employees teaching Social Studies, was irrelevant because his employment was

continued in other subjects within the scope of his certification. (*Id.* at 5-6.) The court noted in that respect, in part, that:

> Seniority rights are not triggered when a school board merely transfers or assigns its tenured teaching staff members to other positions within the teacher's appropriate certification. *Id.* at 6.

The local board's decision, otherwise lawful, should not be overturned because of the order in which the district exercised its authority. (*Ibid.*)

As the parties recognize, there is conflicting authority on the issue. Madeline Childs had been employed by the local board of education since November 1971. She worked as a teacher and was tenured as such. In 1974, Childs qualified for, and obtained, a Student Personnel Services certificate entitling her to be appointed as a guidance counselor. She was employed by the board for five years as a guidance counselor, with no teaching duties, until May 1979, when she was transferred to a teaching position. The transfer created a vacancy in the guidance counselor position, which the board sought to fill with another counselor. *Madeline Childs v. Union Twp. Board of Education*, 1982 *S.L.D.* 1456 (App. Div. 1082), *certif. denied* 91 *N.J.* 550 (1982) (*Childs*).

The presiding ALJ held that the transfer constituted a "demotion" to a job of lesser tank, which could not be accomplished without Childs' consent, a RIF, or a tenure hearing. The Commissioner affirmed the initial decision, but rejected the view that the position of guidance counselor was of superior rank to that of teacher. The State Board affirmed the Commissioner's decision. *Id.* at 1456-1457.

The Appellate Division preliminarily found that Childs had gained tenure as a guidance counselor. *Id.* at 457. Referencing *N.J.S.A.* 18A:28-6, the court rejected the board's arguments that Childs had not been 'dismissed' because she was still employed as a teacher, that the board had a right to 'transfer' her pursuant to *N.J.S.A.* 18A:25-1, and that Childs could "only complain if she were 'dismissed' or 'reduced in

compensation.' " *Id.* at 1458. The court held that Childs had attained tenure as a guidance counselor and could not, without proof of the grounds set forth in *N.J.S.A.* 18A:28-5 and 6-10, or *N.J.S.A.* 18A:28-9, be unilaterally dismissed from that position without a hearing required by *N.J.S.A.* 18A:6-10. *Id.* at 1459. In the circumstances, it was "pure sophistry" to argue that Childs' 'transfer' was " . . . anything less than dismissal from her clearly tenured position. Such a view would render her statutory tenure in her 'new position' meaningless." *Id.* at 1460. The court noted in that respect:

> . . . The applicable legislation, particularly N.J.S.A. 18A:28-6 contemplates that a tenured 'teaching staff member,' or one eligible for tenure, may be transferred to a different certificated position and, upon meeting the statutory requirements, obtain tenure in that new position. What is important is that the certifications for teachers and for guidance counselors are based upon different qualifications.* This case does not present . . . a transfer back to a position where 'the certification required is the same'. . . Childs earned her right to tenure in her separately certified position as guidance counselor. She cannot, without proper statutory grounds established at a statutory hearing, be removed or dismissed from that position. *Id.* at 1461 (citations and footnote omitted).

In reaching that decision, the court rejected arguments by the board relying on the Appellate Division's decision in *Stegmann*. The court noted that the decision in *Stegmann* did not reference the fact that Stegmann was separately certificated as a Coordinator of CIE and had held that position for five years prior to his termination and did not discuss the effect of *N.J.S.A.* 18A:28-6. The court in *Childs* held that to the extent that *Stegmann* might be regarded as espousing a view contrary to the decision in *Childs*, the court was "compelled to disagree" with the determination in *Stegmann*. *Id* at 1461. (See footnote)

The Commissioner subsequently applied *Childs* in *Ayoub v. South Plainfield Board of Ed.*, 1988 *S.L.D.*, 941 (*Ayoub*). As of January 1, 1987, Ayoub held the position of Teacher of Industrial Education and the title of CIE at the local high school. He had held the position of teacher since 1956 and the position of Teacher of Industrial Arts since 1966 and had worked as CIE Coordinator since 1972. He received a

permanent Teacher's Certification in Industrial Arts in 1970 and a certification as CIE Coordinator in 1972. He was a tenured teaching staff member. In June 1987, Ayoub was notified by the high school principal that he would not be assigned as CIE Coordinator during the 1987-88 school year but would be assigned as Teacher of Industrial Arts. Ayoub's pay scale was not altered. The board did not adopt a resolution regarding the change of assignment. In addition, Ayoub's prior annual assignment to the position of CIE Coordinator was not made pursuant to a resolution of the local board each year in question, but was pursuant to a letter to him each year from the Assistant Superintendent of Personnel. The only exception was that Ayoub received a Special Service Contract for the summers of 1972, 1973 and 1974. Since 1972, the high school principal had designated certain individuals as CIE Coordinators. The number of coordinators changed during those school years. From January 1 to June 1, 1987 there were two. As of June 1, 1987, two staff members, one of whom was Ayoub, were employed as CIE Coordinators at the high school; the other was a Dierdre Falato. Subsequent to the reassignments announced in June 1987, there was one CIE Coordinator at the high school, Falato. Falato received her certification as a CIE Coordinator in 1979 and had been hired by the local board in 1987 in that title. As of June 1987, there was only one available teaching staff member at the high school qualified to teach one of the course offerings in Industrial Arts, *i.e.*, Ayoub. *Ayoub* at 942-943.

Ayoub argued that the local board violated his tenure rights as a CIE Coordinator when it involuntarily transferred him to the position of Teacher of Industrial Arts, relying, in part, on *Childs*. *Id.* at 944. The board of education argued that Ayoub did not have tenure as a CIE Coordinator and that if he did, his assignment as a teacher did not violate his tenured status under *Stegmann*. *Id.* at 944.

As a preliminary matter, the ALJ determined that Ayoub had not acquired tenure as a CIE Coordinator. The ALJ therefore held that his assignment as a teacher for the 1987-88 school year was proper. *Id.* at 946.

The Commissioner reversed the ALJ's determination that Ayoub had not acquired tenure as a CIE Coordinator. More importantly for this case, the Commissioner also held:

> In light of the above case law, the Commissioner rejects the Board's argument that even if petitioner were tenured as CIE Coordinator, a reassignment to full-time duties as teacher was appropriate based on Stegmann v. Bd. of Ed. of the Twp. of Union . . . The Appellate Court in Childs, supra, expressly disagreed with the court's decision in Stegmann and since that time the Commissioner, State Board and the courts have consistently relied upon Childs as appropriate law on the issue. *Id.* at 950 (citation omitted.)

The Commissioner therefore held that Ayoub's removal from his tenured CIE Coordinator position was improper and that he should be reinstated "forthwith" to that position. *Id.* at 951.

McAleer relies, in part, on the State Board's decision in a more recent case, *Kartan v. Board of Education of the Borough of North Arlington*, 97 *N.J.A.R.* 2d (EDU 435) 1997 (*Kartan*). Kartan had been employed by the local district for 32 years prior to the 1995-96 school year, having commenced employment as a Teacher of Mathematics, for which he was properly certified. Kartan was employed as a full-time mathematics teacher for the 1963-64 through 1971-72 and the 1972-1973 school years and in a guidance position for the 1972-73 school year. He gained tenure in a teaching position. He was employed for the 1977-78 through 1994-95 school years as a full-time high school guidance counselor, for which he was properly certified. Kartan gained tenure as a guidance counselor. The local board, in June 1995, adopted a resolution approving staff transfers for the 1995-96 school year, including the assignment of Kartan to the middle school for one period daily as a mathematics teacher. The board did not abolish any guidance counselor positions. In June 1996, the local board acted to transfer Kartan to the middle school to teach mathematics for the 1996-97 school year. The board abolished an elementary guidance counselor position. Kartan's compensation was not reduced. He was to teach mathematics one

period daily. Kartan's transfer resulted from a consolidation of the sixth, seventh and eighth grades at a newly expanded middle school, a change which took two years of planning. Kartan's total number of working hours were not changed. Financial constraints caused the board to reduce teaching staff in the 1996-97 school year. *Kartan*, at 436-437. Kartan argued that his assignment to teach one class of mathematics daily violated his tenure rights as a guidance counselor acquired under his Educational Services Certificate. *Id.* at 436.

The ALJ concluded that Kartan's tenure rights were not violated, holding that the board properly exercised its managerial prerogative. *Id.* at 437. Referencing *N.J.S.A.* 18A:25-1 and 11-1(d), the ALJ noted that " . . . transfers and reassignments are not mandatorily negotiable terms and conditions of employment." *Id.* at 437. The ALJ stressed that Kartan was not 'dismissed' from his guidance counselor position "in any meaningful sense" and did not incur a reduction in compensation. To the contrary, the local board exercised "its inherent managerial prerogative to utilize its existing staff most efficiently and effectively." It was " . . . based on valid educational reasons, notably curriculum needs and staffing conflicts in the district. It was not designed as a subterfuge to circumvent the tenure law . . . nor did it have the incidental effect of eroding 'tenure rights which appear plain on the face of the statute . . .' " *Id.* at 438 (citations omitted).

The Commissioner affirmed the ALJ's decision, with clarification. The Commissioner held that Kartan's assignment to teach one algebra period per day, while maintaining his position as a guidance counselor, did not constitute a 'transfer' from one position to another in the manner contemplated by the school laws. The Commissioner noted in that respect that Kartan had suffered no loss in status or pay. The board's action, "notwithstanding the choice of wording in its resolution, constituted nothing more than a revision of petitioner's duties to require that he teach one class period per day." Citing *Gargano*, the Commissioner also noted that the assignment was "a good faith exercise of the Board's managerial discretion and resulted in no loss to petitioner." The Commissioner therefore concluded that Kartan's tenure rights pursuant to *N.J.S.A.* 18A:6-10 were not violated. *Id.* at 439.

The State Board held that the local district's action constituted an improper transfer violating Kartan's tenure rights. Citing *Howley and Childs*, the State Board noted that a local board can reassign a tenured staff member to any other assignment within the scope of his/her certificate but cannot transfer the individual to another separately tenurable position without his/her consent. *Frank Kartan v. Board of Education of the Borough of North Arlington* (EDU 11371-95), decision dated May 8, 1998, p.3. The State Board also concluded that although Kartan was only transferred in part, the board's action constituted an improper diminution of the statutory tenure rights he had achieved under his Educational Services Certificate. The action in question constituted a "partial transfer" from one tenured position to another which, if allowed to stand, would 'erode tenure rights'. *Id.* at 4. Citing *N.J.S.A.* 18A:28-9 and 6-10 *et seq.*, the State Board emphasized that even a partial dismissal from a tenured position constitutes a RIF, "triggering the affected staff member's tenure rights." *Id.* at 5. The fact that Kartan had previously achieved tenure under his Instructional Certificate, and the fact that he did not suffer a reduction in compensation, were not determinative, although the latter could affect his relief. *Id.* at 5.

The court held that the State Board's interpretation of *N.J.S.A.* 18A:28-5 was reasonable. The court noted that it was not within its "review jurisdiction to chose between these conflicting views" and the principle that an administrative agency's interpretation of the statute it is empowered to interpret is entitled to deference. *Frank Kartan v. Board of Education of the Borough of North Arlington*, A-5978-97T1 (June 16, 1999), p.3.

The court's decision in *Stegmann* and the ALJs' reasoning in *Dallmeyer* and *Gargano,* as well as the Board's arguments, have appeal based on practical considerations. It is clear that respondent faced budgetary difficulties, and its action regarding McAleer was cost-effective. There is nothing in the record to suggest improper motivations. Notwithstanding, I am persuaded that petitioner's position is more consistent with applicable school law than that of respondent. In the absence of a contrary decision by the State Supreme Court, any changes in that respect must come from the Legislature.

I am not persuaded by the Board's arguments regarding its past practices of assigning guidance counselors simultaneously to teaching assignments. Not all guidance counselors in the district previously served simultaneously as teachers. In any event, the Board's practices, which might arguably be related to its motivations, are not relevant to the legal issues presented in this case.

As petitioner argues, *Dallmeyer, Gargano,* and *Carpenito* can be distinguished from the current matter. Petitioner gained tenure as a Guidance Counselor. *Dallmeyer* involved a claim between two tenured supervisors, while petitioner asserts tenured status vis-à-vis DeFilippo, who was non-tenured. The statutory claim arising in the former situation therefore would be, as McAleer notes, which individual has the most seniority. Supervisors earn separate seniority in each specific job title. *N.J.A.C.* 6:3-5.1(1)(10)(I). Dallmeyer arguably had no seniority rights to assert since her job title was separate from that of DeFilippo. In the instant matter, in contrast, seniority is not implicated because petitioner raises a tenure claim against a non-tenured individual. In addition, seniority for guidance counselors is not controlled by titles, as it is for supervisors. *Gargano* focused on the fact that Gargano did not suffer a RIF when he was assigned to teach in addition to supervisory responsibilities. In this case, respondent asserts that a RIF occurred, as reflected in Kaplan's certification of April 20, 1992. Such stance is also consistent with the April 21, 1998 letter. The instant case, contrary to *Carpenito*, involves a transfer from one certification to another, a situation expressly addressed in *Kartan.*

This case is more analogous to *Kartan* and *Ayhoub*, than to those cases relied upon by respondent. Two different certifications are implicated, the Board reduced the number of counselors and treated the matter as a RIF, and petitioner asserts rights vis-à-vis a non-tenured individual. For the reasons articulated by the court in *Childs*, I give more weight to that decision than to *Stegmann*. As petitioner argues, the State Board found that a RIF occurred in *Kartan*, although the local board did not contend there was a RIF. Respondent, similar to the local board in *Kartan*, argues that its action in making a partial reassignment was for sound educational reasons, a position rejected by the State Board in *Kartan*, as was Kartan's argument that the change in question

was *de minimis*. As petitioner argues, DeFilippo was not tenured because she had not yet served three years and a day and, in addition, the Board arguably could have assigned DeFilippo to teach Social Studies.

I am persuaded by McAleer's argument that adoption of respondent's position would be tantamount to not recognizing the separate tenure rights under Educational Service Certificates and Instructional Certificates, a principle upheld in *Childs*. The fact that tenure accrues separately in each of the certificate categories as petitioner argues was also recognized in *Kartan*. As recognized in that case, even a partial diminution of tenured guidance service and its replacement with teaching service triggers the right to assert tenure.

I am also not persuaded by the Board's arguments regarding the fact that petitioner has less tenure as a guidance counselor than other individuals. As McAleer argues, because she was the only counselor who apparently asserted her right to a full-time guidance position, she is entitled to that remedy. Finally, I am not persuaded by respondent's argument that petitioner waived any right to challenge any Board policy simultaneously assigning individuals as Guidance Counselors and teaching several courses.

As found, McAleer did not suffer any diminution in compensation, nor employment emoluments. Petitioner's initial request that an order directing respondent to reinstate her to a full-time guidance position is moot. I am persuaded that McAleer should be granted seniority as a guidance counselor for her teaching assignment during the 1989-90 school year, during which she should have held a guidance position vis-à-vis DeFilippo. Petitioner's seniority as a Guidance Counselor would be relevant if she is subsequently again affected by a RIF.

CONCLUSIONS

I **CONCLUDE** that the Board's action assigning petitioner as a teacher during the 1988-99 school year violated her tenure rights as a Guidance Counselor and that

respondent should credit McAleer with seniority as a Guidance Counselor for her teaching assignment during the 1998-99 school year.

ORDERS

It is hereby **ORDERED** that respondent credit petitioner with seniority as a Guidance Counselor for her teaching assignment during the 1998-99 school year and provide her with a calculation of her seniority in that title at the current time.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER**

OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 13, 1999
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

8/19/99
DATE

Debbie Catanzaro/lg
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 20 1999
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

\mvh

APPENDIX

STIPULATED EXHIBITS:

Exhibit 1	Petitioner's Schedule for the 1998-99 school year
Exhibit 2	Certification regarding petitioner, issued February 1981
Exhibit 3	Certification regarding petitioner, issued May 1997
Exhibit 4	Certification regarding petitioner, issued August 1990
Exhibit 5	Certificate of Eligibility with Advanced Standing regarding petitioner, issued May 1994
Exhibit 6	Letter dated April 21, 1998
Exhibit 7	Letter dated May 4, 1998
Exhibit 8	Certificate regarding DeFilippo, dated February 1, 1996
Exhibit 9	Certificate regarding DeFilippo, dated August 5, 1965
Exhibit 10(a)&(b)	Job Description, High School Guidance Counselor
Exhibit 11(a)&(b)	Job Description, School Guidance Counselor
Exhibit 12	List of Guidance Counselors/Teachers and employment histories
Exhibit 13	Memorandum dated April 16, 1999

OAL DKT. NO. EDU 7879-98
AGENCY DKT. NO. 216-6/98

MARY MC ALEER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of the Board and petitioner's reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in reaching his determination herein.

The Board's exceptions essentially recast and reiterate its arguments advanced below which the Commissioner determines were fully addressed and resolved by the Administrative Law Judge (ALJ) in her Initial Decision and will not, therefore, be revisited herein.

Upon his careful and independent review, the Commissioner concurs, for the reasons advanced in the ALJ's cogent decision, that the within Board's assignment of petitioner as a teacher for the 1998-99 school year was violative of her tenure rights as a guidance counselor and, as such, the Board must credit petitioner with seniority as a guidance counselor for the period of such teaching assignment during that school year.

Accordingly, the Initial Decision of the OAL is affirmed. The Board is hereby directed to credit petitioner with seniority as a guidance counselor for the period of her teaching assignment during the 1998-99 school year.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.,* within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

October 1, 1999
Date of Mailing, October 1, 1999

315-99R

IN THE MATTER OF THE TENURE	:	
HEARING OF ELMENA JEAN,	:	COMMISSIONER OF EDUCATION
STATE- OPERATED SCHOOL DISTRICT	:	DECISION ON REMAND
OF THE CITY OF NEWARK ESSEX,	:	
COUNTY.	:	
	:	

October 4, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1546-98
Agency Dkt. No. 379-9/96

REMAND
OAL DKT. NO. EDU 1119-96
Agency Dkt. No. 379-9/96

STATE-OPERATED SCHOOL DISTRICT OF NEWARK,
Petitioner,
v.
ELMENA JEAN,
Respondent.

Cherie L. Maxwell, Esq., for petitioner
(Sills, Cummis, Radin, Tischman, Epstein & Gross, attorneys)

Charles Auffant, Esq., for respondent

Record Closed: July 22, 1999 Decided: August 13, 1999

BEFORE **DIANA C. SUKOVICH**, ALJ:

NATURE OF CASE AND PROCEDURAL HISTORY

On March 12, 1996, the Acting Assistant Executive Superintendent of the State-Operated School District of the City of Newark (petitioner) filed tenure charges against Elmena Jean (respondent), a tenured teacher employed in the district. The State

district Superintendent of petitioner issued a Certification of Determination in support of the tenure charges on August 30, 1996. Respondent filed a response to the charges on July 26, 1996. The State Department of Education (DOE) transmitted the matter to the Office of Administrative Law (OAL) on October 23, 1996 for a determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

The parties reached a resolution of the matter. This judge issued an Initial Decision approving a stipulation of settlement on December 15, 1997.

On January 23, 1998, the Commissioner of the DOE (Commissioner) issued a decision remanding the matter to the OAL.

The DOE transmitted the matter on remand to the OAL on February 4, 1998 for a determination as a contested case. Telephone conferences were conducted throughout the proceeding and an in-person conference was conducted on June 24, 1999. In the interim, the parties reached a revised resolution of the matter. Counsel stated the rationale for the settlement on the record on the latter date. An executed stipulation of settlement was filed on July 22, 1999, on which date the record was closed. Attached herewith is a copy of the stipulation.

DISCUSSION

The Commissioner remanded the matter for consideration of whether the initial settlement met the standards articulated in *Frank Cardonick v. Board of Education of the Borough of Brooklawn*, 1990 *SLD* 842 (*Cardonick*). The State Board of Education (State Board) held in *Cardonick* that a settlement or withdrawal in a tenure matter should not be approved unless circumstances justifying the action are apparent, that is, the employee entered into the agreement with a full understanding of his/her rights, the agreement is consistent with the public interest, and the employee is advised of the

Commissioner's duty, pursuant to *N.J.A.C.* 6:11-3.7, to refer tenure determinations to the State Board for possible revocation of his/her certificate.

As reflected in the Stipulation of Settlement in the current matter, approval of the Settlement will result in the uncertainty and prevention of litigation. In addition, in light of the fact that respondent agrees to submit her resignation, the settlement would not present any risk of harm to students and/or the safe operation of the district. I also note in that respect, parenthetically, that the tenure charges did not allege any risk to the safety of students. As reflected in the Stipulation, petitioner acknowledges the issue of possible revocation of her teaching certificate may be considered by the State Board, notwithstanding approval of the Stipulation of Settlement. Finally, as the parties stated on the record, it is equitable for petitioner to pay all required pension contributions to ensure that respondent, a long-standing employee, can be credited with 25 years of pension contributions, and the payment of such contributions would be substantially less than the payment of back pay, if petitioner did not prevail in the instant matter.

FINDINGS

For these reasons, I am persuaded that the Stipulation complies with the *Cardonick* standards and should be approved.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

CONCLUSION AND ORDER

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and should be approved. I approve the Stipulation of Settlement and therefore **ORDER** that the parties comply with the agreement.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

DATE

DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

8/19/99

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 20 1999

DATE

OFFICE OF ADMINISTRATIVE LAW

cb

661 Franklin Avenue
Nutley, New Jersey 07110
(973) 661-4545
Attorney for Respondent

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK	:	**COMMISSIONER OF EDUCATION** **OAL Docket No. EDUOA 09844-97N** **Agency Reference No. 340-9/97**
-V-	:	
ELMENA JEAN	:	**STIPULATION OF SETTLEMENT**

The State-Operated School District of the City of Newark ("District") and Elmena Jean ("Jean"), agree to the following terms in full resolution of this matter:

WHEREAS, the parties dispute the allegations of the tenures charges, and

WHEREAS, the parties agree that it is in the public interest to enter into this agreement in resolution of said charges in order to avoid the uncertainty and expense of litigation, and

WHEREAS, the parties further agree that the terms of this agreement will not present any risk of harm to students and/or the safe operation of the school district,

NOW, THEREFORE, the parties agree as follows:

1. The district shall pay all required pension contributions to insure that Jean is credited with twenty-five (25) years of pension contributions as a teacher in the Newark School District.

2. Jean agrees to submit to the District, in writing and upon approval of this Agreement by the Commissioner of Education and the Division of Pensions, a resignation from her employment.

3. Jean shall be placed on administrative leave pending approval of this agreement by the Commissioner of Education and the Division of Pensions.

4. Jean acknowledges, as required under *In re Cardonick*, that despite the approval of this agreement, the issue of possible revocation of her teaching certificate may be considered by the State Board of Examiners.

5. The school district agrees that all future referances given to prospective employers' and others' inquires will confirm dates of employment and position only

6. The parties enter this agreement voluntarily and without coercion, after consultation with their respective counsel.

State-Operated School District of the City of Newark

Dated: _____

By: Beatrice C. Colligmore

Dated: _____

Elemena Jean

IN THE MATTER OF THE TENURE	:	
HEARING OF ELMENA JEAN,	:	COMMISSIONER OF EDUCATION
STATE- OPERATED SCHOOL DISTRICT	:	DECISION ON REMAND
OF THE CITY OF NEWARK ESSEX,	:	
COUNTY.	:	
	:	

The record, Stipulation of Settlement, and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner is compelled to once again remand the settlement agreement to the OAL. On its face, the agreement is expressly contingent upon not only approval of the Commissioner, but the Division of Pensions and Benefits as well. The agreement provides that

> 1. The district shall pay all required pension contributions to insure that Jean is credited with twenty-five (25) years of pension contributions as a teacher in the Newark School District.
>
> 2. Jean agrees to submit to the District, in writing and upon approval of this agreement by the Commissioner of Education *and the Division of Pensions*, a resignation from her employment.
>
> 3. Jean shall be placed on administrative leave pending approval of this agreement by the Commissioner of Education *and the Division of Pensions.* (emphasis supplied)

Any settlement agreement effectuated by parties to an administrative dispute shall, upon the agency head's approval, be deemed a *final* decision. *N.J.A.C.* 1:1-19.1(d). Therefore, the Commissioner cannot approve a settlement which is clearly contingent upon the

satisfaction of conditions *by an agency* which is neither a party to the matter nor the reviewing agency, namely the Department of Treasury, Division of Pensions and Benefits.

Further, upon review of those terms of the agreement, which are within the jurisdiction of the Commissioner, the Commissioner notes two points which must also be addressed on remand. First, with respect to the settlement term concerning responses to inquiries about respondent's employment, the Commissioner cautions the parties that the District must comply with the requirements of Executive Order No. 11 when responding to such inquiries. Secondly, the Commissioner is unclear what term 3 means when it states respondent will be placed on administrative leave pending approval of the agreement by him and the Division of Pensions and Benefits. The Certificate of Determination, which accompanied the original filing of tenure charges in this matter in September 1996, stated that respondent had been suspended without pay. Consequently, the Initial Decision on Remand must explicate exactly what meaning "administrative leave" has within the context of the specific factual circumstances of this matter and *why* placing respondent on such leave is consistent with the *Cardonick* standards.

Lastly, upon review of the Initial Decision, the Commissioner is constrained to comment on respondent's resignation vis-à-vis the standards for approving the settlement of tenure charges pursuant to *Cardonick, supra*. The ALJ states in pertinent part that "in light of the fact that respondent agrees to submit her resignation, the settlement would not present any risk of harm to students and/or the safe operation of the district." (Initial Decision at p. 3) While this statement certainly reflects a legitimate consideration in applying the *Cardonick* standards to assess whether or not the public interest is served by the settlement of tenure charges, and, while the Commissioner does not preclude the possibility of settlement in this matter, he stresses that when applying the *Cardonick* standards, concern for the public interest extends beyond the boundaries of the particular district certifying the charges. Thus, the mere fact that a

respondent's resignation from a district may be one of the terms incorporated into a proposed settlement does not in and of itself signify that the public interest in this State has been met. *See In the Matter of the Tenure Hearing of Wende Stuart, Board of Education of the Township of Irvington, Essex County*, decided by the Commissioner, March 26, 1998.

Accordingly, the Commissioner directs that this matter be remanded to the OAL for reconsideration of, and revision to the terms of the settlement agreement, as necessary, to address the concerns noted above. It is further ordered that, if the parties wish to continue settlement proceedings, the matter be held in abeyance pending final disposition by the Division of Pensions and Benefits relative to respondent's retirement and the District's payment of pension contributions. If the parties obtain the necessary approval from the Division of Pensions and Benefits, the within agreement may be modified to so reflect that approval, and it then, at that point, may be resubmitted to the Commissioner for review. If, however, the parties cannot obtain from the Division of Pensions and Benefits the cooperation they seek, or they are unable to agree on revised settlement terms, this matter shall proceed to a determination on the tenure charges.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

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* This decision, as the Commissioner's interim determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

October 4, 1999
Date of Mailing, October 4, 1999

316-99

D.W., on behalf of minor child, T.N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning aunt challenged Board's residency determination concerning her nephew, T.N. She contended she was supporting T.N. gratis since he was unable to live with his mother and stepfather in California due to marital discord there.

ALJ concluded petitioner did not meet the burden of demonstrating incapacity on the part of T.N.'s mother to support him. Therefore, the ALJ concluded T.N. was not eligible for a free education from the West Orange School District. ALJ ordered petitioner to pay the Board $7,198, representing tuition for that part of the 1998-99 school year during which T.N. attended West Orange High School.

Commissioner, noting that the record in this matter indicates that petitioner applied to Superior Court for custody of T.N., concluded that, under the unique circumstances existing in this case, and, in the interests of justice, this matter should be returned to the OAL for expansion of the record with respect to petitioner's custody application, and reanalyzation, as dictated by the resultant findings.

October 4, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1160-99

AGENCY DKT. NO. 521-11/98B

D.W. o/b/o MINOR CHILD, T.N.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,

Respondent.

D.W. o/b/o minor child **T.N.,** Petitioner, *pro se*

Stephen J. Christiano, Esq., for Respondent

Record Closed: August 12, 1999 Decided: August 16, 1999

BEFORE **THOMAS R. VENA,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter commenced on November 20, 1998, when D.W., on behalf of T.N. (hereinafter "Petitioner") filed a petition with the Commissioner of Education contesting the determination of the Board of Education of the Township of West Orange (hereinafter "Respondent") that T.N. was not permitted to attend the public schools of the district free of charge. An answer was filed on behalf of the Respondent on

December 15, 1998, and on January 12, 1999, the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

A motion for summary disposition was filed by the Respondent and denied by the undersigned via letter opinion dated June 15, 1999. On that date, the parties agreed that the issues to be resolved were:

1. Whether T.N. is entitled to a free education from Respondent as an affidavit student within the meaning of *N.J.S.A.* 18A:38-1(b).

2. If not, in what amount should tuition be assessed?

Respondent stipulated that (a) D.W. is domiciled in West Orange and (b) is supporting the child gratis and will assume all personal obligations for the child. Respondent further stipulated, at the commencement of the hearing, that the child "is not residing with the resident of the district solely for the purpose of receiving a free public education within the district."

A hearing was scheduled for August 12, 1999 and took place as scheduled. D.W. and T.N. testified on behalf of the Petitioner and in support of the petition and Assistant Superintendent of Schools, Joseph DelGuercio, testified on behalf of the Respondent. At the conclusion of testimony the record was closed.

FINDINGS OF FACT

The facts relevant to a disposition of this matter are not in dispute and I, therefore, **FIND** the following as uncontested **FACTS:**

Prior to November of 1998, T.N. resided with his mother, Donna W., in Los Angeles, California, with his mother's husband, a full-time plumber, and his now six-year-old half sister. T.N.'s mother works in the brokerage industry and earns $40,000

per year. That household income is supplemented by T.N.'s stepfather's full-time income as a plumber. T.N.'s biological father resides in New York City and works for the Long Island Railroad.

T.N.'s mother and his stepfather have periodically separated and returned to cohabitation. Life in the Los Angeles home was sometimes difficult. T.N. had difficulty getting along with his stepfather, was unable to "bond" with him and he asked whether or not he could live with his aunt, D.W., in West Orange, New Jersey. Never close to his stepfather, his home in Los Angeles was "full of argument" and he was not happy. Since moving to West Orange to live with his aunt, he feels more wanted and is no longer residing in an argumentative household.

D.W. is a resident and homeowner in West Orange and is supporting T.N. gratis. She has assumed all personal obligations for him and intends to do so indefinitely. In fact, she has applied for custody (P-3).

The annual cost for maintaining a student at West Orange High School is $10,124 per year. T.N. has been educated at West Orange High School in the junior year class from December 1, 1998 for a period of 128 days. The daily cost of educating T.N. from December 1, 1998 to the end of the school year was $56.24 ($10,124 divided by 180 school days) for a total cost during the 1998/1999 school year of $7,198.

DISCUSSION AND CONCLUSION

Pursuant to *N.J.S.A.* 18A:38-1, certain proofs must be presented to the Board in order for an individual child to receive a free and public education in the district. *N.J.S.A.* 18A:38-1(b)(1) provides, in pertinent part:

> Any person who is kept in the home of another person domiciled within the school district and is supported by such person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the

> board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term . . . and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district.

Petitioners have filed the required sworn affidavit and Respondent has stipulated that T.N. is kept in the home of D.W. who is domiciled in the school district, that she is supporting T.N. gratis, assuming all personal obligations, and intends to do so indefinitely. Respondent further stipulates that T.N. is not residing with D.W. solely for the purpose of receiving a free public education from West Orange.

What is clear, however, is that no evidence has been provided by Petitioner to substantiate any claim that T.N.'s mother "is not capable of supporting or providing care for the child due to a family or economic hardship." The thrust of Petitioner's argument is that his life at home in Los Angeles was not a happy one. He did not get along with his stepfather and much prefers the company of his aunt and cousins. There is no question that his mother is capable of supporting him, at least financially, in light of her income. T.N. acknowledges that if his mother divorced his stepfather, he would return home forthwith.

Thus, the hardship claim cannot be sustained. *N.J.S.A.* 18A:38-1(b) provides a two-part test for establishing hardship. "Under the statute, there must not only be a 'family or economic hardship,' but the child's parent or guardian must also be 'incapable of supporting or providing care for the child due to [that] hardship.'" *J.B. o/b/o her Guardian R.H. v. Board of Education of the Township of Ocean, Monmouth County, State Board of Education Decision No.* 26-97, September 3, 1997.

While the hardship need not necessarily be financial, the "family or economic hardship must be real and demonstrable, evincing a current incapability on the part of [T.N.'s] parents to support him or provide care as a result of that hardship." *J.B. Ibid.* at pg. 6. It may well be that T.N. has a better life or is better off in West Orange with his aunt. However, the statute requires much more before a district can be required to fund a child's education.

Having had an opportunity to observe the demeanor of the witnesses, consider their testimony and review the documentary evidence submitted, I **CONCLUDE** that Petitioners have not met their burden established pursuant to statute in that no real and demonstrable evidence has been presented evincing an incapacity on the part of T.N.'s mother to support him.

I, therefore, **CONCLUDE** that Petitioner's petition for a free education from the West Orange School District be **DENIED.**

For the foregoing reasons, it is hereby **ORDERED** that the Petitioner compensate Respondent in the amount of $7,198 representing tuition for that part of the 1998-99 school year during which T.N. attended West Orange High School.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Aug 16, 1999
DATE

Thomas R. Vena
THOMAS R. VENA, ALJ

Receipt Acknowledged:

8/19/99
DATE

Debbie Antanaitis/pb
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 20 1999
DATE

Barbara A Kerner
OFFICE OF ADMINISTRATIVE LAW

pb

APPENDIX

Exhibits

P-1 Petitioner dated November 20,1998 (2 pgs)

P-2 Affidavit of Parent dated November 2, 1998 (2 pgs)

P-3 Petition for Custody (3 pgs)

P-4 Letter from Constance White to Thomas R. Vena dated June 7, 1998

P-5 Undated letter from Angela White to Thomas R. Vena

OAL DKT. NO. EDU 1160-99
AGENCY DKT. NO. 521-11/98B

D.W., on behalf of minor child, T.N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed.[1]

Upon his careful and independent review, the Commissioner finds that the record before him is insufficient to enable him to make a reasoned decision at this time. Specifically, such record indicates that subsequent to T.N.'s arrival from California, the within petitioner sought information from Family Court in Newark on obtaining legal custody of him. Petitioner states that "[she] was told that [her] nephew would have to reside with [her] in [her] home for six months before [she] could file for custody of him," (Petitioner's June 1, 1999 Letter to ALJ Thomas R. Vena), a fact which is confirmed by a form document from Superior Court of New Jersey – Essex Vicinage, Family Division, Non-Dissolution Unit, which at No. 1. states "the child for whom custody is sought must have resided in State of New Jersey for at least six

[1] It is noted that by letter dated August 31, 1999, petitioner submitted what purported to be exceptions to the Administrative Law Judge's (ALJ) initial decision. Since there is no indication that copies of this submission were provided to the Board and the ALJ, it was not considered by the Commissioner in making his determination herein.

(6) months." (See attachment to petitioner's letter to ALJ Vena dated June 15, 1999.) Petitioner reports, in a letter dated June 1, 1999, that this six-month period concluded at the end of May. Petitioner's June 1 letter further states that "[s]ince my nephew will be eighteen in six months, I don't see the need for me to go through the time and expense of filing for custody of him[, b]y the time the paperwork is signed, he will be of legal age" (*id.* at p. 2). *However*, the within record also contains a copy of a custody application made by petitioner to the Superior Court of New Jersey, Chancery Division, Family Part, Essex County, on June 17, 1999. (See P-3.)

Under the unique circumstances existing in this case, the Commissioner concludes that, in the interest of justice, this matter should be returned to the OAL for expansion of the record, and for such further analysis as may be necessary, with respect to the status of petitioner's custody application and its effect on the within dispute.

Accordingly, the recommended initial decision is set aside and this matter is hereby returned to the OAL for further proceedings as set forth above.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

October 4, 1999
Date of Mailing, October 4, 1999

316-99

EDU #1160-99
C # 316-99
SB # 47-99

D.W., on behalf of minor child, T.N.,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, October 4, 1999

For the Petitioner-Respondent, D.W., pro se

For the Respondent-Appellant, Stephen J. Christiano, Esq.

On November 23, 1998, D.W. (hereinafter "petitioner") filed a petition of appeal with the Commissioner of Education, challenging the determination by the Board of Education of the Township of West Orange (hereinafter "Board") that her nephew, T.N., who had recently begun to live with her in West Orange, was not entitled to a free public education in that district.[1] T.N. had previously lived with his mother and stepfather in Los Angeles. In an affidavit submitted to the Board by T.N.'s mother, she indicated that she was having marital problems, would be filing for a divorce, and felt that the petitioner, her sister, would be "able to provide the stability and support that my son needs at this time." Affidavit of Parent, at ¶4.

[1] We note that T.N. began to attend public school in West Orange on December 1, 1998, following the filing of the petition in this matter, as required by N.J.S.A. 18A:38-1b(1).

Aug. 2, 2000

On August 16, 1999, an administrative law judge ("ALJ") recommended dismissing the petition, finding that the petitioner had provided no evidence to substantiate her claim that T.N.'s mother was not capable of supporting or providing care for him due to a family or economic hardship, as required by N.J.S.A. 18A:38-1(b).[2] The ALJ recommended that the petitioner be directed to compensate the Board in the amount of $7,198, representing tuition for the period of T.N.'s attendance at West Orange High School.

On October 4, 1999, the Commissioner concluded that the record was insufficient to enable him to determine this matter, observing that the petitioner had filed an application for custody of T.N. with the Superior Court, Chancery Division on June 17, 1999. Accordingly, the Commissioner directed that the case be returned to the Office of Administrative Law ("OAL") "for expansion of the record, and for such further analysis as may be necessary, with respect to the status of petitioner's custody application and its effect on the within dispute." Commissioner's Decision, slip op. at 9.

The Board filed the instant appeal to the State Board. The Board acknowledges that the petitioner was awarded custody of T.N. on September 15, 1999,[3] and it concedes that T.N. was thereafter entitled to a free public education in West Orange.

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[2] N.J.S.A. 18A:38-1 provides, in pertinent part:

> Public schools shall be free to the following persons over five and under 20 years of age:
> a. Any person who is domiciled within the school district;
> b.(1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child...and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship....

[3] We note that the petitioner apparently did not inform the Commissioner of the fact that she had been awarded legal custody of T.N.

Consequently, the Board limits its argument on appeal to the period prior to September 15, 1999, contending that a remand to determine the effect of the petitioner's application for custody was unnecessary since the only relevant issue for the period prior to issuance of the custody order was whether the petitioner had demonstrated hardship under the standard set forth in N.J.S.A. 18A:38-1(b).

After a careful review of the record, including the papers submitted on appeal, we find that it is unnecessary to remand this matter to OAL in order to resolve it. Under the circumstances, we conclude that T.N. was entitled to a free public education in West Orange during the period of his attendance in the district.

As previously noted, public school is free to any person over five and under 20 "who is domiciled within the school district." N.J.S.A. 18A:38-1a. In this instance, T.N. moved from Los Angeles to live with the petitioner, his aunt, in West Orange in November 1998. The petitioner, however, could not apply for legal custody until T.N. had lived in New Jersey for six consecutive months. N.J.S.A. 2A:34-31. [The Superior Court has jurisdiction to make a child custody determination if New Jersey "is the home state of the child at the time of commencement of the proceeding...." "Home state" is defined as "the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least 6 consecutive months...." N.J.S.A. 2A:34-30(e).] On June 17, 1999, shortly after expiration of the six-month period, the petitioner filed an application for custody, which was granted by the Court.

Given that the Court did not have jurisdiction to award custody of T.N. to the petitioner until after the six-month waiting period had expired, that the petitioner applied

for and was awarded legal custody of T.N. shortly after the expiration of that period, and that a condition for the Court having jurisdiction to issue such an order was that T.N. had been domiciled in New Jersey with "his parents, a parent, or a person acting as parent, for at least 6 consecutive months," N.J.S.A. 2A:34-30(e) (emphasis added), we conclude that the custody order should relate back to the waiting period for purposes of T.N.'s entitlement to a free public education in West Orange.

We note in that regard that if T.N. had resided in New Jersey with his mother for six months prior to his moving to West Orange to live with the petitioner, the petitioner could have applied for legal custody immediately. T.N.'s entitlement to a free public education in West Orange should not be altered by the happenstance that he had lived in another state prior to moving to that district.

Thus, under the particular circumstances presented by this case, we conclude that T.N. was entitled to a free public education in West Orange during the entire period of his attendance in that district.[4] In view of our determination, further proceedings are unnecessary and we set aside the Commissioner's decision to remand this matter to the Office of Administrative Law.

Attorney exceptions are noted.

August 2, 2000

Date of mailing AUG 04 2000

[4] We find that the interpretation urged by the Board in its exceptions to the report of our Legal Committee, i.e., that a custody order under these circumstances should not relate back to the waiting period for purposes of the educational entitlement of the children involved, is inconsistent with our obligation to assure continuity of education for those children and contrary to their best interests.

317-99E

J.K., on behalf of minor child, L.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

October 4, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

GRANTING EMERGENT RELIEF

OAL DKT. NO. EDU 8010-99

AGENCY DKT. NO. 265-9/99

J.K. ON BEHALF OF MINOR
CHILD L.K.,

Petitioners,

v.

HUNTERDON CENTRAL
REGIONAL SCHOOL DISTRICT,
HUNTERDON COUNTY,

Respondent.

Steven M. Latimer, Esq., ACLU of New Jersey, for petitioner (Loughlin & Latimer, attorneys)

James P. Granello, Esq., for respondent

BEFORE **JOSEPH F. MARTONE,** ALJ:

STATEMENT OF THE CASE

Petitioner J.K. seeks an order on behalf of her son, L.K., a 17-year-old senior at respondent high school, staying the imposition of certain penalties upon L.K. based on an allegation by the respondent school district that L.K. possessed drug paraphernalia.

Petitioner filed a petition in this matter with the Commissioner of the Department of Education on September 1, 1999 (P-1). Petitioner also filed a Notice of Motion for Stay and for Interim Relief on September 3, 1999 (P-2). The matter was then transmitted by the Commissioner of the Department of Education to the Office of Administrative Law (OAL) on September 7, 1999, for hearing as a contested case. An emergent relief hearing was scheduled to be heard on September 13, 1999, with respect to petitioner's motion for a stay and for interim relief, but this was adjourned at the request of attorney for petitioner because he had been newly retained, and the matter was rescheduled for an emergent relief hearing on September 21, 1999. On September 21, 1999, oral argument on the application for emergent relief was held and concluded.

FACTUAL DISCUSSION

For purposes of the ruling with respect to petitioner's application for emergent relief, I make the following **Findings of Fact**:

L.K. is 17 years old and is presently entering his senior year at Hunterdon Central Regional High School, Flemington, New Jersey. At the time of the alleged incident giving rise to this petition L.K. was 16 years old and in his junior year at the same high school.

On April 27, 1999, L.K. was attending a ceramics class. During this class he molded an object in soft clay which was apparently designed to hold material which could be lighted and burned. L.K. presented this soft clay object to the teacher for firing in a kiln for the purpose of hardening the object. The object was placed on the shelf to dry prior to firing.

At some time between the conclusion of this class and the next day, school authorities were given opinions from various individuals that the object molded by L.K. was a "hash pipe" and was drug paraphernalia (R-2, attachments 1, 2, 3 and 4). On April 28, 1999, L.K. was absent and on his return to school on April 29, 1999, he was informed that he needed to be drug tested based on the school's Student Handbook policies (P-1, Exhibit A, P-2 attachment 1). A urine drug screening was administered on May 2, 1999, and on May 4, 1999, a negative result was issued (P-1, Exhibit B).

On May 5, 1999, J.K. and her attorneys met with the school principal, vice-principal and attorney (P-1, Exhibit C) and the vice-principal indicated that two police officers confirmed that the object molded by L.K. was a hash pipe (R-2, attachment 2). J.K. disputed this and demonstrated that the object was to be used as an incense holder, it did not have an opening that pierced through it by which smoke could pass it could not be used as a pipe, and since it was unfinished soft clay it could not have been used for "hash" (P-1, paragraph 8). Subsequent to this meeting attempts were made to arrange for an appeal hearing before the Superintendent, but this could not be arranged in a timely manner. As a result, by notices dated May 28, 1999, petitioners were notified that L.K. had been assigned an in-school suspension for three days and that he had been assigned to Saturday detention and was to attend five drug education prevention programs on dates which would be assigned in September 1999 (P-1, paragraph 9 and 10, and R-1, attachments 1 and 2).

At the emergent relief hearing, it was determined that three areas which were the subject of this request for a stay involve L.K.'s loss of parking privileges for his entire senior year, his exclusion from extra-curricular activities for 60 days, and the requirement that he report to Saturday detentions for five Saturdays commencing in October 1999, where he is to be provided with drug counseling or a drug education prevention program. It is presumed that the five Saturday detentions and attendance at a drug counseling/education program will commence on October 2, 1999. It is not disputed that L.K. has served the three-day in-school suspension dates and two days out of school suspension. It was revealed by attorney for respondent and not disputed by petitioner, that the 60-day period of ineligibility for L.K.'s participation in extra-curricular activities has expired and this penalty is no longer applicable. Therefore, it is the penalties involving the loss of parking privileges which is currently in effect and will remain in effect for L.K.'s entire senior year, and the five Saturday detentions during which L.K. is to attend a drug counseling/education program scheduled to commence on October 2, 1999, which are the subject of this application for a stay.

DISCUSSION AND ANALYSIS

Emergency relief is authorized by *N.J.A.C.* 6:24-1.5 and *N.J.A.C.* 1:1-12.6. The standards applicable to a request for emergency relief in administrative proceedings are analogous to those applied in courts of law and equity. The most recent statement of these standards is found in *Crowe v. DeGioia*, 90 *N.J.* 126, 132-34 (1982), and may be summarized as follows:

1. The relief should not be granted except when necessary to prevent irreparable harm, or harm for which there is no adequate legal remedy.

2. The relief should not be granted when the legal right underlying the applicant's claim is unsettled.

3. The applicant for relief must make a preliminary showing of a reasonable probability of ultimate success on the merits.

4. The relative hardship to the parties in granting or denying relief must be considered.

In the present matter, in addition to their written submissions, the attorneys for the respective parties made certain oral arguments.

Attorney for petitioner pointed out that respondent no longer has the alleged hash pipe in its possession so that, in the event there is a plenary hearing in this matter, the item cannot be examined in order to determine its true nature. He argues that respondent violated its own established policies by requiring L.K. to submit to a drug screening when there was absolutely no evidence that L.K. may have been under the influence of a drug or alcohol. It was argued that by imposing the punishment of requiring L.K. to attend five Saturday detentions where he will attend a drug prevention and education program causes irreparable harm in that L.K. is being singled out and treated differently than any other student in the high school and that he is not attending these sessions on a voluntary basis. It is argued that this attendance is clearly punitive in nature and that, if a stay is not granted, there will be no remedy for the imposition of this punishment.

Attorney for respondent argued that if there is any emergency in this matter it was caused by petitioner's failure to take immediate steps to challenge the May 5, 1999 decision of the school district to enforce the district's drug policy. He pointed out that the school principal, by letter of May 5, 1999 (Exhibit D, attached P-1) made the decision to enforce the policy and that petitioner

failed to appeal that determination on an immediate basis. Rather, petitioner waited until the beginning of September 1999, after school had started, to challenge that action.

In addition, attorney for respondent argued that the clay object in question was clearly identified by school district officials and by two police officers as being drug paraphernalia. He urged that no stay be imposed in this matter because it is within the authority of the school district to protect students against the dissemination of drug paraphernalia. He argues that having L.K. attend five Saturday drug counseling sessions and loss of student parking does not constitute irreparable harm and that the sanctions have no impact whatsoever on L.K.'s academic program. He indicates that it was through petitioner's inaction that respondent believed that there would be no challenge to the sanctions imposed and the alleged drug paraphernalia was lost or misplaced.

As it was stated in *Crowe v. DeGioia*, *Id* at 132-133, harm is generally considered irreparable if it cannot be addressed adequately by monetary damages and, in certain circumstances, severe personal inconvenience can constitute irreparable injury. In the present matter, I am unaware of any statutory or regulatory provision or any case law which would permit petitioner to seek monetary damages for his attendance at five Saturday detentions in the event that it is determined that the clay object is not an item of drug paraphernalia. I agree with attorney for petitioner that L.K. is being singled out as violating the drug policies and regulations and by being subjected to the imposition of a penalty consisting of five Saturday detentions. This is a sufficient basis for a determination that this is an irreparable injury in view of the fact that there is no way of redressing the imposition of these detention periods in any adequate manner by monetary damages if it is determined that L.K. is not guilty of the infraction. Therefore, I **FIND** that the injury is irreparable.

If the clay object is not drug paraphernalia, the school district has no right to impose any type of sanction. Therefore, I **FIND** that the legal right underlying petitioner's claim is settled as a matter of law.

Petitioner must make a preliminary showing of a reasonable probability of ultimate success on the merits. On the one hand, I have the certification of Linda Batz, the Principal at Hunterdon Central High School who indicated that a representative of Hunterdon Drug Awareness examined

the object and indicated that the object was drug paraphernalia. Richard Schneebeli indicates in his certification that two local police officers offered the same opinion that the ceramic object was drug related paraphernalia. Lisa A. Brady, Vice-Principal at Hunterdon Central Regional High School, in her certification, offered the opinion that the object appeared to be a hash pipe traditionally used to smoke controlled dangerous substances. The same opinion was offered by Jan Block, Student Assistance Coordinator at the high school in his certification.

On the other hand, petitioner, in paragraph 8 of her petition, indicates that the object was to be used as an incense holder and she pointed out that L.K.'s alleged pipe did not even have an opening that pierced through it by which smoke could pass, thus, it was not even be useful as a pipe. In addition, since the item was unfinished soft clay, it could not have been used for "hash" and was, therefore, not paraphernalia. Unfortunately, as indicated in the certification of Mr. Schneebeli, the ceramic object which is the subject of this matter was either lost of destroyed over the summer months and can no longer be examined to determine if it could be used as a hash pipe.

In assessing whether petitioners have made a preliminary showing of a reasonable probability of ultimate success on the merits, it is not necessary that I conclude that the petitioners have proven their case, but merely that there is a rational basis for their contentions which are likely to be proven. It is noted in the *Crowe v. DiGioia*, that this requirement is tempered by the principal that mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo. The point of temporary relief is to maintain the parties in substantially the same condition when the final determination is made as they were when the litigation began. Keeping these principles in mind, I **FIND** that petitioners have made a preliminary showing of some reasonable probability of ultimately succeeding on the merits. In addition, the granting of temporary relief will clearly have the effect of maintaining the status quo while denying the relief will have the opposite effect.

The final consideration is the relative hardship to the parties in granting or denying the relief. Clearly, the burden of attending Saturday detentions and being stripped of parking privileges is much more significant of any hardship which may be suffered by the school district if a stay is granted. In fact, I am not aware of any hardship which the school district will face if a stay is granted in this matter.

Based upon the foregoing analysis, I **CONCLUDE** that all of the circumstances in this matter are such as to warrant a stay against the imposition of any further penalties against L.K. until the final determination in this matter.

DECISION AND ORDER

Based upon the foregoing, it is hereby **ORDERED** that petitioner's request for emergent relief seeking a stay is hereby **GRANTED**, and respondent is hereby **ORDERED** to stay the imposition of the penalties of removing L.K.'s parking privileges for the year, and requiring that L.K. attend five Saturday detentions where he will receive either drug counseling or be required to attend a drug prevention and education program.

This order on application for emergency relief may be adopted, modified or rejected by the Commissioner of the Department of Education who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

September 22, 1999
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

/lam

APPENDIX

Petitioner's Exhibit:

P-1 Petition with attachment as follows:

- Exhibit A: Excerpt from Student Handbook
- Exhibit B: Drug Screening Report
- Exhibit C: Incident Report
- Exhibit D: Principal Batz letter of May 5, 1999
- Exhibit E: James P. Granello, Esq., letter of May 20, 1999
- Exhibit F: May 28, 1999 Notice of Suspension
- Exhibit G: May 28, 1999 Notice of Detention

P-2 Notice of Motion for Stay and Interim Relief

P-3 Petition for Injunctive Relief and for an Order to Show Cause

P-4 Stephen M. Latimer, Esq., reply letter of September 18, 1999, with attachments

1. Excerpt from Student Handbook
2. Initial Decision, EDU 6661-98
3. Initial Decision, EDU 4410-97

Respondent's Exhibit:

R-1 Respondent's Answer with attachments:

1. James P. Granello, Esq., letter of May 12, 1999
2. James P. Granello, Esq., letter of May 15, 1999

R-2 Respondent's Response to Motion for Stay and Interim Relief, with attachments:

1. Certification of Linda Batz
2. Certification o Richard Schneebeli
3. Certification of Lisa Brady
4. Certification of Jan Block
5. OAL Decision, EDU 7366-92

OAL DKT. NO. EDU 8010-99
AGENCY DKT. NO. 265-9/99

J.K., on behalf of minor child, L.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this emergent matter, which included an audiotape of the hearing conducted at the Office of Administrative Law on September 21, 1999, along with the Initial Decision and Order of the Administrative Law Judge (ALJ) have been reviewed. By letter dated September 24, 1999, the parties were accorded an opportunity to file exceptions and reply exceptions to the ALJ's recommended order. Such submissions by the Board and petitioner, respectively, were timely filed and fully considered by the Commissioner in reaching his determination herein.

Upon his independent and careful review of the record, the Commissioner concurs with the ALJ that petitioner has satisfied the requisite standards for the granting of emergent relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) and, as such, the Board's imposition of both five Saturday detentions where L.K. will either receive drug counseling or be required to attend a drug prevention and education program, and removal of his parking privileges for the

year as a result of the incident at issue in this matter must be stayed pending a final determination of this case on its merits.

Accordingly, the Initial Decision and Order of the ALJ granting emergent relief is affirmed for the reasons stated therein. This matter shall move forward, consistent with the recommendation of the ALJ, to an expedited plenary hearing on the merits.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

October 4, 1999
Date of Mailing, October 4, 1999

318-99E

D.B. AND E.B., on behalf of minor child, I.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE GREATER EGG HARBOR REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

October 5, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 6682-99

AGENCY REF. NO. 254-8/99

D. B. AND E. B. ON BEHALF OF MINOR CHILD I.B.
Petitioner,

v.

BOARD OF EDUCATION OF GREATER EGG HARBOR REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,
Respondent.

I. B., petitioner, *pro se* by her father, D.B.

Louis Greco, for respondent

Record Closed: September 3, 1999 Decided: September 10, 1999

BEFORE **EDGAR R. HOLMES,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The respondent Board of Education, Greater Egg Harbor Regional School District (Board), expelled petitioner from Oakcrest High School after it adjudged her guilty of having perpetrated an unprovoked assault upon a fellow student on school property and during school hours. The petitioner requested a fair hearing and the matter was transmitted to the Office of Administrative Law (OAL) to be heard as a contested case pursuant to the Administrative Procedures Act N.J.S.A. 52:14B-1 to -15, and the act creating the OAL N.J.S.A. 52:14F-1 to -13.

The petitioner, I.B., has two friends, K.W. and L.D., all girls, who ride the same school bus. None of the three girls have a good relationship with a girl named J.L. I. B. and K.W. report that she "bumps" them in the hallways. L.D. claims that J.L. pointed her out to her friends as someone whom they would "get."

The three girls obviously discussed their mutual adversary with each other. On or about March 10, 1999, Lovey Lilly, a Vice Principal at Oakcrest High School received a telephone call from the mother of K.W. alerting Ms. Lilly that there might be an incident between K.W and J.L. Ms. Lilly questioned K.W. and K.W. denied that any incident would occur.

The very next day, March 11, 1999, the three girls got on the bus dressed for action, jeans, boots, shirt, hair pulled back and no jewelry. When they arrived at school they went first to K.W.'s locker. They claim that J.L. glared at K.W. Just in case J.L. was going to hit K.W., K.W. punched J.L. in the face. The two of them fell into L.D. who joined the action by kicking J.L. as she was down on the floor where she and K.W. were pulling each other's hair. K.W. actually described the two kicks she gave to J.L. as "stomping." In other words, she lifted her leg over J.L. and stomped down on her as though she was killing a bug. She did this twice by her own admission.

In the meantime, K.W. shouted "get this B. off of me" and I.B. punched J.L., kicked her and pulled her hair.

The assault broke up when a male student stopped the action and teachers arrived on the scene. All three girls admitted to fighting with J.L. including kicking and stomping her, but refused to take any responsibility for starting the action or planning it in advance. They were all expelled. This was a planned attack carried out with a vicious "stomping" by three girls against one. The only good news was that J.L. was not badly hurt.

It is presumed as a matter of law that the Board's decision in this matter is valid and the petitioner must show that the action was arbitrary and unreasonable in order to prevail. *Thomas v. Board of Ed. of Morris Twp.*, 89 *N.J. Super.* 327, 332 (App. Div. 1965); *Kopera v. West Orange Bd. of Ed.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960).

Physical assault upon another pupil constitutes cause for suspension or expulsion of any pupil. *N.J.S.A.* 18A:37-2. Neither remedy abrogates a student's constitutional rights to attend public school because the right is related to obedience to school rules. *G.F. v. Washington Twp. BOE*, 1 *N.J.A.R.* 55 (1979).

The statute permits some discretion between suspension and expulsion. The gravity of the offense, the students prior record of discipline and similar considerations furnish the BOE with the distinguishing criteria as they do in other disciplinary hearings.

This case was properly brought. It was three students against one in a premeditated attack. However, no serious injury occurred. The victim suffered only abrasions on her face and arms. No weapons were used or even brought to school. The three offenders did not resist when others came on the scene to break it up. All the offenders admitted that they hit, kicked and pulled the victim's hair. They only refused to admit that the act was premeditated. This was a very serious incident and supports the Board's determination to hold a hearing. The petitioner

was afforded a fair hearing. She had the benefit of discovery, legal counsel and was permitted to cross examine freely. The hearing was conducted in a fair and impartial manner.

The Board also reviewed the petitioner's prior disciplinary record and her academic standing. Petitioner is a good student and is college bound. She has the support of her family which appeared on her behalf and who conducted themselves and their portion of the hearing in a polite, intelligent and reserved fashion. The petitioner also has a good reputation at Oakcrest High School. Two Vice Principals indicated that this incident, while gravely serious, was out of character for this petitioner who was always polite and well groomed and dressed, except on this one occasion. If it was possible to wipe the slate clean of this single event, both Vice Principals said they would expect to have no problems with I.B. Both also indicated that violence had no place in their school. Everyone agrees I.B. is not a candidate for an evaluation by the Child Study Team (CST).

I **FIND** the action of the Board to be unreasonable only insofar as it determined that I.B. should be expelled. All other actions by the Board were reasonable. Because of I.B.'s prior good record, because of her grades and desire to go on to college, and because the incident, while very serious, did not include either weapons or serious injury, alcohol or drugs, I.B. should have an opportunity to receive an education appropriate to her ability, but with safeguards for other students and so that it can be seen that the Board is consistent in the administration of its school discipline policy. The district has such an option open to it; an alternative school at the *Atlantic County Community College* where she may graduate early and if qualified, and an opening exists, take college courses in lieu of high school courses and get credit for both. The district agreed to provide the petitioner with tuition and transportation to the *Atlantic County Community College* school pending the outcome this hearing.

I **ORDER** the Board to continue this program for the petitioner for the balance of the academic year 1999/2000 or until the petitioner graduates whichever first occurs.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF EDUCATION** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

9/10/99
DATE

EDGAR R. HOLMES, ALJ

lmh

WITNESSES

For Petitioner:

Lovey Lilly

Joanna Gabris

I. B.

L. D.

For Respondent:

None

OAL DKT. NO. EDU 6682-99
AGENCY DKT. NO. 254-8/99

D.B. AND E.B., on behalf of minor child, I.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE GREATER EGG HARBOR REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

The Petition of Appeal, Motion for Emergent Relief, audio cassette tapes of the emergent hearing conducted at the Office of Administrative Law (OAL) on September 3, 1999, and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Both parties filed exceptions.

In its exceptions, the Board underscored that its offer to pay for the cost of tuition for I.B. at the alternative school located on the campus of the Atlantic County Community College (ACCC) was, indeed, temporary, and urged that the Commissioner uphold its determination to expel I.B. Additionally, the Board informed the Commissioner that "on September 9, 1999 the parents of I.B. signed her out of the schools of the Greater Egg Harbor Regional High School District indicating that they have moved." (Board's Exceptions at p. 1) The Board attached a withdrawal form for I.B.

Petitioners except to the ALJ's finding that I.B.'s involvement in the assault on March 11, 1999 was premeditated, and, based on I.B.'s testimony, they deny that I.B. ever discussed fighting J.L. with K.W. prior to that date. Moreover, petitioners note that I.B. presented a plausible reason for the way she was dressed on that day, in that she explained that "she always dresses nice at the start of the week, but by the end of the week she usually wears jeans or sweats. March 11, 1999 was a Thursday and she was in sweats and she had coordinated her out fit (sic) and thought she looked very nice." (Petitioners' Exceptions at p. 1) Further, although the Board has agreed to temporarily place I.B. in the alternative school at the ACCC, petitioners are not satisfied with this result. They argue, *inter alia*, that by attending the alternative program, I.B. will not be able to go to her prom and will not have a graduation. Therefore, although petitioners are maintaining their efforts to have I.B. eventually reinstated in the Board's high school, they note that they "have been forced to give [c]ustody of [I.B.] to a relative so she can finish school with honor, so she can go to college like she deserves." (*Id.* at p. 2)

At the very outset, based on exception submissions, the Commissioner holds that the fact that I.B. may no longer be attending the alternative education program at the ACCC does not necessarily render this matter moot, since I.B. is still, at this juncture, expelled from the Board's District and remains unable to return to the District's high school, as her parents apparently wish.

Turning to the substance of the application, the Commissioner initially underscores that this matter is presently before him pursuant to a request for emergent relief, where, in accordance with State Board regulations found at *N.J.A.C.* 6:24-1.5, the standard for granting such relief is established by *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). However, although

a *Crowe* analysis would ordinarily ensue, here, the Commissioner notes the Board's offer made at the outset of the emergent hearing to pay for the cost of tuition for I.B. at the alternative school located on the campus of the ACCC on an temporary basis, pending outcome of the appeal on the merits. Under the particular circumstances of this matter, the Commissioner accepts this interim arrangement as fair and appropriate, and it is his final order with respect to emergent relief.

As to further proceedings, this matter shall continue at the OAL for a plenary hearing where petitioners must demonstrate that the Board's expulsion of I.B. was arbitrary, capricious or otherwise contrary to law. In so directing, the Commissioner notes that the ALJ's findings in the recommended Order on Motion for Emergent Relief are of no binding effect, such findings having been made without benefit of plenary proceedings on the merits.

Accordingly, the Board is directed to resume payment of both tuition and transportation costs for I.B.'s attendance at the alternative education program located at the ACCC, should petitioners elect to avail themselves of this option, pending final decision in this matter. This matter is returned to the OAL for further proceedings as may be necessary to conclude this case on its merits.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

October 5, 1999
Date of Mailing, October 5, 1999

JAMES J. ADAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF GREENWICH, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning taxpayer contended the Board violated the law by disseminating misleading and inaccurate school bond election information to the public in order to promote a position favoring financing for building a new school rather than expanding an existing school facility.

Having reviewed all of the Board's mailings, the ALJ determined that the Board fairly presented the public with the facts of the bond issue in question. ALJ was not persuaded that the distribution of the flyer, with use of public funds, contained inaccurate and misleading information which was intended to exhort voters to vote one way or another. Moreover, the ALJ determined that none of the testimony at the hearing by any of the witnesses in any way, either inadvertently or intentionally, indicated that the presentation of the flyer was for the purpose of persuading voters to cast their ballots one way or another. Rather, the Board intended to present facts to the voters to exhort them to either ask questions or attend meetings where the bond was discussed. ALJ concluded that petitioner failed to establish, by a preponderance of credible evidence, any violation of N.J.S.A 18A or existing applicable case law on the part of the Board in connection with the bond referendum at issue herein. Petition was dismissed.

Commissioner adopted findings and determination in Initial Decision as his own.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO.: EDU 5448-98

AGENCY DKT. NO. 74-3/98

JAMES J. ADAMS,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF GREENWICH,

Respondent.

James J. Adams, *pro se*, petitioner

Steven S. Glickman, Esq., represented respondent (Ruderman & Glickman, attorneys)

Record Closed: May 22, 1999 Decided: August 19, 1999

BEFORE **JEFFREY A. GERSON**, ALJ:

PROCEDURAL HISTORY

On or about March 20, 1998, James J. Adams, a taxpayer living in Stewartsville, New Jersey, a town whose children are educated by the Greenwich Board of Education, filed a petition before the Commissioner of Education requesting him to consider a controversy which arose as a result of what Mr. Adams contends is the dissemination of misleading and inaccurate school bond election information to the public. On or about April 14, 1998, the Board of Education of the Township of Greenwich filed its answer basically denying all of the contentions found in Mr. Adams' petition.

On or about June 1, 1998, the Commissioner of Education, having reviewed submissions from both sides in connection with the Board's motion to dismiss Mr. Adams' case, denied that motion and forwarded this matter to the Office of Administrative Law for hearing.

STATEMENT OF CASE

In his petition, Mr. Adams' contends that inaccurate and misleading information was distributed on December 6, 1997 to the residents of Greenwich Township. The inaccurate and misleading information dealt with the upcoming referendum to secure financing by way of a bond issue intended to build a new school.

A second contention made by Mr. Adams is that publicly funded written documents circulated by the Board of Education must fairly present both sides of the issue and must not favor or discourage any position. In addition, it is alleged that the ballot question was inaccurately worded because it did not distinguish between the cost of a new school and the cost of upgrading an existing school.

Mr. Adams' third contention is that the school board compared the cost of expanding an existing school facility to the building of a new school, cost comparisons which were misleading.

The balance of Mr. Adams' petition suggests the remedies he thinks would satisfy him if his claims were found to be correct.

DISCUSSION

Mr. Adams' first contention relates to a community relations information book mailed to residents of Greenwich Township on or about December 6, 1997 (paid by public funds) which states in part:

> "In the absence of a new school, it is anticipated that the costs of sending the expected 300 students to another school district by way of tuition will cost over two million dollars a year ($660 per $100,000 of assess property value). This cost will grow annually. It is anticipated that in the absence of a new school the tax impact faced by the taxpayer in Greenwich will be even greater". (See P-1, in evidence.)

The above language, according to Mr. Adams, "clearly promotes and favors the new school over the stated alternative". The Board indicated that building a new school would costs $485 per $100,000 valuation. If State aid had been computed into the calculation for the cost of sending 300 students out of District, the tax impact would be reduced by approximately 36 per cent changing the $660 dollar figure to $422. (There was no corroborating proof of the percentage of 36 which was used by Mr. Adams because it was quoted by the Superintendent. For purposes of this analysis, I will accept this contention as fact).

It is Mr. Adams' contention that the distribution of inaccurate and misleading information to the residents of Greenwich Township was a violation of *N.J.S.A.18A:42-4 which* reads as follows:

> No literature which in any manner and in any part thereof promotes, favors or opposes the candidacy of any candidate for election at any annual school election, or the adoption of any bond issue, proposal, or any public question submitted at any general, municipal or school election shall be given to any public school pupil in any public school building or on the rounds thereof for the purpose of having such pupil take the same to his home or distribute it to any person outside of said building or grounds, nor shall any pupil be requested or directed by any official or employee of the public schools to engage in any activity which tends to promote, favor or oppose any such candidacy, bond issue, proposal, or public questions. The board of education of each school district shall prescribe necessary rules to carry out the purposes of this section.

It is clear that this statute prohibits the distribution of literature that promotes favors or opposes the adoption of any bond issue to any public school pupil in any public school building or on the grounds thereof. There was no proof, nor was there any allegation, that the community

relations information bulletin of December 6, 1997 was distributed to any pupil It was, in fact, conceded that the December 6, 1997 bulletin was mailed to the Greenwich Township residents.

Mr. Adams cited the matter of *Citizens to Protect Public Funds v. The Board of Education of the Township of Parsippany-Troy Hills, 13 N.J. 172, S.Ct. 1953* to support the proposition that public funds cannot be used by the Board to favor one side of an issue over the other.

The *Citizens* case was an action for declaratory judgment to render a school bond election invalid. Public money was used for distribution of booklets and for advocating a favorable vote at Election and school children were exposed, pre-election, to a radio broadcast by the Township Board of Education. According to Justice Brennan:

> "There is no expressed statutory provision authorizing the expenditure by Boards of Education of public funds in the manner done by defendant Board for the printing and distribution of the booklet. The power, however, within the limit hereafter stated, is to be found by necessary or fair implication in the powers expressly conferred by *R.S. 18:7-77.1* which enumerates the permissible items which might be included in the annual budget, and more particularly as incident to (b) the building, enlarging, repairing or furnishing of the schoolhouse or schoolhouses.
>
> The power so implicit plainly embraces the making of reasonable expenditures for the purpose of giving voters relevant facts to aid them in reaching an informed judgment when voting upon the proposal."

Thus, Justice Brennan reasons that the need for full disclosure of relevant facts is obvious but there must be a fair presentation of the facts. If the presentation is fair, Mr. Justice Brennan concludes:

> "the power to make reasonable expenditures for the purpose may fairly be implied as within the purview of the power, indeed duty, of the Board of Education to formulate the construction program in the first instant. And the choice of the media of communication to give such facts, whether by use of a booklet, as in this case, radio broadcast, newspaper advertising, or other means, is within the discretion of reasonable exercise of the Board of Education."

In the *Citizens* case, the booklet in question exhorted a yes vote on three of its 18 pages. It was accompanied by a paragraph of dire consequences that would result if there was a failure to pass the bond issue. Though Mr. Justice Brennan concludes that the exhortation to "vote yes" by the Board made use of public funds to advocate one side only of the controversial question, he goes on to state:

> We do not mean that the public body formulating the program is otherwise restrained from advocating and espousing its adoption by the voters. Indeed, as in the instant case, when the program represents the bodies judgment of what is required and the affect of the discharge of its responsibility, it is no longer the right but the duty of the body to endeavor to secure the assent of the voters thereto. The question we are considering is simply the extent to and the manner in which the funds may with justice to the rights of dissenters be expended for espousal of the voters approval of the bodies judgment. Even this the body may do in fair limits. The reasonable expense, for example, of the conduct of a public forum at which all may appear and freely express their views pro and con would not be improper.

A closer look at all of the mailings (P1, P2, P3 and P4) firmly discloses an effort by the Board to fairly present the public with the facts of the bond issue in question.

The one sentence to which Mr. Adams points to in P-1 is simply not enough to convince me, even by a preponderance of the evidence, that the distribution of the flyer, with use of public funds, contained inaccurate and misleading information which was intended to exhort voters to vote one way or another. None of the testimony at the hearing by any of the witnesses in any way, either inadvertently or intentionally, indicated that the presentation of the flyer was for the purpose of persuading voters to cast their ballots one way or another. Reading the four flyers *pari materia* it appears clear the Board intended to present facts to the voters, and more importantly to exhort them to either ask questions or attend meetings where the bond issue would be discussed. The issue to be resolved here is whether the Board of Education or the Superintendent of Schools acting on behalf of the Board of Education expended funds to unfairly

promote their own position on the bond issue. I find from a review of P1, P2, P3 and P4, in evidence in combination with the testimony of the witnesses at the hearing, that neither the Board of Education nor the Superintendent unfairly advocated any position with respect to the bond issue.

Attached hereto is a copy of the Proposal as it appeared on the ballot on January 15, 1998. The Proposal states, in what I find to be very clear and fair language, that the purpose of the bond issue is to construct a new school and renovate an older section of the Stewartsville Elementary School. The amount to be spent would not exceed $11,965,000. And, if passed all of the statutory borrowing margin of $5,775,343 would be gone.

According to Mr. Adams, the cost of the new school should have been separated from the cost of the renovation of the old school. Mr. Adams is apparently of the opinion that if a breakdown of the cost of new construction and the cost of renovating the old building were presented it would have been a fairer presentation of what the bond issue encompassed. I disagree, and find specifically that the Proposal as it appeared was a fair and accurate representation of the bond issue to be voted on.

Mr. Adams' last contention is that when the School Board compared the cost of just expanding an existing school facility to the cost of building a new school, the cost comparisons were misleading. Put simply, the Board has the exclusive discretion to determine what proposal is going to be presented to the public when seeking funding by way of a bond issue. What Mr. Adams complains of when focusing on the price of a new school as compared to the price of renovating an old school is not an issue that was presented in the bond issue but rather an issue

that was disposed of by the Board when they determined that a new school was preferable to just renovating an old school.

CONCLUSION

At the hearing, Mr. Adams conceded that he did not want the result of the bond issue overturned. What he sought from the Commissioner, in essence, is what amounts to an advisory opinion in which he requested that the Commissioner chastise the Board for what Mr. Adams contended were their misdoings. The remedies suggested by Mr. Adams are simply not remedies which the Commissioner should be examining but rather Legislative remedies which should be submitted to legislators.

Though I find that the remedies requested by Mr. Adams are simply not cognizable before the Commissioner, I more specifically find that there has been no statutory violations by the Board nor have they violated any case law as it stands today.

ORDER

It is **ORDERED** that the Petition filed by James J. Adams is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

OAL DKT. NO. EDU 5448-98

8/19/99
DATE

JEFFREY A. GERSON, ALJ

Receipt Acknowledged:

8/24/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 26 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

Greenwich Township

Special School Election Ballot

Thursday, January 15, 1998

Terrance D. Lee

TERRANCE D. LEE
Warren County Clerk

INSTRUCTIONS TO VOTERS

To vote for any person whose name appears on this ballot, or for or against a question, complete the arrow pointing to the candidate or question that you wish to vote for.

To Vote, Complete the Arrow Pointing to Your Choice, Like This: ⬅ ⬅

Do not vote for more candidates than there are to be elected.

To vote for a person whose name is not printed on this ballot, print the name in the blank space provided for write-in and complete the arrow to the right.

Mark only with the pencil provided. **Do Not Erase.**

If you tear, deface or wrongly mark this ballot, return it and get another.

PROPOSAL

The Board of Education of the Township of Greenwich, in the County of Warren, State of New Jersey, is authorized (A)(1) to construct, furnish and equip a new grades K-4 school on a site located on Greenwich Street within the Township and (2) in connection with the conversion of the existing Stewartsville Elementary School from a grades K-8 to a grades 5-8 facility, to renovate the older section of the school, including the upgrading of the HVAC system, the replacement of windows, the expansion of the multipurpose room, the conversion of kindergarten rooms into computer and science labs, and the modernization of lavatories, various hallways and general classrooms; (B) to spend for all of such purposes not exceeding $11,965,000; and (C) to issue bonds of the School District for all of such purposes in the principal amount of not exceeding $11,965,000, thus using up all of the $5,775,343 statutory borrowing margin of the Township of Greenwich previously available for other improvements and raising its net debt to $5,676,363 beyond such borrowing margin.

YES ⬅

NO ⬅

OAL DKT. NO. EDU 5448-98
AGENCY DKT. NO. 74-3/98

JAMES J. ADAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF GREENWICH, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Petitioner's exceptions initially charge that the Initial Decision is untimely pursuant to *N.J.A.C.* 1:1-18.1(d), which requires that an initial decision be issued no later than 45 days subsequent to the conclusion of the hearing in the matter. Here, petitioner contends, the within record closed on May 22, 1999, and the case was decided on August 19, 1999, a period in excess of the allotted timeframe. He further asserts, the Initial Decision was infirm in that it did not include a list of exhibits admitted into evidence as required by *N.J.A.C.* 1:1-18.3(c). As such, petitioner requests that the Administrative Law Judge's (ALJ) decision be dismissed as null and void and this matter remanded to the OAL for a new hearing. (Petitioner's Exceptions at p. 1)

In the alternative, petitioner urges that the Initial Decision be reversed based on his exceptions. In this regard, he excepts to the ALJ's conclusion, on page 5 of the Initial

Decision, that a closer look at all of the mailings in connection with the bond referendum (P-1, P-2, P-3, and P-4) "firmly discloses an effort by the Board to fairly present the public with the facts of the bond issue in question." (Petitioner's Exceptions at p. 2) Rather, petitioner avers, such a conclusion is misplaced given the testimony and evidence advanced at the hearing which, he claims, demonstrate "that the Board presented *intentionally* inaccurate and misleading 'relevant facts,' regarding the tax impact of the 'Cost of Doing Nothing,' at meetings that the flyers exhorted them to attend[, and] [t]his presentation of *intentionally* inaccurate and misleading relevant facts unfairly promoted their position." (emphasis in text) (*Id.*) In this regard, he presents "specific facts" which he alleges were elicited from testimony at hearing claiming these show that the Board was aware that State aid was not factored into the cost of "doing nothing" but was calculated in the cost of a new facility and it subsequently took no action to alter the "doing nothing" computation, which, petitioner advances, evidences that the inaccuracies were "intentional."[1] (*Id.* at p. 3) Petitioner maintains that "[p]ublic funds have been used throughout the Board's campaign process in the development of presentation materials, public meetings held at the school, public mailing ***, and professional fees" and he alleges that the Board's responsibility to provide "honest and accurate" information to the public that it can rely on in making its decision was compromised by the Board's "intentional actions." (*Id.* at p. 4)

The Board's reply exceptions initially charge that petitioner's exceptions fail to comply with *N.J.A.C.* 1:1-18.4(d) in that "[he] failed to specify the findings of fact, conclusions

[1] Here, petitioner is again arguing, as he did below, that the Board's cost computation for sending students out of district (Doing Nothing) failed to include State aid which, petitioner alleges, would have significantly reduced the tax impact of this option vis-a-vis construction of a new facility. The Commissioner finds, as did the ALJ in his initial decision discussion, that the record contains no corroborating proof as to the extent of any such reduction. (See Initial Decision at p. 3.) Notwithstanding this, it is further noted that, for purposes of his analysis, the ALJ accepted such a contention as fact. (*Id.*)

of law or dispositions to which exception is taken." (Board's Reply Exceptions at p. 1) It further avers that although petitioner alleges that specific hearing testimony demonstrates "that the Board presented intentionally inaccurate and misleading 'relevant facts' regarding the tax impact of the 'Cost of Doing Nothing' at meetings[,] [he] identified no documentary or other evidence to support this allegation." (*Id.* at p. 2) The Board urges that the documents it presented in conjunction with the testimony of its witnesses evidence that such "documents were not misleading, let alone *intentionally* misleading." (emphasis in text) (*Id.*) The Board discounts the "specific facts," which petitioner avers were adduced at the hearing, categorizing these as "fabrications and inaccuracies," which represent nothing more than petitioner's own interpretation of testimony and resultant conclusions, none of which are substantiated by the record. (*Id.* at p. 3) The Board urges that inasmuch as petitioner has failed to advance any information or evidence which could call into question the findings and conclusions of the ALJ in his Initial Decision, such decision should be affirmed. (*Id.* at pp. 3-4)

Upon his careful and independent review, the Commissioner, finding petitioner's exceptions unpersuasive, agrees with the ALJ that petitioner has failed to establish, by a preponderance of the credible evidence, any violation of *N.J.S.A.* 18A or existing applicable case law on the part of the Board in connection with the bond referendum at issue herein. In so concluding, he finds that even accepting, *arguendo*, the factual allegations as advanced by petitioner as true, the existence of such "facts" does not rise to the level of substantiating his claim that the Board's actions were violative of law.[2]

[2]It is noted that petitioner's exceptions challenge conclusions of the ALJ based on testimony, he avers, was adduced at hearing below. However, the record before the Commissioner does not include a transcript of such hearing. Challenges to the factual findings of an ALJ predicated upon specific testimony require the charging party to supply the Commissioner with the relevant and necessary portion of the transcript. *See In re Morrison*, 216 *N.J. Super.* 143 (App. Div. 1987). Notwithstanding that the Commissioner's review persuades him that the presence of transcripts would not, under the circumstances here, have altered the ultimate determination in this matter, the parties are reminded of this necessary requirement.

Moving to petitioner's contentions with respect to technical infirmities with the Initial Decision, the Commissioner finds and determines that even assuming he had the ability to grant the relief sought, justice would not be served by the conduct of a new hearing, since there is no indication that petitioner was prejudiced by the apparent delay of the Initial Decision or the lack of a specific listing of exhibits admitted into evidence in the decision itself.[3]

Accordingly, the Initial Decision of the OAL is affirmed and the within Petition of Appeal is hereby dismissed.[4]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[3]All exhibits contained in the record were fully considered by the Commissioner in reaching his determination in this matter.

[4] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

October 5, 1999
Date of Mailing, October 5,1999

319-99

EDU #5448-98
C # 319-99
SB # 44-99

JAMES J. ADAMS,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF GREENWICH, WARREN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, October 5, 1999

For the Petitioner-Appellant, James J. Adams, pro se

For the Respondent-Respondent, Ruderman & Glickman (Stephen S. Glickman, Esq., of Counsel)

The decision of the Commissioner of Education to dismiss the petition filed in this matter is affirmed for the reasons expressed therein. In so doing, we grant the petitioner's motion to supplement the record on appeal pursuant to N.J.A.C. 6:2-1.9, and have considered the record as supplemented.

May 3, 2000

Date of mailing MAY 05 2000

320-99L

State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

CHRISTINE TODD WHITMAN
Governor

DAVID C. HESPE
Commissioner

October 6, 1999

Philip E. Stern, Esq.
Sills Cummis Radin Tischman Epstein & Gross
One Riverfront Plaza
Newark, NJ 07102-5400

Paul E. Griggs, Esq.
4 Waterloo Road
P.O. Box 111
Stanhope, NJ 07874

Dear Counsel:

Upon review of the revised Stipulation of Settlement and related attachments submitted in connection with the charges brought against the tenured business administrator in the matter entitled *In the Matter of the Tenure Hearing of Anthony J. Mistretta, School District of the Township of River Vale, Bergen County*, Agency Dkt. No. 92-4/99, I have determined to approve the settlement terms, since they comport with the *Cardonick* standards for review of settlements in tenure matters, and to adopt the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. This matter is hereby dismissed, subject to compliance with the terms of the settlement.* A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

Sincerely,

David C. Hespe
Commissioner

DCH/DG/DA/JB/let/case/mistretta3
c: County Superintendent

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

321-99

ATLANTIC CITY EDUCATION ASSOCIATION, on behalf of itself and the members named herein, REVEREND DAVID BELL, LUIS CARMONA, MICHAEL DAVIS, RALPH MONAGAS, MICHAEL MOODY, JAMES PALIN, RAY RODRIGUEZ, SANTOS VERGARA, KENNETH WHITE, RICHARD JOHNSON, JORGE COSME AND WILLIAM SMALLWOOD,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Association and former head custodians alleged Board's actions terminating their employment or transferring them to regular custodian positions and reducing their salaries accordingly, was violative of their tenure and seniority rights. Board contended they had no tenure as "head custodians," and it acted for reasons of economy.

Citing *Spiewak*, the ALJ determined that petitioners acquired a tenured status in the Board's employ in the position of custodian (janitor). *N.J.S.A.* 18A:17-3, 17-4. ALJ determined that the position of chief (head) janitor denotes a special assignment within the general classification of janitorial services and, therefore, it comes within the scope of the tenure statute. The Board's attempt to create a "supervisory subclass of Head Custodians" who do not have tenure must fail. Thus, the ALJ found that Petitioners Johnson, Cosme and Smallwood had more years of service than several employees who were retained, fell under the tenure protection of custodians and were to be afforded all the benefits and emoluments attached thereto. ALJ ordered that they be immediately restored to their rightful positions with all of the lost wages and other emoluments withheld from them for the 1997-98 school year. ALJ further ordered that the compensation of all other petitioners be returned to the level they would have earned during the 1997-98 school year pursuant to the Appellate Decision in *Bassett* (compensation of a tenured teacher cannot be reduced following his/her transfer from one teaching position to another). To the extent the Board's contract appears to create the opportunity to reduce the compensation of petitioners, the contract "contravene[s] a specific term or condition of employment set by a statute." (*Spiewak*) ALJ granted summary decision to petitioners and dismissed the Board's motion for summary decision.

Commissioner concurred with the ALJ that petitioners were entitled to the relief they sought. Commissioner directed Board to reinstate Petitioners Johnson, Cosme and Smallwood and, should there be an ensuing RIF, to provide each with preference over less senior staff. *N.J.S.A.* 18A:17-4 . Moreover, the Commissioner directed the Board to compensate them with lost wages and emoluments, less mitigation, if any, from the date of their respective terminations to the date of their reappointments. The Board was directed to restore each of the remaining petitioners to the salary level each enjoyed during the 1997-98 school year and to reimburse them for the amount, less mitigation, if any, representing the difference between what each should have received in the 1998-99 school year and up to the date of restoration, as per this decision, and what each was actually paid by the Board, after being relieved from assignment as head custodian.

October 7, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 10335-98

AGENCY REF. NO. 435-9/98

ATLANTIC CITY EDUCATION ASSOCIATION, ON BEHALF OF ITSELF AND THE MEMBERS NAMED HEREIN, REVEREND DAVID BELL, LUIS CARMONA, MICHAEL DAVIS, RALPH MONAGAS, MICHAEL MOODY, JAMES PALIN, RAY RODRIGUEZ, SANTOS VERGARA, KENNETH WHITE, RICHARD JOHNSON, JORGE COSME AND WILLIAM SMALLWOOD,

Petitioners,

v.

BOARD OF EDUCATION OF ATLANTIC CITY, ATLANTIC COUNTY,

Respondent.

Kathleen A. Naprstek, Esq., for petitioners (Zazzali, Zazzali, Fagella & Nowak, attorneys)

George Frino, Esq., for respondent

Record Closed: July 27, 1999 Decided: August 19, 1999

BEFORE **LILLARD E. LAW,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, all former Head Custodians in the employ of the Board of Education of the City of Atlantic City (Board), alleges that the Board's action to transfer the Head Custodians to regular custodian positions and reducing their salaries violates their tenure rights.

The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A prehearing conference was held on January 28, 1999, at which the issues to be determined by this administrative tribunal were agreed upon and set forth in the Prehearing Order. Hearing dates were also established. However, subsequent to the completion of discovery, the parties were granted leave to cross-move for summary decision, pursuant to *N.J.A.C.* 1:1-12.1 to -12.5. The last submission was received by the undersigned on July 26, 1999, which constitutes the close of the hearing record.

ISSUES

The issues to be determined, as set forth in the Prehearing Order are as follows:

1. Whether or not the named petitioners have acquired tenure status with the Board?

2. If so, whether their individual tenure rights were violated by the Board's action to change their respective employment positions?

3. Whether the Board's action to reduce their respective salaries also violated their individual tenure rights?

Having carefully reviewed and considered the entire record before me, I **FIND and CONCLUDE** that the criteria for summary disposition of the instant matter has been established, pursuant to our Supreme Court's determination in *Judson v. Peoples Bank & Trust Company of Westfield,* 17 *N.J.* 67 (1954). Accordingly, the matter is ripe for summary disposition.

STIPULATION OF FACTS

The parties have stipulated to the relevant facts in this matter, which are adopted as my **FINDINGS OF FACT,** as follows:

1. Petitioner, Atlantic City Education Association (Association) is the majority representative, pursuant to *N.J.S.A.* 34:13A-1 *et seq.*, of all custodians employed by respondent. Pursuant to said status, petitioner Association is authorized and required to act on behalf of all custodians with respect to matters relating to their employment. See, Exhibit J-1,¶1.

2. Respondent Board is responsible for the administration and operation of the schools in the City of Atlantic City. See Exhibit J-1, ¶2.

3. Petitioner Luis Carmona commenced employment with respondent on or about July 1, 1990, as a custodian. On or about July 1, 1992, petitioner Carmona was reassigned to the position of head custodian, a position which he served in until on or about June 30, 1998. See Exhibit J-2.

4. By virtue of his service with respondent, petitioner Luis Carmona acquired tenure under *N.J.S.A.* 18A:17-3. See Exhibit J-1, ¶4.

5. Petitioner Michael Davis commenced employment with respondent on or about

April 1, 1991, as a custodian. On or about July 1, 1992, petitioner Davis was reassigned to the position of night supervisor. On or about July 1, 1994, petitioner Davis was reassigned to the position of head custodian, a position which he served in until on or about June 30, 1998. See Exhibit J-2

6. By virtue of his service with respondent, petitioner Michael Davis acquired tenure under *N.J.S.A.* 18A:17-3. See Exhibit J-1, ¶6.

7. Petitioner Ralph Monagas commenced employment with respondent on or about August 7, 1989, as a manager. In or about April 1995, petitioner Monagas was reassigned to the position of head custodian, a position which he served in until on or about June 30, 1998. See Exhibit J-2.

8. By virtue of his service with respondent, petitioner Ralph Monagas acquired tenure under *N.J.S.A.* 18A:17-3. See Exhibit J-1, ¶8.

9. Petitioner Michael Moody commenced employment with respondent on or about January 1, 1985, as a custodian. In or about April 1990, petitioner Moody was reassigned to the position of head custodian, a position which he served in until on or about June 30, 1998. See Exhibit J-2.

10. By virtue of his service with respondent, petitioner Michael Moody acquired tenure under *N.J.S.A.* 18A:17-3. See Exhibit J-1, ¶10.

11. Petitioner James Palin commenced employment with respondent on or about January 1, 1968, as a custodian. In or about 1972, petitioner Palin was reassigned to the position of head custodian, a position which he served in until on or about June 30, 1998. See Exhibit J-2.

12. By virtue of his service with respondent, petitioner James Palin acquired tenure under *N.J.S.A.* 18A:17-3. See Exhibit J-1, ¶12.

13. Petitioner Ray Rodriguez commenced employment with respondent on or about February 1, 1993, as a maintenance worker. In or about April 1995, petitioner Rodriguez was reassigned to the position of head custodian, a position which he served in until or about June 30, 1998. See Exhibit J-2

14. By virtue of his service with respondent, petitioner Ray Rodriguez acquired tenure under *N.J.S.A.* 18A:17-3. See Exhibit J-1, ¶14.

15. Petitioner Santos Vergara commenced employment with respondent on or about May 1, 1986, as a custodian. On or about September 1, 1992, petitioner Vergara was reassigned to the position of head custodian, a position which he served in until on or about June 30, 1998. See Exhibit J-2.

16. By virtue of his service with respondent, petitioner Santos Vergara acquired tenure under *N.J.S.A.* 18A:17-3. See Exhibit J-1, ¶16.

17. Petitioner Kenneth White commenced employment with respondent on or about January 3, 1994, as a custodian. On or about July 1, 1996, petitioner White was reassigned to the position of head custodian, a position which he served in until on or about June 30, 1998. See Exhibit J-2.

18. By virtue of his service with respondent, petitioner Kenneth White acquired tenure under *N.J.S.A.* 18A:17-3. See Exhibit J-1, ¶18.

19. On June 23, 1998, respondent for reasons of economy, voted to abolish the head custodian positions held by petitioners Bell, Carmona, Davis, Monagas, Moody, Palin, Rodriguez, Vergara and White, effective June 30, 1998, and to transfer them to other custodial positions, effective July 1, 1998. See Exhibit J-3.

20. Petitioners were notified of this action by letters dated June 25, 1998.

21. Petitioner Reverend David Bell's annual salary for the 1997-98 school year was $40,753. His annual salary for the 1998-99 school year is $26,805. See Exhibits J-1, ¶22; J-2, J-4.

22. Petitioner Luis Carmona's annual salary for the 1997-98 school year was $42,756. His annual salary for the 1998-99 school year is $24,642. See Exhibits J-1, ¶23; J-2, J-4.

23. Petitioner Michael Davis' annual salary for the 1997-98 school year was $46.356. His annual salary for the 1998-99 school year is $24,116. See Exhibits J-1, ¶24; J-2, J-4.

24. Petitioner Ralph Monagas' annual salary for the 1997-98 school year was $49,233. His annual salary for the 1998-99 school year is $24,927. See Exhibits J-1, ¶25; J-2, J-4.

25. Petitioner Michael Moody's annual salary for the 1997-98 school year was $44,833. His annual salary for the 1998-99 school year is $36,115. See Exhibits J-1, ¶26; J-2, J-4.

26. Petitioner James Palin's annual salary for the 1997-98 school year was $46,058. His annual salary for the 1998-99 school year is $37,465. See Exhibits J-2, ¶27, J-2, J-4.

27. Petitioner Ray Rodriguez's annual salary for the 1997-98 school year was $41,953. His annual salary for the 1998-99 school year is $24,600. See Exhibits J-1, ¶29; J-2, J-4.

28. Petitioner Santos Vergara's annual salary for the 1997-98 school year was $42,356. His annual salary for the 1998-99 school year is $28,729. See Exhibits

J-1, ¶29; J-2, J-4.

29. Petitioner Kenneth White's annual salary for the 1997-98 school year was $39,185. His annual salary for the 1998-99 school year is $23,516. See Exhibits J-1, ¶30; J-2, J-4.

30. Petitioner Richard Johnson commenced employment with respondent on or about February 1, 1991, as a head custodian, a position which he served in until on or about June 30, 1998. See Exhibit J-2.

31. By virtue of his service with respondent, petitioner Richard Johnson acquired tenure under *N.J.S.A.* 18A:17-3. See Exhibit J-1, Count Two ¶3.

32. On June 23, 1998, respondent for reasons of economy, voted to abolish the head custodian position held by petitioner Johnson, and to terminate his employment effective June 30, 1998. See Exhibit J-3.

33. Petitioner Johnson was notified of this action by letter dated June 25, 1998. See Exhibit J-5.

34. Petitioner Jorge Cosme commenced employment with respondent in or about August 1987 as a custodian. In or about September 1989, petitioner Cosme was reassigned to the position of stockroom worker which is a custodial/janitorial position; he served in that position until on or about July 6, 1998.

35. By virtue of his service with respondent, petitioner Jorge Cosme acquire tenure under *N.J.S.A.* 18A:17-3. See Exhibit J-1, Count Three ¶3.

36. Petitioner William Smallwood commenced employment with the respondent in or about December 1987 as a stockroom worker, which is a custodial/janitorial position; he served in that position until on or about July 6, 1998.

37. By virtue of his service with respondent, petitioner William Smallwood acquired tenure under *N.J.S.A.* 18A:17-3. See Exhibit J-1, Count Three ¶5.

38. On or about July 2, 1998 respondent voted, for reasons of economy, to abolish the stockroom worker positions held by petitioners Cosme and Smallwood, and to terminate their employment, effective July 6, 1998. See Exhibit J-6.

39. Petitioners Cosme and Small were notified of this action by letter dated July 8, 1998. See Exhibit J-7.

40. Respondent employed custodial employees during the 1998-99 school year as set forth in Exhibit J-4.

LEGAL ARGUMENTS OF THE PARTIES

Petitioners' Argument

Point One

Respondent Violated the Tenure Rights of Petitioners Johnson, Cosme and Smallwood When it Terminated Their Employment

It is undisputed that all of the individual petitioners obtained tenure in their employment positions with respondent under *N.J.S.A.* 18A:17-3, which specifically provides that janitorial employees who have obtained tenure "shall not be dismissed or suspended or reduced in compensation except as the result of the reduction in the number of janitors in the district made in accordance with the provisions of this title or except for neglect, misbehavior or other offense" and then only in the manner set forth under *N.J.S.A.* 18A:6-9 *et seq.* Reductions in the number of

janitorial employees in a district are thus governed by *N.J.S.A.* 18A:17-4 which requires that any such reductions must be performed in accordance with the seniority of the respective janitorial employees. Specifically, *N.J.S.A.* 18A:17-4 states that:

> . . . when any janitor, janitor engineer, custodian or janitorial employee under tenure is dismissed by reason of reduction in the number of such employees, **the one having the least number of years to his credit shall be dismissed in preference to any other having a longer term of service . . .** (emphasis added)

Thus, although respondent may have had a right to reduce the number of its custodial employees, it was required by law to do so in a manner which acknowledged the seniority rights of these tenured custodial employees.

The undisputed facts reveal that petitioner Richard Johnson was employed by respondent as a custodial employee in the position of head custodian from February 1, 1991 until June 30, 1998, when respondent abolished that particular position. Thus, petitioner Johnson had accrued approximately seven years and five months of service as a custodial employee at the time that respondent determined to terminate his employment pursuant to a reduction in force. Petitioner Jorge Cosme was employed by respondent as a custodial employee in the positions of custodian and stockroom worker from September 1989 until July 6, 1998, when respondent abolished the stockroom worker position. Thus, Cosme had accrued approximately eight years and ten months of service as custodial employee at the time that respondent determined to terminate his employment pursuant to a reduction in force. Finally, petitioner William Smallwood was employed by respondent as a custodial employee in the position of stockroom worker from December 1987 until July 6, 1998, when respondent abolished the stockroom worker position. Thus, petitioner Smallwood had accrued approximately ten years and seven months of service as a custodial employee at the time that respondent determined to terminate his employment pursuant to a reduction in force.

In early July 1998, respondent notified each of these petitioner's that he had not accrued enough years in service as a custodial employee to be transferred to another custodial position following the abolishment of his current position. The facts, however, reveal that this conclusion

was incorrect. Exhibit J-2 to the Stipulation of Facts contains a listing of the custodial employees who were employed by respondent prior to its determination in June/July of 1998 to effectuate a reduction in force; this listing actually ranks these employees, based upon their dates of hire. Exhibit J-4 to the Stipulation of Facts contain a listing of the custodial employees who were retained/employed by respondent for the subsequent school year (1998-99). In reviewing both of these listings it is evident that respondent retained several employees who has less years of seniority than did petitioners Johnson, Cosme and Smallwood in custodial positions to which they were entitled by virtue of their tenure and seniority rights. For example, respondent retained Kevin Gilbert (hired on November 12, 1996), Aladine Marcus (hired on January 24, 1996), and Wayne King (hired on December 14, 1995). All three of these individuals, as well as more than a dozen others, had fewer years of service with respondent than did these petitioners. Thus, when respondent determined to reduce its custodial force, it was required under *N.J.S.A.* 18A:17-4 to dismiss these less senior custodial employees before it dismissed petitioners Johnson, Cosme and Smallwood.

Respondent may argue that it did not have an obligation to place petitioners Johnson, Cosme and Smallwood in other custodial positions when it abolished their previous positions of head custodian and stockroom worker, claiming that they only acquired tenure rights in those particular positions. The law, however, had made it clear that the statutory coverage of *N.J.S.A.* 18A:17-3 and *N.J.S.A.* 18A:17-4 extends to all types of janitorial and custodial positions. More than 30 years ago, the Appellate Division addressed the issue of the scope of these tenure statutes (previously codified at *N.J.S.A.* 18:5-66.1 and 18:5-67) in *Barnes v. Bd. of Ed. of Jersey City,* 85 *N.J. Super.* 42 (1964). There the Court refuted the Board's argument that these statutes were intended to provide tenure protection only to the positions specified (*i.e.*, janitor, janitor engineer, custodian or janitorial engineer). Stating that "[o]ur consideration of the statutes in light of the principle of liberal construction satisfies us that the Legislature used the terms janitor, custodian, etc., in a generic sense with the intent to include all janitorial and custodial employees," the Court determined that other types of custodial positions such as utility men and groundskeeper are also included. *Barnes,* 85 *N.J. Super.* at 46.

The Commissioner of Education thereafter ruled that the position of chief janitor (comparable to the position of head custodian in the instant situation) also falls within the statutory protection of the janitors' tenure statutes. *In Brunner v. Bd. of Ed. of the City of Camden,* 1960 *S.L.D.* 155, the Commissioner rejected the Board's argument that the petitioner, whose position as chief janitor was abolished, did not have tenure rights to another janitorial position, since "chief janitor" is not a specifically enumerated position in those tenure statutes. Maintaining that the intent of the tenure acts is to extend employment protection to a general category of employees, the Commissioner noted that "the position of chief janitor denotes a special assignment within the general classification of janitorial services and, therefore, it comes within the scope of the tenure statute." *Brunner,* 1960 *S.L.D.* at 157.

The *Brunner* and *Barnes* decisions were followed by the Commissioner of Education in a decision rendered about 20 years later in determining that tenure rights acquired under *N.J.S.A.* 18A:17-3 in one janitorial position are transferable to any other individual who had attained tenure under that statute as a result of service in the position of maintenance man, and who later transferred to a position as custodian, was deemed to carry his tenure status to any janitorial/custodial position. "Since his tenure status did not attach to a specific position (maintenance man), but instead to a category or class of employment (*i.e,* janitorial), petitioner's tenure remained with him when he was rehired as a custodian. As is clear from *Brunner,* the acceptance of the position of custodian did not serve as a relinquishment of tenure since it is clearly a position for which tenure as a janitor may accrue." *Lauffer,* 1984 *S.L.D.* at 1294.

Respondent has acknowledged that petitioners Johnson, Cosme and Smallwood all acquired tenure under *N.J.S.A.* 18A:17-3 (Stipulation of Facts ¶¶31, 35 and 37). It is therefore axiomatic that the tenure status they acquired based upon their service in the head custodian, custodian and stockroom worker positions transfers over to any other janitorial/custodial position maintained by the Board.[1] Thus, when respondent abolished the positions of head custodian and stockroom worker, it was required under *N.J.S.A.* 18A:17-3 and *N.J.S.A.* 18A:17-4 to reassign

[1] The parties have previously acknowledged that the stockroom worker position is an assignment within the custodial category, as the salary schedule for the parties 1994-97 collective bargaining agreement (Exhibit J-9) groups stock, maintenance and shop employees together and also identifies these employees as custodial employees or custodians in the "recognition" provision of the contract. (Exhibit J-8).

them to other custodial positions since they had more seniority than at least a dozen other custodial employees who were retained in such positions. Petitioners, therefore, respectfully, request that this Court issue an order compelling the Board to immediately reinstate petitioners Johnson, Cosme and Smallwood to custodial positions and provide them with backpay retroactive to the date of their termination, together with all pension credit and other benefits attendant to those positions.

Point Two

Respondent Violated the Tenure Rights of All Petitioners When it Reduced Their Compensation Following Their Reassignment from Head Custodian to Custodian Positions

As noted above, *N.J.S.A.* 18A:17-3, specifically provides that janitorial employees who have obtained tenure "**shall not be** dismissed or suspended or **reduced in compensation** except as the result of the reduction in the number of janitors in the district made in accordance with the provisions of this title or except for neglect, misbehavior or other offense" and then only in the manner set forth under *N.J.S.A.* 18A:6-9 *et seq.* (emphasis added). Since the law clearly provides that, for purposes of tenure acquisition and tenure rights, the positions of head custodian and custodian are merely different assignments within the same tenure position, a reduction in a tenured employee's compensation following his/her transfer from one custodial position to another clearly violates the prohibition set forth in *N.J.S.A.* 18A:17-3 against reduction in compensation unless same is the result of actions taken against the employee for neglect, misbehavior or other offense pursuant to the Tenure Hearing Act.

Relying upon these basic tenants of law, the Commissioner held in *Reinertsen v. Bd. of Ed. of the Twsp. of East Brunswick,* OAL Dkt No. EDU 10328-97 (May 27, 1998), adopted Comm'r of Ed. (July 8, 1998) that the reassignment of a tenured custodial employee from a head custodian position to a custodian position was permitted by law, but held that the Board could not reduce his salary without violating the tenure laws. This comports with decisions which provide

that the compensation of a tenured teacher cannot be reduced following his/her transfer from one teaching position to another. *Bassett v. Board of Education of Oakland,* OAL Dkt No. EDU 8061-83 (January 31, 1984), Commr's Decision (March 19, 1984), *aff'd* in part State Board of Education (February 4, 1987), *aff'd* 223 *N.J. Super.* 136 (App. Div. 1988), and those which provide that the compensation of a tenured secretarial/clerical employee cannot be reduced following his/her transfer to another secretarial/clerical position, *Casey v. Board of Education of the Township of Cinnaminson, Burlington County,* State Bd. Dkt. No. 1-94 (October 5, 1995). In *Casey,* where the petitioner was reassigned from one clerical position to another clerical position following a reduction in force, the State Board of Education declared that a tenured employee who is reassigned within the same tenure position cannot be reduced in compensation, even if the reassignment resulted from a reduction in force. Since petitioners had all acquired tenure status pursuant to *N.J.S.A.* 18A:17-3, respondent was not permitted to reduce their compensation when it reassigned them from one janitorial/custodian position (head custodian) to another janitorial/custodial position (custodian).

It is, in addition, irrelevant that the compensation for the custodian position may have been established in the applicable collective bargaining agreement, since the law clearly holds that contract terms may not contravene or supersede a specific term or condition of employment which is set by statute, and in particular, the Tenure Act. *Spiewak v. Rutherford Bd. of Ed.* 90 *N.J.* 63, 76 (1982); *State v. State Supervisory Employees Association,* 78 *N.J.* 55 (1978); *Belen v. Woodbridge Twsp. Bd. of Ed.* 142 *N.J. Super.* 487 (App. Div. 1976). Indeed, in *Belen,* the court suggested that a negotiated salary provision resulting in the reduction of a tenured employee's salary, even if not violative of the PERC Act, would violate the Tenure Act. Since the tenure provisions of *N.J.S.A.* 18A:17-3 provide that petitioners may not suffer a reduction in compensation in their tenured positions, respondent was not permitted to reduce their compensation when it transferred them from the head custodian positions to the custodian positions, which are the same positions for tenure purposes, regardless of any contrary provision in the collective bargaining agreement.

In sum, the law clearly prohibits the Board from reducing the compensation of petitioners, tenured employees who were transferred from one position to another in the same tenure

category. Petitioners, thus, respectfully request that the Court issue an order compelling the Board to restore their salaries to the amount they received during the 1997-98 school year and to reimburse them for lost compensation, including but not limited to pension credit and other such benefits.

The Board's Arguments

Statement of Facts

The within petition brought in the name of the Atlantic City Education Association (ACEA) and twelve ex-Head Custodians alleges in Count One that:

> 20. The positions of custodian and head custodian are the same tenure positions under *N.J.S.A.* 18A:17-3. Petitioners are therefore entitled to continue to be compensated at the same salaries they received in their positions of head custodian.
>
> 31. Said salary reductions occurred without proceedings under the Tenure Act, *N.J.S.A.* 18A:6-10 *et seq.*, and in violation of petitioners' tenure rights as secured by *N.J.S.A.* 18A:17-3.

Counts Two and Three allege violation of seniority rights of two employees, Richard Johnson and Jorge Cosme. These Counts allege that the retention of less senior individuals violated their tenure and seniority rights.

A. The Collective Negotiations Agreements (CNA)

The Individual petitioners were members of the Atlantic City Head Custodians' Association. The CNA of the Head Custodians' Union at Article 8.1 provided:

> All newly hired employees shall be required to serve a probationary period of no more than ninety consecutive calendar days, during which they may be discharged at the sole discretion of the Board (no grievance may be filed.) During the probationary period, employees shall be paid a hiring rate to be set by the Board. During probation, the Board agrees to provide health benefits pursuant to the carrier's regulations, but no other contractual benefits will be provided; however, the Board will abide by *N.J.S.A.* 18A with respect to sick leave benefits. Upon satisfactory completion of said probationary period, an employee shall be issued an employment contract, and all time worked from initial date of hire shall be counted towards seniority, increment credit and for pension purposes. Any head custodian or cafeteria manager who, just prior to their appointment as head custodian or cafeteria manager, was a custodian or food services worker in the Atlantic City school system shall not be required to serve a formal probationary period; however, the Board retains the right to revert such an employee back to the custodian or food service worker position for appropriate reasons.
>
> Ra9.

The CNA recognized the supervisory "right" of the ACHCA member as Head Custodians.

Paragraph 17.11 states:

> Prior to any custodian being assigned to a school, the head custodian of the school shall have the opportunity to interview said custodian and offer his input as to the custodian's qualifications and abilities.
>
> Ra10.

The CN provides for no "bumping rights" other than those provided for by the Education Laws.

The CNA that the petitioner ACEA was a party to does not recognize "head custodians" as members. *See,* Article 1.1 and 1.2.4.; Ra13-Ra14.

Job security for custodians is provided for in Article 25.1 that states:

> After three years of uninterrupted continuous service, each custodian employee shall be appointed for an unfixed term so as to provide the tenure protection available to such employees under the provisions of Chapter 137, Public Laws of 1960 (*N.J.S.A.* 18A:17-3 and *N.J.S.A.* 18A:17-4).
>
> Ra. 15

"Bumping rights" are governed by Article 28.6. it states:

> Any reduction in force and subsequent recall shall be in accordance with the prevailing law of the State of New Jersey and applicable guidelines, rules and regulations of the Board of Education of the State of New Jersey. Consultation when the Association shall take place in advance of effectuating any reduction in force.
>
> Ra16-Ra17.

B. <u>The Reduction in Force</u>

The individual petitioners were notified on January 30, 1998, of a reduction in force (RIF) by way of correspondence. Ra18.

Discussion by the School District concerning the RIF occurred in February of 1997. In a memo prepared by the Director of Facilities, the Plan was outlined and projected a $752,000 cost savings. Ra19-Ra24.

A January 27, 1998, memo reiterated substantially the same RIF plan. Ra25-Ra26.

Based upon the RIF, the total re-deployment of the custodial function occurred. A cost savings was again projected. Ra26.

C. The Job Descriptions

The custodial job description reflects responsibilities of cleaning, sweeping, vacuuming, dusting, washing and performing "other work related duties as assigned by the head custodian." Ra31-Ra32.

Unlike the custodial responsibilities, the Head Custodial job description reflects an essential supervisory function. The duties are:

1. Assigns and schedules tasks to workers and inspects completed work for conformance to standards;

2. Issues supplies and equipment;

3. Trains new workers, recommends discharge of incompetent workers and performs other supervisory duties as required;

4. Submits requests for repair of cleaning equipment;

5. May requisition or purchase cleaning supplies and equipment;

6. Perform cleaning duties during staffing shortages or as needed;

7. Supervises, trains and evaluates staff; and

8. Performs other work related duties as assigned by the immediate supervisor.

Ra27-Ra30.

The petitioner ACHCA consistently maintained its supervisory function. In June of 1998, it argued, in the context of a CNA arbitration:

> The Association has demonstrated beyond any doubt that Head Custodians supervise and are required by the Board to supervise any custodians, including evening custodians, assigned to their building. A *supervisor,* defined in Black's Law Dictionary, is one *having authority over others, to superintend and direct.* The testimony and documents submitted by the Association substantiate that the Head Custodians do supervise the evening custodians and as such are entitled to received the stipend for each of those contracted employees pursuant to the terms of the Agreement.
>
> Ra34-Ra38

Obviously the distinctive feature of its membership was a routine position asserted when it served its interest.

By the time the RIF was put in place, the financial stress of the District was well established.

In a November 26, 1997, memorandum to the Atlantic County Superintendent of Schools, it was reported that:

> Please be advised that at least evening's meeting of the Atlantic City Board of Education, upon the recommendation of the Board secretary, the Board voted not to certify the budget. A copy of the certified resolution is attached. The Board recognized that there were insufficient funds in the 1997-98 budget to complete the fiscal year without going into a deficit status.
>
> Ra33.

The Board submits that the within petition is frivolous in that the *bona fide* RIF does not in any way implicate the tenure laws. The Board also submits there is no seniority issue inasmuch as the "bumping rights" of *all* affected employees was observed in strict accordance with the job titles and actual duties of the employees.

Point One

The Tenure Laws Do Not Apply to the within Reduction in Force

Petitioners are seeking to use the Tenure Laws as a means to accomplish a result that would do violence to both the Tenure Laws and the virtually unlimited right of a school district to reduce costs through *bona fide* reduction in its work force. The Board will demonstrate, that as a matter of law, the Tenure Protection Act does not apply and that the RIF prerogative would be destroyed if salary levels were maintained at the inflated supervisory levels.

Tenure protection for "janitorial employees" is found in *N.J.S.A.* 18A:17-3 that states in full:

> Every public school janitor of a school district shall, unless he is appointed for fixed term, hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, *except as the result of the reduction of the number of janitors in the district made in accordance with the provisions of this title* or except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title. (emphasis supplied).

N.J.S.A. 18:17-4 provides for seniority rights.

N.J.S.A. 18A:6-10 states:

> No person shall be dismissed or reduced in compensation,
>
> (a) If he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, or
>
> (b) If he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the Deaf, or in any other educational institution conducted under the supervision of the commissioner; except for inefficiency, incapacity, unbecoming conduct, or other

> just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.
>
> Nothing in this section shall prevent the reduction of the number of any such persons holding such offices; positions or employments under the conditions and with the effect provided by law.

The CNA of the petitioner of ACEA recognizes the job security in Article 25.1. Ra15.

It is quite clear that the literal reading of the statutes excepts a *bona fide* RIF from the application of the mandate. In short, compensation *can* be reduced where there is a reduction in force. *Impey v. Shrewsbury Board of Education,* 142 *N.J.* 388 (1995).

In the case at bar, the Head Custodian CNA does not allow for tenure protection for the supervisory subclass. The individual petitioners are afforded tenure protection as custodians and were given their bumping rights in accordance with the Education Laws.

In interpreting this statute, the Supreme Court has opined that:

> *N.J.S.A.* 18A:17-3 does not speak in the imperative. Rather, the statute grants the Board discretion to determine which custodians, if any, are to receive the benefits of tenure.
>
> Every public school janitor of a school district shall [receive tenure] unless he is appointed for a fixed term. It is clear from the statute that a janitor employed without a fixed term contract will gain tenure immediately upon beginning employment. On the other hand, the statute allows an employing board to deny tenure to all custodians, as an appointment for a fixed term is an appointment without statutory mandated tenure.
>
> Yet even though the statute provides mechanisms for immediate tenure and complete denial of tenure, these are only the alternatives contemplated by the statute. By using the word unless to modify the word shall, the Legislature has signaled its intention to leave

> employing boards with some flexibility. Accordingly, boards may, without contravening the terms of the statute, permissibly pick and choose between the statutory minimum of no tenure for any custodial employee and the statutory maximum of instant tenure for all custodians.

Wright v. East Orange Board, 99 *N.J.* 112, 119 (1985).

The facts in the case at bar demonstrate a bargain struck by the individual petitioners through a collective negotiations organization that did not create a subspecies of tenure protection. It expressly reserved the Board's right to revert them to a custodial position. *See* Article 8.1 Ra9. Only custodians receive tenure involving their CNA.

In this case, the Board bargained for and attained no tenure for the supervisory subclass of Head Custodians and tenure for *custodians* as members of the ACEA.

This tribunal has summarized the controlling legal authority:

> A long line of school law decisions has interpreted this reduction in compensation language as prohibiting a local board from reducing a tenured employee's salary, unless the board successfully brings tenure charges or the employee is laid off or demoted as the result of a reduction in force. *See, e.g., Kalapos v. Trenton Bd. of Educ.,* 93 *N.J.A.R.* 2*d.* (EDU) 430 (Comm'r June 2, 1993) (overpayment due to clerical error); *Galop v. Hanover Twp. Bd. of Educ.,* 1975 *S.L.D.* 358 (Comm'r May 16) (inadvertent placement on wrong step of salary guide); *Anson vs. Bridgeton Bd. of Educ.,* 1972 *S.L.D.* 638 (Comm'r Dec. 5) (administrative error in placement on salary guide); *Docherty v. West Paterson Bd. of Educ.* 1967 *S.L.D.* 297 (Comm'r Oct. 23) (miscalculation of graduate credits)

DeLyon v. Old Tappan Bd. of Ed., 97 *N.J.A.R.* 2*d.* (EDU) 499 (1997).

A custodian and a Head Custodian are radically different positions that require a separation of bargaining units in order to separate the supervisory and non-supervisory classes. This was accomplished by mutual consent. To now suggest or imply that they are identical positions for Tenure Act purposes defies logic and the law.

The text of the janitor tenure statutes recognizes an adverse employment result where there is a RIF.

Petitioners assert that the unreported Commissioner's ruling in *Reinersten vs. East Brunswick Board,* OAL Dkt No. EDU 10328-97 controls this case. It does not. In *Reinertsen* the facts were different. The East Brunswick Board had an express policy that extended tenure to all janitors. Thus, that critical fact distinguishes the case. Moreover, at the time of the RIF in this case (January 30, 1998), the law was not as set forth in *Reinertsen* so that no retroactive application should be applied in this case.

In short, there is no tenure claim available because the tenure rights of petitioners are those of a non-supervisory custodian and those rights were respected. No separate tenurable right as Head Custodian exists, and even if it did, the Tenure Laws allow a RIF to be implemented without reference to a tenure proceeding. Those tenured petitioners were "bumped" by virtue of their seniority in terms of actual service as a non-supervisory custodians.

Point Two

No Viable Claim to Superior Seniority Has Been Stated.

Reductions in force are controlled by *N.J.S.A.* 18A:17-4 which provides:

> No board of education shall reduce the number of janitors, janitor engineers, custodians or janitorial employees in any district by reason of residence, age, sex, race, religion or political affiliation and when any janitor, janitor engineer, custodian or janitorial employee under tenure is dismissed by reason of reduction in number of such employees, the one have the least number of years to his credit shall be dismissed in preference to any other having a longer term of service and the person so dismissed shall be and remain upon a preferred eligibility list, in the order of years of service, for re-employment whenever vacancies occur and shall be re-employed by the board in such order and upon re-employment shall be given full recognition for previous years of service in his respective positions and employments.

There is no reference in the statute to a "head custodian."

Seniority must be determined strictly in accordance with *N.J.A.C.* 6:3-5.1. The concept of "categories" is at the heart of the determination.

> *N.J.A.C.* 6:3-5.1(g) states:
>
> > Where the title of any employment is not properly descriptive of the duties performed, the holder thereof shall be placed in a category in accordance with the duties performed and not by title. Whenever the title of any employment shall not be found in the certification rules or in these rules, the holder of the employment shall be classified as nearly as may be according to the duties performed, pursuant to the provisions of *N.J.A.C.* 6:11-3.3.

Likewise, *N.J.A.C.* 6:3-5.1(i.)states:

> > Whenever any person's particular employment shall be abolished in a category, he or she shall be given that employment in the same category to which he or she is entitled by seniority. If he or she shall have insufficient seniority for employment in the same category, he or she shall revert to the category in which he or she held employment prior to his or her employment in the same category and shall be placed and remain upon the preferred eligible list or the category from which he or she reverted until a vacancy shall occur in such category to which his or her seniority entitles him or her.

Unquestionably there is no Head Custodian title in the rules. Consequently, classification for seniority must be governed by the title or the actual duties performed. *See, N.J.A.C.* 6:3-5.1(g).

In this case, the petitioners were classified based upon the actual performance of their duties as Head Custodians that *supervised* custodians. The custodians were classified based upon the performance of their duties. The job description for each title reflects those duties.

Accordingly, there is no viable claim for a superior seniority. The petitioner's as a matter of law, are not entitled to bootstrap their service as a supervisory Head Custodians to that of

custodians. The length of the actual service in the specific position is the essential criteria. *Nelson v. Old Bridge Board of Education,* 146 *N.J.* 499 (1996).

Point Three

Assuming Arguendo that this Tribunal Rules that Tenure Proceedings are Required, then Leave Shall be given to File Charges

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Although the Board submits that no tenure proceedings should be filed the facts demonstrate that "good cause" is present in order to effectuate a reduction in compensation because of the bona fide RIF. Tenure protection is essentially a procedural protection bottomed on a just cause analysis.

N.J.S.A. 18A:6-10 states:

> No person shall be dismissed or reduced in compensation.
>
> (a) If he is or shall be under tenure of office, position of employment during good behavior and efficiency in the public school system of the state, or
>
> (b) If he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teaching or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner; except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act, in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member of members of a board of education, and filed and proceeded upon as in this subarticle provided.

> Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law.

Clearly a RIF, by express statutory exception does not apply. However, if this tribunal is somehow persuaded that a tenure charge proceeding should be brought, then the Board should be given leave to institute such proceedings for each individual in order to rectify a procedural defect. At that stage then, the same proofs, as in the case at bar, would serve as the basis to cure the technical attack of the respondent.

Petitioners' Response

In response to petitioners' claims that it violated their statutory tenure and seniority rights as custodial employees when it reduced their compensation following their reassignments as head custodians to assignment from assignments as head custodians to assignments as custodians, respondent first acknowledges that tenure and seniority are statutorily granted to custodial employees by *N.J.S.A.* 18A:1-3 and *N.J.S.A.* 18A:17-4.[2] Respondent, nevertheless, claims that petitioners were not afforded tenure protection in their positions as head custodians because their collective bargaining agreement did not allow for same and because the aforementioned statutes do not specifically reference the position of "head custodian.[3] This argument fails on several levels. First and foremost, this position clearly contravenes the numerous rulings made by the New Jersey Supreme Court which hold that terms set forth in a collective bargaining agreement may not supersede a specific term or condition of employment which is set forth by statute. *Spiewak v. Rutherford Bd. of Ed.*, 90 *N.J.* 63, 76 (1982); *State v. Supervisory Employees Association,* 78 *N.J.* 55 (1978). Thus, the fact that the collective bargaining agreement covering head custodians did not contain a specific provisions granting them tenure does not, and cannot,

[2] The Stipulation of Facts agreed upon by the parties prior to the submission of the cross motions for summary decision recognizes that the petitioners all obtained tenure as custodial employees pursuant to *N.J.S.A.* 18A:17-3. This Stipulation of Facts was prepared in final form by petitioners' counsel and forwarded to counsel for the respondent for execution; a fully executed copy has not yet been returned.

[3] In Point Two of its brief, respondent states that seniority must be determined in accordance with *N.J.A.C.* 6:3.5-1. This regulation, however, is applicable to certificated school employees only and no relevance to non-certified personnel such as custodial employees who are granted statutory seniority rights pursuant to *N.J.S.A.* 18A:17-4. This law provides that dismissals following a reduction in force be made on the basis of total years of service as a custodial employee not according to the various custodial assignments in which they served.

negate the tenure protection afforded by the law. As discussed in detail in petitioners' brief in support of summary decision, the Appellate Division as well as the Commissioner of Education have clearly extended tenure protection under *N.J.S.A.* 18A:17-3 to all types of custodial positions, including that of chief or head custodian. *Barnes v. Bd. of Ed. of Jersey City,* 85 *N.J. Super.* 42 (1964); *Brunner v. Bd. of Ed. of the City of Camden,* 1960 *S.L.D.* 155; *Lauffer v. Bd. of Ed. of the Borough of Leonia,* 1984 *S.L.D.* 1290. These cases clearly demonstrate that the position of head custodian, although not specifically identified in the tenure and seniority statutes, is merely a particular assignment within the general classification of janitorial employee and thus falls within the scope of those statutes. This is also comparable to the tenure protection afforded an individual who holds the position of "teacher" regardless of the particular teaching assignment of position which he/she holds. Although respondent opines that such a conclusion defies logic and the law, it fails to address the well-reasoned arguments in the aforementioned decisions which provide for same.

When petitioners obtained tenure as custodial employees under *N.J.S.A.* 18A:17-3, they also acquired certain protections against dismissal, suspension and reduction in compensation. In filing this petition of appeal with the Commissioner of Education, petitioners have never maintained that the Board could not effectuate a reduction in force to alleviate financial difficulties. This is clearly permitted by *N.J.S.A.* 18A:17-3 and *N.J.S.A.* 18A:17-4, which specifically allow for a *reduction in the number of janitors in the district.* However, the only way in which the compensation of a tenured custodial employee can be reduced as if his/her position is reduced from full-time to part-time or from twelve months to ten months or some other comparable reduction in work time, and even then his/her rate of compensation may not be reduced. *See Casey v Board of Education of the Township of Cinnaminson, Burlington County, State Bd.,* Dkt. No. 1-94 (October 5, 1995), discussed in more detail in petitioners' brief in support of summary decision. Moreover, in reducing the number of janitorial employees in the district, respondent was statutorily obligated to dismiss those employees with the least number of years of service in the district. Contrary to respondent's assertions, Exhibit J-4 (and J-) clearly reveal that several employees with less seniority than petitioners Johnson, Cosme and Smallwood were retained while they were terminated.

For the foregoing reasons, as well as those set forth in their brief in support of summary decision, petitioners respectfully request that this court issue an order for the reinstatement of petitioners' Johnson, Cosme and Smallwood to custodial positions and the restoration of all lost wages and benefits suffered by them, as well as for the restoration of the salaries earned by all petitioners, including Johnson, Cosme and Smallwood to that which they earned during the 1997-98 school year, without an appropriate ward for backpay and lost benefits.

CONCLUSIONS

There is neither question nor doubt that a board of education is authorized, by statute, to terminate janitors in its employ who possess a tenure status for reasons other than "neglect, misbehavior or other offenses." *N.J.S.A.* 18A:17-3. Janitorial positions may be abolished for reasons of economy. *Impey, supra.* In exercising its authority to effectuate a RIF, the board must, moreover, comply with the statutory provisions, pursuant to *N.J.S.A.* 18A:17-4, which provides that:

> No board of education shall reduce the number of janitors, janitor engineers, custodians or janitorial employees in any district by reason of residence, age, sex, race, religion or political affiliation and when any janitor, janitor engineer, custodian or janitorial employee under tenure is dismissed by reason of reduction in the number of such employees, *the one having the least number of years to his credit shall be dismissed in preference to any other having a longer term of service* and the person so dismissed shall be and remain upon a preferred eligibility list, in the order of years of service, for reemployment whenever vacancies occur and shall be reemployed by the board in such order and upon reemployment shall be given full recognition for previous years of service in his respective positions and employments. (emphasis supplied).

In the instant matter, the Board contends, among other things, that the "Tenure Protection Act does not apply and that the reduction in force prerogative would be destroyed if salary levels were maintained at the inflated supervisory levels." (Board's brief, at Point One). The Board relies, in great measure, upon the collective bargaining agreement between it and petitioners.

With respect to the Board's reliance upon the agreement entered into between it and the petitioners, our Supreme Court has clearly stated that:

> It is now well settled that public employees and employers may not agree to contractual terms that contravene a specific term or condition of employment set by a statute. "If the Legislature establishes a specific term or condition of employment that leaves no room for discretionary action, then negotiation on that term is fully preempted." *In re IFPTE Local 195 vs. State,* 88 *N.J.* at 403. We have specifically stated that the tenure provisions of *N.J.S.A.* 18A:28-5 constitute a mandatory contractual term that may not be waived or bargained away. *Spiewak, supra.* at 76.

This same principle holds true for janitors as it does for teachers. Thus, the contract or agreement between the Board and the members of the Atlantic City Head Custodian's Association is of no moment in the instant matter. Notwithstanding the Board's arguments to the contrary, the *Spiewak* Court, without question, holds that any negotiated term which contravenes the statutory provisions of the Tenure Act "is fully preempted." *Spiewak* at 76. The Court, in *Spiewak,* continued to state that tenure is a "statutory right imposed upon a teacher's contractual employment," quoting from its holding in *Zimmerman v. Newark Bd. of Ed.* 38 *N.J.* 65, 72 (1962). The Court further stated that tenure may not be forfeited or waived. *Spiewak* at 77. Thus, the herein petitioners' have acquired a tenure status in the Board's employ in the position of custodian (janitor) *N.J.S.A.* 18A:17-3, *N.J.S.A.*18A:17-4.

The Board continues to argue, at Point One, that "A Custodian and Head Custodian are radically different positions that requires a separation of bargaining units in order to separate the supervisory and non-supervisory units." This is true for purposes under the New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13A-1 to -21. The Board, however, argues that "head custodian" is not mentioned in the statute which protects janitors with tenure and, therefore, petitioners, are not protected by *N.J.S.A.* 18A:17-3. The Commissioner has held otherwise in the matter of *Brunner v. Bd of Ed. of Camden,* 1960 *S.L.D.* 155 where he said at 157 that:

> In the opinion of the Commissioner, petitioner is protected in his position as chief janitor under the janitors' tenure statute. While it is true that the specific title "chief janitor" is not mentioned in the

> law, the intent of the act is to extend protection in their employment to a general category of employees. This reasoning is supported by the language of *R.S.* 18:5-66.1, enacted subsequent to the earlier statutes, which enumerates "janitors, janitor-engineers, custodians or janitorial employees." It is obviously impracticable to list in a statute by specific title every individual employee to whom the act applies. It seem significant that the legislature in its later enactment enlarged upon the single title "janitor" to include several others, thereby indicating that the scope of the statute embraced the general classification of janitorial employees. In the Commissioner's judgment, the position of chief janitor denotes a special assignment within the general classification of janitorial services and, therefore, it comes within the scope of the tenure statute.

Thus, petitioners and especially petitioners Johnson, Cosme and Smallwood, fall under the tenure protection of custodian and are to be afforded all of the benefits and emoluments attached thereto. I **CONCLUDE**, therefore, that pursuant to *N.J.S.A.* 18A:17-3, petitioners have acquired tenure in the Board's employ as janitors (custodians). I **FURTHER CONCLUDE** that under the statutory provisions at *N.J.S.A.* 18A:17-4, petitioners Johnson, Cosme and Smallwood have acquired seniority in their respective positions and shall be provided preference over those custodians with less seniority.

Petitioners are correct in their assertion that the law clearly holds that a reduction in a tenured employees' compensation following a transfer from one custodial position to another violates the prohibition set forth in *N.J.S.A.* 18A:17-3 against reduction in compensation unless the reduction is the result of action taken against the employee for "neglect, misbehavior or other offense and only in the manner prescribed," pursuant to the Tenure Hearing Act. As petitioners observed, the Commissioner in *Reinertsen, supra.* held that the reassignment of a tenured custodial employee from a head custodian position to a custodian position was permitted by law, however, the board of education could not reduced the salary of the employee without violation of the tenure laws. *See also, Bassett, supra.; Casey, supra.*

I **CONCLUDE**, therefore, that while the Board herein may engage in a RIF action, it may not reduce the compensation of those tenured employees who have acquired a tenure status in its employ.

ORDER

Accordingly, it is hereby **ORDERED** that petitioners Johnson, Cosme and Smallwood be immediately restored to their rightful positions with all of the lost wages and other emoluments withheld from them for the 1997-98 school year.

It is **FURTHER ORDERED** that the compensation of all other petitioners be returned to the level they would have earned during the 1997-98 school year pursuant to the Appellate Decision at *Bassett, supra.*

It is **ORDERED**, therefore, that Summary Decision be and is hereby **ENTERED ON BEHALF OF PETITIONERS** and the Board's Motion for **SUMMARY DECISION IS DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

19 August 1999
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

Aug 23, 1999
DATE

Deborah N. Antenaitis/lf
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 24 1999
DATE

Barbara A Hervey
OFFICE OF ADMINISTRATIVE LAW

lmh

OAL DKT. NO. EDU 10335-98
AGENCY DKT. NO. 435-9/98

ATLANTIC CITY EDUCATION ASSOCIATION, on behalf of itself and the members named herein, REVEREND DAVID BELL, LUIS CARMONA, MICHAEL DAVIS, RALPH MONAGAS, MICHAEL MOODY, JAMES PALIN, RAY RODRIGUEZ, SANTOS VERGARA, KENNETH WHITE, RICHARD JOHNSON, JORGE COSME AND WILLIAM SMALLWOOD,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions were filed by petitioners and the Board, and a reply was filed by petitioners in accordance with *N.J.A.C.* 1:1-18.4.[1] All submissions were considered by the Commissioner in reaching his decision.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the ALJ that petitioners are entitled to the relief they seek. The Supreme Court has provided direction regarding the options local boards enjoy when employing custodians. That is, a local board may, "without contravening the terms of the statute,

[1] Petitioners disagreed only with the relief ordered by the ALJ in his recommended decision. Specifically, Petitioners Johnson, Cosme and Smallwood seek, not only to be reinstated, but to be compensated with all lost wages and emoluments withheld from them during the 1998-99 school year, and up to the date of reappointment. The remaining petitioners seek an amended order providing not only that their salaries return to that which they earned in the 1997-98 school year, but that they be awarded back pay equal to the difference between the amount they earned during the 1997-98 school year and the reduced amount they earned during the 1998-99 school year, and

permissibly pick and choose between the statutory minimum of no tenure for any custodial employee and the statutory maximum of instant tenure for all custodians." *Wright, supra,* at 119. As the Court instructs:

> ***teachers' tenure statute is fundamentally different from the janitors' statutory tenure provision, *N.J.S.A.* 18A:17-3. The teachers' tenure statute speaks in the imperative, providing that all teachers shall have tenure after three years of employment. A teacher's statutory right to tenure cannot be altered by contract and boards have no discretion to deny a teacher tenure if he is reemployed after three years of service. Conversely, *** *N.J.S.A.* 18A:17-3 grants an employing board discretion in determining whether to grant tenure to custodians.*** Therefore, negotiation of custodians' tenure rights must be permitted***. *Wright, supra,* at 122.

In *Wright*, the Court upheld a collective bargaining agreement which provided that custodians would receive tenure after three years of employment. Similarly, the collective negotiations agreement between the Board herein and the Atlantic City Education Association (ACEA) provided that

> After three (3) years of uninterrupted continuous service, each custodial employee shall be appointed for an unfixed term so as to provide the tenure protection available to such employees under the provisions of Chapter 137, Public Laws of 1960 (*N.J.S.A.* 18A:17-3 and *N.J.S.A.* 18A:17-4). (Board's Appendix at p. 15)[2]

There can be no dispute that each of the petitioners acquired tenure as a custodian; indeed, the parties stipulated to this fact. "Once tenure accrues in a designated *category* of employment, it is *not nullified* by the title given to a particular position." *Brunner, supra,* at 157. (emphasis added) Thus, despite the Board's efforts to distinguish the classes of custodians and head custodians,

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up to the date of restoration of their proper compensation. (Petitioners' Exceptions at p. 2) The Board's exceptions reiterated the arguments in its post-hearing brief, as recounted in full by the ALJ.

[2] The record indicates that the ACEA is the majority representative of all custodians in the District. (Petition of Appeal at p. 2) However, its collective bargaining agreement does not recognize "head custodians" as members. (Initial Decision at p. 15) Respondent argues that the petitioning head custodians were members of the Atlantic City Head Custodians' Association (ACHCA) and were governed by a different agreement, see *infra*, which recognized the supervisory nature of the head custodial position.

arguing they are "radically different positions that require a separation of bargaining units in order to separate the supervisory and non-supervisory classes" (Board's Exceptions at p. 8), the Commissioner has recognized that

> [t]he title "head custodian" merely denotes a special assignment within the general classification of janitorial services and, therefore, it comes within the scope of the tenure statute. [Therefore,] [p]etitioner's title can be changed without violation of the statute, *but as long as he remains within this category/class of employment he is afforded the protections of a tenured janitor. Reinertsen, supra,* at slip. op. pp. 5-6. (emphasis added)

Therefore, the Board's attempt to create a "supervisory subclass of Head Custodians" who *do not* have tenure must fail. (Initial Decision at p. 21)

With respect to petitioning Head Custodians Bell, Carmona, Davis, Monagas, Moody, Palin, Rodriguez, Vergara and White, since they had all acquired tenure as custodians, the Board was not permitted to reduce their compensation when it abolished their respective positions as head custodian and reassigned them to *another* janitorial/custodial position. *N.J.S.A.* 18A:17-3. As petitioners correctly observe, this principle, which was central to the outcome in *Reinertsen*,

> comports with decisions which provide that the compensation of a tenured teacher cannot be reduced following his/her transfer from one teaching position to another. *Bassett v. Board of Education of Oakland,* *** 223 *N.J. Super.* 136 (App. Div. 1988), and those which provide that the compensation of a tenured secretarial/clerical employee cannot be reduced following his/her transfer to another secretarial/clerical position, *Casey v. Board of Education of the Township of Cinnaminson, Burlington County,* [95 *N.J.A.R.* 2d EDU 585] ***. (Initial Decision at pp. 12-13, citing to Petitioners' Brief in Support of Summary Decision at pp. 8-9)

To the extent the Board's contract appears to create the opportunity to reduce the compensation of petitioners, the contract "contravene[s] a specific term or condition of employment set by a statute." *Spiewak, supra,* at 76. In this respect, as the ALJ correctly observes, the agreement of

Atlantic City Head Custodians' Association (ACHCA) "is of no moment in the instant matter." (Initial Decision at p. 28)

Turning to Petitioners Johnson, Cosme and Smallwood, the Commissioner concurs that, pursuant to *Barnes, supra, Brunner, supra,* and *Lauffer, supra,* each acquired tenure in the category of "custodian," and, as such, enjoyed the protections of *N.J.S.A.* 18A:17-3 and 18A:17-4.[3] As the ALJ properly noted:

> There is neither question nor doubt that a board of education is authorized, by statute, to terminate janitors in its employ who possess a tenure status for reasons other than "neglect, misbehavior or other offenses." *N.J.S.A.* 18A:17-3. Janitorial positions may be abolished for reasons of economy. *Impey, supra.* [However,] [i]n exercising its authority to effectuate a RIF, the board must *** comply with the statutory provisions, pursuant to *N.J.S.A.* 18A:17-4 ***. (Initial Decision at p. 27)

When the Board determined on June 23, 1998 to eliminate the custodial positions held by tenured employees, Johnson, Cosme and Smallwood, for reasons of economy, they were obliged to respect the seniority rights of each. *N.J.S.A.* 18A:17-4. In that the record clearly demonstrates that Johnson, Cosme and Smallwood were *not* the least senior custodians at the time of the RIF, their termination was contrary to the statutory mandate.

Accordingly, the Initial Decision is adopted for the reasons expressed therein and amplified above. The Board is directed to reinstate Petitioners Johnson, Cosme and Smallwood and, should there be an ensuing RIF, provide each with preference over less senior staff. *N.J.S.A.* 18A:17-4. The Board is further directed to compensate Johnson, Cosme and Smallwood with lost wages and emoluments, less mitigation, if any, from the date of their respective terminations to the date of their reappointments. With respect to the remaining petitioners, the Board is directed to restore each of them to the salary level each enjoyed during the 1997-98

[3] Indeed, the parties stipulate that although both Cosme and Smallwood were assigned to a position known as "stockroom worker," both served in "custodial/janitorial" positions. (Initial Decision at p. 7)

school year, *and* to reimburse each for the amount, less mitigation, if any, representing the difference between what each should have received in the 1998-99 school year and up to the date of restoration, as per this decision, and what each was actually paid by the Board, after being relieved from assignment as head custodian. Mindful of the Board's "financial stress" (Initial Decision at p. 18), the Commissioner reiterates that this decision in no way precludes the Board from prospectively implementing a reduction in force in accordance with *N.J.S.A.* 18A:17-3 and 17-4.[4]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[4] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

321-99

EDU #10335-98
C's # 321-99
SB # 46-99

ATLANTIC CITY EDUCATION ASSOCIATION, on behalf of itself and the members named herein, REVEREND DAVID BELL, LUIS CARMONA, MICHAEL DAVIS, RALPH MONAGAS, MICHAEL MOODY, JAMES PALIN, RAY RODRIGUEZ, SANTOS VERGARA, KENNETH WHITE, RICHARD JOHNSON, JORGE COSME AND WILLIAM SMALLWOOD,	:	STATE BOARD OF EDUCATION
PETITIONERS-RESPONDENTS,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, October 7, 1999

For the Petitioners-Respondents, Zazzali, Zazzali, Fagella & Nowak (Kathleen A. Naprstek, Esq., of Counsel)

For the Respondent-Appellant, George G. Frino, Esq. and Michael C. Epps, Esq.

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

March 1, 2000

Date of mailing MAR 09 2000

322-99R

IN THE MATTER OF THE TENURE :
HEARING OF BRIAN YATAURO, :
SCHOOL DISTRICT OF THE :
TOWNSHIP OF LACEY, OCEAN :
COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION ON REMAND

SYNOPSIS

This matter was severed from the tenure case wherein the Commissioner dismissed respondent from his tenured employment for unbecoming conduct and, at the request of the ALJ, remanded the matter to OAL on the outstanding issue of monies which may be due and owing respondent.

On remand, the ALJ denied respondent's claim for the salary withheld from September 17, 1996 through May 12, 1997, while he was under indictment in Ocean County Superior Court for criminal charges. Based upon considerations of fundamental fairness and equity, the ALJ concluded that where a tenured employee seeks to recover salary which was withheld after an indictment from which the employee obtained a favorable disposition, but where the employee has subsequently been proven in a tenure proceeding to have committed the same misconduct, which was the essential subject of the criminal charges, the employee may not recover the salary withheld during the pendency of the indictment. ALJ, however, concluded that the Board did owe respondent his full salary for the period from the 121st day following certification of tenure charges, January 14, 1998, until the date of the initial decision, January 15, 1999, pursuant to *N.J.S.A.* 18A:6-14. ALJ noted that the award of post 120-day back pay shall be reduced by any monies respondent received by way of salary from substituted employment assumed during the 120-day period.

Commissioner affirmed the Initial Decision with modification. Commissioner denied respondent's claim for salary payment for the period of his suspension while under indictment. Commissioner concurred that, pursuant to *N.J.S.A.* 18A:6-14, the Board must pay respondent his salary for the period from the 121st day following certification of tenure charges against him, less set-off for substituted employment. Commissioner, however, clarified that, although the Initial Decision specified that respondent's entitlement to compensation terminated with the determination of the ALJ in his Initial Decision on the tenure charge matter, such entitlement concluded on March 1, 1999, the date of the Commissioner's final decision in the tenure matter. Commissioner remanded matter to the OAL solely for expansion of the record and resolution of the exact amount of set-off, if any, the Board may deduct from these monies owed for compensation respondent received from substituted employment.

October 13, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 00793-99S (EDU 08619-97 Remanded)
AGENCY DKT. #347-9/97

LACEY TOWNSHIP BOARD OF EDUCATION,
Petitioner,
v.
BRIAN YATAURO,
Respondent.

Arthur Stein, Esq., for petitioner (Arthur Stein & Associates, attorneys)

Steven R. Cohen, Esq., & **Keith Waldman,** Esq., for respondent (Selikoff & Cohen, attorneys) and **Henry Collins**, Esq., (Collins & Berman, attorneys)

Record Closed: June 3, 1999 Decided: July 12, 1999

BEFORE **JEFF S. MASIN**, ALJ:

This matter was previously before the Office of Administrative Law ("OAL") in a contested case which led to a determination that Mr. Yatauro, who had been employed as a teacher in the Lacey Township School District, had engaged in sexual relations with a student and had thereby violated his tenure. The details of that matter are related in an initial decision, *Board of Education of the Township of Lacey, Ocean County v. Brian Yatauro,* EDU 8619-97S, initial decision, January 14, 1998, adopted by Commissioner, March 1, 1999, *In The Matter of the Tenure Hearing of Brian Yatauro, School District of the Township of Lacey, Ocean Township, http:www.state.nj.us/njded/legal, (51-99).* As a result of the findings in the tenure proceeding, Mr. Yatauro was stripped of his tenure. In the current matter, he seeks to recover salary withheld from him during two periods. First, he seeks the salary withheld from September 17, 1996,

through May 12, 1997, while he was under indictment in Ocean County Superior Court for criminal charges which directly related to the inappropriate sexual relationship which was ultimately determined in the tenure hearing to have existed. Mr. Yatauro was acquitted of the criminal charges after a trial. The acquittal occurred before the filing of the Board's tenure charges. Second, he seeks to recover salary not paid to him following the expiration of the statutory 120-day period following the certification of the tenure charges to the Commissioner up through the date of the Initial Decision rendered on January 14, 1998. In each instance, the Board of Education ("Board") opposes Yatauro's claim.

Mr. Yatauro was suspended with pay on March 27, 1996, pending the resolution of a criminal allegation relating to his purported sexual misconduct with student E.K. He was subsequently indicted and his suspension was modified to a suspension without pay. He was later acquitted following a jury trial in 1997. On September, 18, 1997, the Board filed its tenure charge with the Commissioner. After the tenure case was determined the Commissioner remanded these salary claims for determination in a separate docket. Counsel have filed supplemental briefs addressing these issues which were originally the object of briefs filed during the hearings on the underlying tenure charge. In addition, the parties have stipulated facts regarding the specific salary amounts and periods in which pay was received or withheld, as documented in a Certification of James G. Savage, Jr., Business Administrator for the Board, J-1 in evidence.

The Claim for Salary Withheld While Yatauro Was Under Indictment

N.J.S.A. 18A:6-8.3 provides that

> Any employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing to trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary as provided in chapter 6 of which this section is a supplement.

This enactment, while authorizing a suspension without pay for an employee who is indicted, does not specify whether such employee is entitled to receive his or her withheld salary after the disposition of the indictment. Prior to the enactment of this specific statutory authority for the suspension of an employee without pay during the pendency of an indictment, the Appellate Division had determined in *Romanowski v. Board of Education of Jersey City*, 89 *N.J. Super.* 38 (App. Div. 1965) that the board had the inherent power to suspend while an indictment was pending, and added that if Romanowski were acquitted he would "be entitled to compensation for the period of his temporary suspension." *Id.* at 41.

Both *Beatty v. Newton Board of Education*, 1991 *S.L.D.* 1001 and *Griffin v. Paterson Board of Education*, 93 *N.J.A.R. 2d* 882 (Dept. of Education), considered the claim of an employee suspended during the pendency of an indictment for his withheld pay. Beatty was suspended with pay upon the filing of criminal complaints of aggravated sexual assault and endangering the welfare of a child in regard to his stepdaughter. He was later suspended without pay when an indictment was returned alleging sexual conduct with several minors, including his stepdaughter. After a criminal trial in which he was acquitted of all charges, he requested reinstatement and back pay. The Board rejected the claim for back pay pursuant to *N.J.S.A.* 18A:6-8.3 and filed tenure charges. The Commissioner termed the case one of "first impression." He agreed that there was no specific statutory language governing the claim. Therefore, he weighed "the equities of this matter." At the time of his decision, Beatty had been found not guilty of any wrongdoing and the indictment had been disposed of in his favor. The Commissioner concluded that considerations of "fundamental fairness . . . as a matter of equity" entitled Beatty to his back pay, the pendency of then unresolved tenure charges notwithstanding. "If petitioner is found guilty of the tenure charges, an appropriate penalty shall be fashioned by the Commissioner, which could include but is not limited to reduction in salary or dismissal." *N.J.S.A.* 18A:6-10. *Beatty*, at 9-10.

In *Griffin*, a school custodian was arrested and charged with sexual offenses involving young female students at the school to which he was assigned. The Board suspended him without pay on the date an indictment was returned against him. He was later acquitted and restored to the payroll. No tenure charges were filed against him by the Board. He filed a petition with the

Commissioner seeking to recover back pay and legal fees. An ALJ ordered that he receive back pay. The Commissioner affirmed.

In neither *Beatty* nor in *Griffin* was the ALJ or Commissioner faced with the situation presented in *Board of Education of the City of Camden, Camden County v. John Hovington*, EDU 6675-97 (*Hovington* II). Mr. Hovington, a teacher and track coach at Woodrow Wilson High School, had been indicted on charges of sexual misconduct with a female student whom he had coached. After a series of three criminal trials he was finally acquitted of the charges. The Board then filed tenure charges related to the very same alleged sexual misconduct. In a prior initial decision, *Hovington* I, adopted by the Commissioner, this ALJ determined that Hovington had indeed violated his tenure by sexual escapades with the very same student who was the alleged victim of the matters for which an indictment had been returned, as well as a second student who was not an alleged victim of the offenses charged in the indictment. In *Hovington* II, Hovington sought to recover the pay withheld from him during the pendency of the indictment. After reviewing *Romanowski*, *Beatty* and *Griffin*, I concluded that a weighing of the equities and of fundamental fairness led to the conclusion that Hovington, who by the time his claim for back pay was determined had been proven to have engaged in the very same sexual misconduct with the very same student whom the indictment had charged was the victim of his misdeed, could not validly assert an equitable claim which outweighed the substantial countervailing equities which argued that the taxpayers of the City of Camden should not be required to pay him a salary for a period when he did not render service and was under a suspension which while based directly upon an indictment ultimately was grounded upon misconduct in which he had in fact engaged and which was of such a character as to demonstrate that he had violated some of the most basic responsibilities and values of an educator. Unlike Beatty and Griffin, he did not stand before the Commissioner as a proven innocent, or even as one presumed innocent. He was instead a proven sexual predator[1], albeit the proof was by a preponderance of the credible evidence rather than by a reasonable doubt. As a person whose hands were most assuredly unclean, as a supplicant to equity who could hardly claim that the indictment, whatever its outcome in the criminal proceeding, had been without factual and legal foundation, he was hardly in any position to obtain recovery of moneys withheld, absent a clear statutory right. Therefore, his claim was denied. The

[1] The lack of a criminal conviction does not make the term any less applicable.

parties apparently settled their dispute prior to the Commissioner's issuance of a final decision and the Commissioner wrote in his final decision that he "finds no need to reach the substantive merits of respondent's claims. Accordingly the order of the ALJ is entered as the final decision in this matter for the reasons expressed herein." *Hovington*, Commissioner of Education Decision on Remand, March 30, 1998.

In further support of its position, the Board cites *Nicholas A. Ciufi v. Board of Education of the Township of Irvington*, EDU 7548-94, Initial Decision, March 30, 1998, *adopted* by Commissioner, May 15, 1998, *http://www.rutgers.edu/oal. Ciufi* involved a claim for indemnification of defense costs under *N.J.S.A.* 18A:16-6.1 by an assistant vice principal who had been accused in a criminal complaint of sexual misconduct with a student. The Grand Jury declined to indict and dismissed the complaint. The Board filed tenure charges. An ALJ determined that Ciufi had indeed engaged in improper sexual conduct with the very student who was the alleged victim in the criminal complaint and found him guilty of unbecoming conduct. The Commissioner sustained the findings and ordered that Ciufi be dismissed from his tenured position. When Ciufi then sought indemnification before Administrative Law Judge Ken R. Springer, Judge Springer analyzed the statute and concluded that while the dismissal of the criminal complaint by the Grand Jury satisfied the first prong of the statutory test for indemnification, namely, that "the charges must either be dismissed or result in a final disposition favorable to the employee," nevertheless, Ciufi could not satisfy the second prong, which required that "any act or omission on which the criminal charges are based must arise 'out of and in the course of performance of the duties' of the position held by the employee." The judge considered Ciufi's claim in light of the then very recent New Jersey Supreme Court decision in *Bower v. East Orange Board of Education*, 149 *N.J.* 416 (1997). In *Bower*, a tenured school employee was charged with sexual abuse of students. Ultimately, after a "convoluted procedural path," *Ciufi*, Initial Decision at page 4, a trial court judge dismissed a second indictment which had been returned in place of a first indictment which had been dismissed "without prejudice." The Commissioner determined that the second dismissal was a final favorable disposition, a view which the Supreme Court endorsed. As for the second prong, no administrative proceedings were ever instituted to remove Bower. In concluding that the dismissal of the indictment "requires the assumption that Bower committed no acts other than to perform his duties as a

kindergarten teacher," 149 *N.J.* at 431, the majority of the Court determined that Bower had satisfied his burden of proof under the statute. However, the majority then explained

> No proceedings were instituted to dismiss Bower, a tenured teacher, on the basis of his alleged misconduct. See *N.J.S.A.* 18A:6-10. *Had the local board seen fit to institute such dismissal proceedings, we assume that any evidence adduced at the hearing addressing those charges would have been material to the proceeding instituted by Bower for indemnification of his legal expenses. Id.* at 433. (emphasis added).

Judge Springer concluded that Ciufi's case was precisely the situation which the Supreme Court had adverted to its explanation. The Board in *Ciufi* filed a tenure charge and then proved to the Commissioner's satisfaction that Ciufi had committed a sexual assault against a student. This necessarily "determined that Ciufi's improper conduct occurred outside the regular course of his teaching duties." *Ciufi*, supra. at 6. As such, Ciufi could not recover the legal expenses. The Judge noted

> It would clearly be incongruous for the Commissioner to uphold the Board's dismissal of Ciufi for unbecoming conduct, while ordering the Board to pay his counsel fees for defense of criminal charges arising out of the same transaction. Rather, as the Supreme Court anticipated, the evidence adduced at the tenure hearing must be regarded as "material" to the indemnification proceeding. *Id.*

Counsel for the Board contends that the *Ciufi* case is highly relevant here, even though there the decision concerned the application of a specific statutory standard for indemnification and here in the Board's view the issue is one of equity. Just as in the case of Ciufi, who unlike Bower came before the Commissioner burdened by the fact that he had been found to have sexually assaulted the student, here Yatauro arrives with the same burden. The "material" fact of a proven event of sexual misconduct committed against a student is just as "material" in the weighing of equities as the Supreme Court considered that it would be in the determination of an indemnification claim. While in the case of indemnification, it established that a statutory standard was not met, in this case it establishes that Yatauro has no grounds to seek to have equity done for him.

Counsel for Mr. Yatauro disputes the relevance of *Ciufi*, rejects the analysis in *Hovington* II and contends that *Romanowski* is still the guidepost. Since *N.J.S.A.* 6:18A-6-8.3 is "unclear on its face" as to an employee's right to recover pay withheld following acquittal of criminal charges in an indictment, it does not change the "common law" determination announced in *Romanowski* as, "[T]he law infers that a statute does not intend to make any alteration in the common law other than is unambiguously expressed." *Green v. Auerbach Chevrolet Corp.*, 248 *N.J. Super.* 128, 133-34 (App. Div. 1991), *aff'd* 127 *N.J.* 591 (1992). Such an employee therefore is still "entitled to compensation for the period of his temporary suspension." *Romanowski, supra.*, at 40-41. As for the *Beatty* and *Griffin* cases, even if the right to repayment is equitable, in *Beatty* the Commissioner did not wait for the determination of a tenure case, but decided the backpay issue prior to such determination, when only the favorable resolution of the criminal matter was before him. Counsel writes

> The equities that the Beatty case reviewed were limited to the fundamental fairness of not paying Beatty for the period of his suspension by reason of indictment when a jury of his peers had acquitted Beatty, in essence, finding that the indictment was without adequate factual basis. In making this determination of fundamental fairness, *Beatty* did not consider the merits of the tenure charges. By deciding the motion for backpay while the tenure case remained pending, the Commissioner implicitly recognized that the merits of the tenure charges would be relevant to the determination of the 120-day suspension pending tenure hearing under N.J.S.A. 18A:6-14, not the indefinite suspension pending indictment under N.J.S.A. 18A:6-8.3.

The determination of a claim for back pay withheld pending the disposition of an indictment which is ultimately determined favorably for the suspended employee would be a simple matter if the Legislature had chosen to speak on the subject. When it provided in *N.J.S.A.* 18A:6-8.3 for suspensions without pay in the case of indictments, it did not find it appropriate to say what if any claim the employee would have for recovering the moneys withheld. The *Romanowski* decision dealt with a situation where there had been a favorable disposition and at the time when that court was called upon to decide the claim, no finding had yet been made which determined that Romanowski had acted improperly. The court recognized that if the administrative proceeding resulted in a determination that he had acted in violation of his tenure obligations the Commissioner could remove him or withhold pay.

It is true that the Legislature did not directly address the *Romanowski* ruling, which was rendered in a case in which there appears not to have been a tenure charge pending when the court wrote its decision. Since that time, no appellate court has addressed the issue and the Commissioner has only addressed it in the context of matters in which the administrative proceeding had either not been completed, or had never even been invoked against the employee. In the absence of Legislative direction, in *Beatty* the Commissioner saw fit to consider fundamental fairness and equity as the basis for deciding the claim. In *Hovington* II and here in *Yatauro*, the decision as to whether the now-former employee should recover the pay withheld from him during the pendency of the indictment is made in a markedly different factual setting than existed in *Romanowski, Beatty*, or *Griffin*. The application of equity principles to decide this issue is in keeping with the Commissioner's view of the law expressed in *Beatty*, and in the absence of express Legislative direction, affords a reasonable means of considering all of the material information now available to decide if an employee who did not work for the Board while suspended and was ultimately determined guilty of serious tenure charges which mirror the criminal charges should nevertheless be allowed to collect this withheld pay.

Ciufi and *Bower*, while not directly on point, are instructive. The *Bower* court, dealing with a case where there had been no tenure proceedings instituted, acknowledged that had there been such proceedings, the information generated therein would have been "material" to the decision on indemnification.[2] In *Ciufi*, the tenure case determined that Ciufi had engaged in misconduct. The tenure findings led Judge Springer to deny the indemnity claim, pointing out the incongruity of an order to the Board to pay for defense costs when the same transaction which was the subject of that defense was ultimately proven to have occurred. Similarly here, the suspension was because of an indictment for engaging in the very same misconduct later proven in the tenure case. While it is of course true that *Bower* and *Ciufi* involved a specific statutory

[2] The Court's recognition that the facts developed in a tenure proceeding could be material to the indemnification issue suggests that the Court saw no fundamental concern as to a delay in the determination of the indemnification dispute while the tenure case proceeded to completion. Similarly, the recognition that the facts developed in the tenure hearing may be material to the determination of the equitable claim for payment of salary and benefits withheld pending disposition of an indictment suggests that any delay in the backpay ruling while awaiting the results of the tenure case is not a significant concern. A determination based upon consideration of all of the material facts and circumstances weighing upon the equitable claim is preferable to a decision made in haste without the facts developed during the tenure case.

standard, the same incongruity exists. While an employee acquitted of a criminal indictment can recover withheld salary, if the very charges are proven to have been true before he does so, ordering a board of education to pay him the salary he would not have received had he been convicted for engaging in those very same actions is both incongruous and inequitable. Indeed, the very findings in the tenure case established that while the criminal case jury could not be convinced of the criminal guilt of the defendant, the factual basis for the charges most assuredly did exist.

Based upon considerations of fundamental fairness and equity, I **CONCLUDE** that where a tenured employee seeks to recover salary which was withheld after an indictment from which the employee has obtained a favorable disposition, but where the employee has subsequently been proven in a tenure proceeding to have committed the same misconduct which was the essential subject of the criminal charges, the employee may not recover salary withheld during the pendency of the indictment. Therefore, Mr. Yatauro's claim for these moneys is **DENIED**.

The Post-120 Day Claim

N.J.S.A. 18A:6-14 provides that a board may suspend any person against whom it has certified tenure charges and further mandates that

> . . . if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made. . . .

This statute contains mandatory language which requires that a board commence payment of salary on the 121st day after certification. It does not authorize a board to withhold such money until some later date, such as the conclusion of a tenure proceeding. The only reason why the salary payments would not begin would be an intervening indictment, or the prompt disposition of the tenure charge prior to the 121st day. Unlike the situation which exists regarding payment of moneys withheld during a period of indictment, where the statute does not indicate when, if at all, such moneys are to be paid to the employee, here the Legislature left no doubt that the salary was

to commence on the 121st day. The statute cannot be read to authorize a board to hold the money aside, to keep a running tab of salary owed to the employee. Instead, it directs that the full salary "shall be paid." Equity is not an issue here.

It is admittedly troubling that an employee such as Yatauro, who conducted himself so improperly and in doing so risked not only his own professional and financial future but the interests of a young student as well, should receive any salary payments for periods when he did not work. If the statute were not mandatory, it would be fully in accord with the equitable analysis applied to the post-indictment period to similarly deny this claim. However, here the Legislature has spoken with clear voice and intent.

It is interesting to note that in *N.J.S.A.* 18A:6-18.1 the Legislature has provided that in the case of college professors and instructors, the full salary of the employee must be paid beginning on the 181st day from the first day of suspension. However, the statute also provides that "[I]f the charges are sustained, the employer may recover any salary which was paid to the employee during the period of suspension." Thus, while this statute also mandates that payment begin and does not allow for withholding after 181 days in order to await the outcome of the administrative charges, it does provide for possible recovery of the sums paid by the employer. *N.J.S.A.* 18A6-14 has no such recovery provision. If one could argue that the ability to seek recovery of a college professor's salary payments after the charges are sustained in some way could justify the employer in withholding post-180 day payments pending the outcome of the charges (admittedly a highly dubious argument), in the case of a public school employee under *N.J.S.A.* 18A:6-14 not even such a weak contention can be ventured.

Counsel for the Board cites cases in which the Commissioner has imposed financial penalties instead of tenure removal in support of the argument that there is nothing sacrosanct about the post-120 payments. It is of course true that the statute allows for salary related penalties in which an employee found to have violated some aspect of the responsibilities of a tenured employee keeps his or her position. That a penalty may require that an employee pay money to the board, or lose some money not yet paid, does not suggest that the board was not obligated to pay the employee in a timely fashion after the passage of 120 days from the certification of the charges. If it were determined that boards could blithely withhold post-120

day salary until the resolution of the pending tenure case, it is doubtful that any board would ever voluntarily pay such salary when it became due. This would surely be in derogation of the clearly stated legislative intent.

I **CONCLUDE** that the law as it currently exists does not permit a board of education to refuse to pay to an employee the employee's full pay once the 120-day initial period has concluded. Where a board fails to do so, it cannot invoke equitable considerations to support a refusal to pay the moneys owed to the now ex-employee following his or her removal on substantiated tenure charges. The *Ciufi*/material facts concept, while applicable to the equitable milieu of the post-indictment salary decision, does not apply here where the Legislature has mandated that the salary be paid and has not provided any discretion to a board to wait to pay the money. Therefore, the Lacey Township Board of Education must pay Mr. Yatauro his full salary for the period from the 121st day following certification of tenure charges, January 14, 1998, until the date of the initial decision, January 15, 1999.

The Board argues that if any backpay is required for the post-120 day period it should nevertheless be denied for that period of time when Yatauro, in its view, delayed the completion of the tenure hearing by first requesting time after the July 8 hearing to consult a handwriting expert and then, just prior to the hearing dates scheduled during the last week of July, 1998 which were expected to conclude the hearing, filing his motion seeking to end the case on grounds of mootness due to his attempt to resign and his offer to tender his teaching certificates to the State Board of Examiners. While that motion was pending an additional issue arose due to the filing of a motion by the Division of Youth and Family Services in which it sought to intervene in the tenure case. The briefing period for these motions was extended due to several pre-scheduled vacations during the month of August. The motions were both rejected in an interlocutory ruling issued on September 29, 1998. The hearing then resumed in accordance with the availability of the judge and counsel on November 25 and concluded on November 30, 1998. Yatauro never did produce a handwriting expert to testify. The initial decision was issued on January 14, 1999.

I cannot find that Yatauro's request for a delay to consult with a handwriting expert was a delay which was unwarranted by the circumstances of discovery, in which the Board did not supply certain discovery until very late in the discovery process, due perhaps to no fault of its

own. That Yatauro never called a handwriting expert does not suggest that the time from July 8 until the final week of July should be deducted from his post-120 day pay. As for his motion, while I determined that the attempt to end the case could not be permitted under the specific circumstances, I cannot find that Yatauro acted in bad faith in suggesting that his resignation and proposed tender of certificates would eliminate the necessity of further hearings and an initial and final decision on the tenure charges. The delay caused by his motion is not, in my view, akin to a delay requested by a respondent in a tenure action due to scheduling conflicts, unreadiness, and the like. Therefore, I **CONCLUDE** that the Board cannot deduct any portion of the post-120 day salary.

The award of post-120 day back pay shall be reduced by any moneys Yatauro received by way of salary from substituted employment assumed during the 120 period. *N.J.S.A.* 18A:6-14, which provides for such a mitigation credit against moneys due to the suspended employee, does not provide for a deduction for "potential earnings."

Any money due to Mr. Yatauro pursuant to this decision shall be paid to him within 15 days of the issuance of the Commissioner's final decision, unless a stay is issued.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 12, 1999
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

7/14/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 15 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

JOINT EXHIBITS:

J-1 Certification of James G. Savage, Jr., signed in May 1999

FOR THE PETITIONER:

Exhibit A Commissioner's Decision in *Ciufi v. Bd. of Ed. of the Twsp. of Irvington,* OAL Dkt. No. EDU 7548-94, Agency Dkt. No. 277-7/94, dated 5/15/98

Exhibit B Commissioner's Decision in *In the Matter of the Tenure Hearing of Fred Engel,* Agency Dkt. No. 554-11/96, dated 4/22/98

Exhibit C Commissioner's Decision in *In the Mater of the Tenure Hearing of Pasquale Raimondo,* Agency Dkt. No. 555-11/96, dated 4/22/98

Exhibit D Commissioner's Decision in *In the Matter of the Tenure Hearing of Philip Maraviglia,* Agency Dkt. No. 556-11/96, dated 4/22/98

Exhibit E Commissioner's Decision in *In the Matter of the Tenure Hearing of Terese Capriglione,* Agency Dkt. No. 557-11/96, dated 4/22/98

Exhibit F Commissioner's Decision in *In the Matter of the Tenure Hearing of Gregory Palumbo,* Agency Dkt. No. 558-11/96, dated 4/22/98

Exhibit G State Board of Education Decision in *In the Matter of the Tenure Hearing of Mary Ellen DiPillo,* OAL Dkt. No. EDU 7457-91, Agency Dkt. No. 288-8/90, dated 5/3/95

Exhibit H State Board of Education Decision in *DiPillo v. Bd. of Ed. of the Twsp. of Randolph,* SB# 2-97, dated 8/6/97

Exhibit I N.J. Superior Court, App. Div. decision in *DiPillo v. Randolph Twsp. Bd. of Ed., et al,* Dkt. No. A-493-97T5, dated 3/4/99

FOR THE RESPONDENT:

Exhibit A 8/14/98 letter brief re Outstanding Salary Issue

Exhibit B 9/3/98 letter brief regarding Reply Brief re Outstanding Salary Issue and Dismissal of Tenure Case as Moot

Exhibit C Newspaper article titled *Board looks to bounce teacher;* newspaper article from Asbury Park Press titled *Cleared teacher targeted by board,* dated 10/30/97;

newspaper article from Ocean County Observer, titled *Cleared teacher fights for his job*, dated 10/30/97; newspaper article from Lacey Beacon, titled *Band teacher faces hearing*, dated 10/30/97

IN THE MATTER OF THE TENURE :
HEARING OF BRIAN YATAURO, :
SCHOOL DISTRICT OF THE :
TOWNSHIP OF LACEY, OCEAN :
COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION ON REMAND

The record of this matter and the Initial Decision on Remand of the Office of Administrative Law (OAL) have been reviewed. Exceptions of the Board and respondent's reply thereto were timely filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4.

The Board's extensive exceptions concur with the Administrative Law Judge's (ALJ) determination that respondent was not entitled to back pay withheld during the period of his suspension while under indictment, but vigorously oppose the ALJ's conclusion granting the respondent pay for the period of suspension subsequent to the 120th day from certification of the tenure charges against him. In this connection, the Board advances that the initial decision did not correctly frame and address the issues to be resolved here. Had respondent made an application to the Court for payment "when the tenure charges were filed or sometime before the trial began," it avers, the Board concedes that it would have been obligated to pay him his salary less set off for mitigation. But, it advances, at issue in this matter is "(1) whether the Board is entitled to reimbursement of the salary paid following the 120th day after certification of tenure charges where the tenure charges are sustained and (2) whether the Board is entitled to calculate

the amount of mitigation resulting from substitute employment before making payment to Yatauro," which, it contends, the Initial Decision, at best, addressed only in a conclusory manner.[1] (Board's Exceptions at p. 6) With respect to its position that respondent is not entitled to payment for the period after the expiration of the 120-day suspension period stipulated by *N.J.S.A.* 18A:6-14, the Board advances, and respondent replies to, five exception arguments:

1. The Board excepts to the failure of the ALJ to harmonize two education statutes which he should have done "to avoid absurd or inconsistent results."

It posits that *N.J.S.A.* 18A:6-14, which is silent as to whether a board may recover salary paid to a teacher during this suspension period must be harmonized with another education statute, *N.J.S.A.* 18A:6-18 (dealing with procedures applicable when tenure charges are filed against a higher education professional), which specifically provides for recoupment of salary paid to such higher education employee if the tenure charges are ultimately sustained. (Board's Exceptions at p. 7) Buttressing this assertion, the Board cites *Accardi v. Mayor and Council of the City of North Wildwood*, 145 *N.J. Super.* 532, 545 (Law Div. 1976) where, in addressing harmonization of statutes, the Court stated:

> A statute should not be construed to permit its purpose to be defeated by evasion. . . . If statutory expression is susceptible of two meanings, that meaning will be adopted which comports with the general public policy of the State as manifested by its legislation rather than that which runs counter to such policy....*Statutes in pari materia are construed as one act and the whole harmonized if possible. Different statutes in pari materia,*

[1]The Board additionally charges that, in reaching his determination, the ALJ failed to consider all of the arguments advanced in its Letter Brief dated September 15, 1998 and in its "sur-reply" to respondent's reply brief on salary issues. It argues that such a contention is supported by the fact that the Initial Decision fails to discuss some of the cases advanced by the Board in support of its position, and the fact that these particular briefs are not listed as exhibits or documents considered on Page 14 of the Initial Decision. The Commissioner's review of this allegation in light of the Initial Decision and the record leads him to the conclusion advanced by respondent in his reply exceptions, "[w]hile the Initial Decision's Exhibit List does not list each of the briefs submitted by each of the parties, the Decision clearly discusses the arguments raised in each brief. The Board fails to point to a single argument that was not considered below and also neglects to show that it was prejudiced in any way by this purely clerical error." (Respondent's Reply Exceptions at p. 13)

> *though enacted at different times, and not referring to each other, should be construed together as one system and as explanatory of each other....* (Emphasis in text);

State v. DiCarlo, 67 *N.J.* 321, 325 (1975) for the proposition that "... it is identity or similarity of purpose or object that most convincingly justifies resort to the rule of in pari materia as an aid in statutory construction"; and finally, the Court's statement in *Accardi, supra,* at 545 that "statutory interpretations which lead to absurd or unreasonable results are to be avoided." (*Id.*)

The appropriateness of harmonizing *N.J.S.A.* 18A:6-14 and *N.J.S.A.* 18A:6-18.1, "two education statutes," is readily apparent, the Board proffers, when considering the legislative history of *N.J.S.A.* 18A:6-18.1 which, it avers, indicates that this provision "was initially drafted as almost a mirror image of the high school teacher tenure statute," (Board's Exceptions at p. 9) but was substantially modified after the then Governor's review and comments. The Board quotes one such modification contained in "Paragraph 4 of the Governor's statement to the General Assembly" wherein it is stated that the provision as drafted

> *permits an employee against whom a determination of guilt has been made to continue to draw salary throughout a lengthy appeal process, and encourages the practice of filing spurious appeals. There should be a provision in this bill providing for the reimbursement by an employee against whom charges have been sustained for all salary payments made after the 181st day of suspension.* (emphasis in text) (*Id.*)[2]

The Board, therefore, advances that, notwithstanding that *N.J.S.A.* 6:14 and *N.J.S.A.* 18A:6-18.1 "were enacted at different times and do not refer to each other," legislative construction and the public policy concern that a teacher who has not worked due to his own unbecoming conduct

[2]The Board further notes that in paragraph 5 of this statement the Governor stated that the 120-day period during which a deliberation should be made is "inadequate and unrealistic" as a consequence of administrative delays and due process requirements, advancing that 180 days was a "more realistic and attainable figure." (Board's Exceptions at pp. 9-10)

should not be rewarded with a gift of public money require that these two provisions be construed together to ensure conformity of application throughout the education law statutes, thereby precluding "absurd and unreasonable results." (Board's Exceptions at p. 9)

Moreover, the Board asserts, the Commissioner has previously, in the name of "equity," harmonized two statutes which not only dealt with separate and distinct subject matter but were also located in different chapters of the New Jersey Statutes. It cites *Beatty v. Board of Education of the Township of Newton*, 1991 *S.L.D.* 1001, wherein it asserts the petitioner, who was seeking back pay for the period of his suspension while under indictment, argued that, while *N.J.S.A.* 18A:6-8.3 was silent as to his entitlement to such compensation subsequent to his acquittal on the charges, *N.J.S.A.* 40A:14-149.2 authorizes police officers to such remuneration under these circumstances. The Board asserts that "the Commissioner held that since the petitioner was not then found guilty of any wrong doing and '[n]otwithstanding the absence of specific statutory language, the Commissioner believes that *in weighing the equities* of this matter, fundamental fairness dictates that the petitioner be granted back pay....' *Id.* at 1009 (Emphasis added)." (Board's Exceptions at p. 8) As such, it argues, the Commissioner effectively "created ***a statutory right on the basis of 'equitable' principles ***by borrowing a statutory right for police officers." (*Id.*)

In reply, respondent charges that each of the Board's arguments in this regard is intended to obfuscate the relevant concern here, the plain language of *N.J.S.A.* 18A:6-14 which unambiguously provides, in pertinent part:

> if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person *shall be paid beginning on the one hundred*

> *twenty-first day until such determination is made.*** (emphasis in text) (Respondent's Reply Exceptions at p. 2)

He proffers that the mandatory nature of this directive is undeniable. Respondent further points to the historical note accompanying *N.J.S.A.* 18A:6-14 which indicates that this provision, as originally written, did not provide for automatic resumption of salary beginning on the 121st day. Such [provision], he asserts, was specifically added by the Legislature in the 1971 statutory amendment. (*Id.*) Moreover, respondent underscores that it is evident from the recently enacted *P.L.* 1998, *c.* 42 that the Legislature remains mindful of the 121st day statutory requirement. He contends that *P.L.* 1998, *c.* 42, enacted in an effort to expedite the tenure hearing process in light of the salary resumption provision, "balances the goal of preventing economic hardship to teachers during the pendency of tenure charges against the public need for prompt determination of charges and the avoidance of the payment of back pay for an inordinately long period of time." (Respondent's Reply Exceptions at p. 3)

With regard to the Board's argument for the "harmonization" of *N.J.S.A.* 18A:6-18.1 which, respondent maintains, on its face, is applicable only to college professors and *N.J.S.A.* 18A:6-14, dealing with primary and secondary school teachers, to allow for "recoupment," respondent maintains such a request is clearly without merit. He avers:

> *N.J.S.A.* 18A:6-18.1 provides in pertinent part "[i]f the charges are sustained, the employer may recover any salary which was paid to the employee during the period of the suspension." As a result, *N.J.S.A.* 18A:6-18.1 demonstrates that the Legislature clearly knew how to provide for recoupment of salary in cases where charges against an educator are sustained but chose not to do so for elementary and secondary school teachers when it enacted P.L. 1983 c. 347. This reading of the statute is consistent with the established rule of statutory construction that "where the Legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded." *GE Solid State, Inc. v. Director, Taxation Div.*, 132 N.J. 298, 308 (1993).

> There is no requirement under *N.J.S.A.* 18A:6-14 that where tenure charges are sustained, the employer may recover any salary which was paid to the employee during the period of the suspension. In construing statutes, the court must assume that the Legislature is thoroughly conversant with its own enactments and with judicial construction placed upon them. *Yacenda Food Management Corp. v. New Jersey Highway Auth.*, 203 N.J. Super. 264 (App. Div. 1985). Such a provision should not be implied where the Legislature has chosen to exclude it. (Respondent's Reply Exceptions at p. 4)

Respondent, therefore, advances that because these two statutory provisions deal with discrete subjects, college professors as opposed to elementary and secondary school teachers, and because at the time it enacted *N.J.S.A.* 18A:6-18.1 it must be presumed that the Legislature was aware of the contrary language in *N.J.S.A.* 18A:6-14 and chose not to alter it, it is obvious that these provisions cannot be read *in pari materia*. (*Id.*)

2. Yatauro Must Have Clean Hands to be Entitled to Back Pay.

The Board's exceptions advance that, in making his initial decision determination that respondent was entitled to payment for the period following the 120th day after the certification of tenure charges against him, the ALJ failed to properly weigh the equities existing in this case. It cites two New Jersey Supreme Court cases for the proposition that it is well established that "a person seeking relief from a forum exercising equitable principles must come with clean hands," and that a "court exercising equitable principles will refuse relief to the wrongdoer." (citations omitted) (Board's Exceptions at p. 12) As respondent has been found guilty of "substantial" unbecoming conduct, it avers, he has unclean hands and should, therefore, be barred from equitable relief. (*Id.*)

In reply, respondent advances that the Board's appeal to equity on this issue is out of line, as it is a well "established maxim of equity that **equity follows the law and will not**

divest rights that have been legally acquired." *Dunkin' Donuts of America, Inc. v. Middletown Donut Corp.,* 100 *N.J.* 166 (1985). (emphasis in text) (Respondent's Reply Exceptions at p. 5) Here, he argues, the Board deliberately ignored the clear dictate of the statute by refusing to pay respondent his salary after the expiration of the 120-day period and "is now attempting to cull the record and the final decision at the conclusion of the case for facts which would justify its improper failure and refusal to pay him in the first place." (*Id.* at p. 6) As was recognized by the ALJ in his Initial Decision at pp. 9-10, because the applicable statute directs that the full salary shall be paid, equity is not an issue here. (Respondent's Reply Exceptions at p. 5)

3. Public policy demands that Yatauro should not be paid for periods of suspension without pay resulting from his own acts committed outside the scope of his teaching duties.

The Board urges that the "public interest and logic" mandate that respondent not be compensated for the period of his suspension at issue here. (Board's Exceptions at p. 15) To do otherwise, it contends, "would amount to nothing more than a gift of public monies to an individual who the Commissioner has found was not available to perform his duties by virtue of his own improper, inappropriate and unbecoming activities." (*Id.*)

Respondent counters by pointing out that the Legislature has clearly spoken in this regard mandating that boards of education are required to resume salary payment to teaching staff members facing tenure charges beginning with the 121st day and continuing until such charges are ultimately resolved. (Respondent's Reply Exceptions at p. 6) Citing *Munoz v. N.J. Auto. Full Ins. Underwriting Ass'n.,* 145 *N.J.* 377 (1996) and *Gauntt v. Mayor and Council of City of Bridgeton,* 194 *N.J. Super.* 468 (App. Div. 1984), respondent maintains "[w]here the

Legislature has clearly spoken and has enacted legislation which plainly demonstrates and codifies its determination of public policy, it is improper for either administrative agencies or the courts to attempt to substitute their judgment for that of the Legislature and to attempt to construe the legislation according to some unexpressed legislative intent." (*Id.*)

4. No absolute right exists to salary following the 120th day after certification of tenure charges.

Contrary to the determination of the ALJ, the Board argues, the Commissioner and the State Board have made it clear that *N.J.S.A.* 18A:6-14 creates no absolute right to salary payment. In support of this contention it cites the related cases of *In the Matter of the Tenure Hearing of Fred Engel, In the Matter of the Tenure Hearing of Pasquale Raimondo, In the Matter of the Tenure Hearing of Philip Maraviglia, In the Matter of the Tenure Hearing of Terese Capriglione, and In the Matter of the Tenure Hearing of Gregory Palumbo,* decided by the Commissioner April 22, 1998, where, it avers, the Commissioner imposed a penalty of "*seven month[s] unpaid suspension, which period included the 120-day unpaid suspension already served.*" (emphasis in text) By fashioning such a penalty, the Board reasons, "the Commissioner destroyed any idea that there is an entitlement to salary that would start on the 121st day." (Board's Exceptions at pp. 16-17) Likewise, it proffers, the State Board in *In the Matter of the Tenure Hearing of Mary Ellen DiPillo, School District of the Township of Randolph, Morris County*, 95 *N.J.A.R.* 2d (EDU) 206, wherein it modified the penalty imposed by the Commissioner to include the forfeiture of six months salary, stated "...*since the petitioner did not prevail on the merits of the tenure charges, she has no entitlement to such relief as is necessary to make her whole, including back pay for the period of her initial suspension****." (*Id.* at pp. 17-18) It is therefore clear, the Board attests, that both the Commissioner and the State Board have established that *N.J.S.A.*

18A:6-14 creates no absolute right to back pay but, rather, the right to such compensation "is very elastic" and awarded at the discretion of the Commissioner and State Board. (*Id.* at p. 19)

In response, respondent posits that the cases cited by the Board are wholly inapplicable to the situation existing in the instant matter. In each of these cases, in lieu of ordering the removal of the individuals from their tenured positions, the Commissioner, instead, imposed periods of suspensions without pay. Here, respondent was removed from his position. A contention that such cases provide authority for "a board to continue a suspension without pay for more than 120 days and the withholding of salary pendente lite **in addition to** the penalty of removal," is preposterous. (emphasis in text) (Respondent's Reply Exceptions at pp. 7-8)

5. Acceding to Yatauro's salary demands will have a chilling effect on future similarly situated boards.

Finally, on this issue, the Board urges that the Commissioner reject the ALJ's determination that it must compensate respondent for the time period in contention on the basis that upholding this ruling will serve to discourage boards from vigorously pursuing tenure charges which require them to expend significant amounts of money for legal fees; require the commitment of a substantial amount of time and effort on the part of its administrators and staff; and require that they pay a replacement teaching staff member while also being required to pay the salary of the individual against whom the charges are lodged. (Board's Exceptions at p. 24) It advances that requiring the Board to pay respondent "these monies under these circumstances is punishing the Board for simply carrying out its moral and legal duties required by statute and the standards established in *Cardonick*." (*Id.* at p. 25)

In reply, respondent avers that such an argument is untenable. He posits that, given the recent legislative changes to the tenure hearing process which provide for an expedited

hearing process and significantly minimize potential delays in the entire procedure, which he points out was not yet effective when this matter was in process, boards of education will be less, not more, reluctant to institute tenure charges based on such considerations. (Respondent's Reply Exceptions at p. 9)

Turning to the Board's remaining exception arguments, it next challenges the ALJ's conclusion that it cannot deduct potential earnings from any back pay award to respondent. Such a conclusion, it argues, is "against public policy," as it is clear that respondent had a duty to mitigate. (Board's Exceptions at p. 32) It cites *Miele v. McGuire,* 31 *N.J.* 339, 350 (1960) for the proposition that "a public employee's claim for back pay may justly be subjected to mitigation in the amount the employee actually *earned or could have earned.*" (emphasis in text) (*Id.*) Therefore, the Board argues that if the Commissioner determines to award back pay for the period of respondent's suspension, the Board should be allowed to withhold from such sum "any monies received by Yatauro as a result of substituted employment during such period of suspension including a reasonable amount for services he could have performed because he had a duty to make a diligent and responsible effort to procure substituted employment." (*Id.* at p. 33)[3]

Respondent replies that the Board's argument that his award must be reduced by "potential" rather than "actual" earnings in mitigation evidences a misunderstanding of the concept of mitigation as it applies in this matter. (Respondent's Reply Exceptions at p. 9) He avers that the plain language of the relevant portion of the applicable statute, *N.J.S.A.* 18A:6-14, provides:

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[3]The Board's exceptions also renewed its arguments, advanced below, that should respondent be awarded back salary in this matter, such an award should be reduced for the period July 8, 1998 through November 30, 1998, due to delays in the proceedings which it avers were solely attributable to respondent. A full review of the record

> the board of education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary from any substituted employment assumed during such period of suspension.

As such, he contends, on its face, the statute provides only for deduction of sums received, not sums which could have potentially been received. (*Id.*) Respondent further argues that, even if the statute could be interpreted to allow a reduction for potential earnings, mitigation is an affirmative defense on which the Board bears the burden of proof, a burden which it has failed to satisfy here. Citing *Goodman v. London Metals Exchange, Inc.*, 86 *N.J.* 19 (1981) as authority, he avers that in order to prevail on this particular defense, the Board is required to "establish that comparable employment opportunities were available." (*Id.*) In making an evaluation with respect to "comparable employment," respondent points out that the Supreme Court in *Goodman* held that "the following factors, among others, are considered: the particular requirements, responsibilities and skills of the job plaintiff was denied, job location and rate of compensation. 85 *N.J.* at 36-37." (*Id.*) Respondent avers that the Board in this matter has not provided any proof whatsoever that there were comparable employment opportunities available to respondent. Consequently, he argues, even assuming, *arguendo*, that respondent's duty to mitigate could be extended to include potential earnings, the Board has not satisfied its burden to establish a *prima facie* case for such mitigation. (Respondent's Reply Exceptions at p. 10)

Finally, the Board objects to the ALJ's directive that money due respondent pursuant to the Initial Decision be paid to him within 15 days of the Commissioner's final determination in this matter. It asserts that while the ALJ's decision allows the Board to withhold from monies which may be due respondent, those sums which he received during the period of his suspension for substituted employment, it avers that "[a]s of this date, the Board has

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persuades the Commissioner that the ALJ's review and discussion of this claim on pp. 11-12 of his Initial Decision

not received any information from Yatauro to calculate the mitigation for the tenure suspension***." (Board's Exceptions at p. 30) The Board requests that the Commissioner's decision direct that any payment which may be owed respondent will be due and owing "within a reasonable period of time after production of proof of full and complete mitigation to allow its analysis and processing by the Board." (*Id.* at p. 31)

Upon his careful and independent review of the full record in this matter, the Commissioner, finding the Board's exception arguments without merit, affirms the recommended decision of the OAL as modified below.

Initially, the Commissioner fully concurs with the ALJ, for the reasons well expressed in the Initial Decision, that respondent is not entitled to compensation for the period of his suspension while under indictment.

The Commissioner, likewise, agrees with the ALJ's conclusion that respondent is entitled to remuneration for the period beginning with the 121st day after the Board's certification of tenure charges against him. While fully concurring with the observation of the ALJ that "[i]t is admittedly troubling that an employee such as Yatauro, who conducted himself so improperly and in doing so risked not only his own professional and financial future but the interests of a young student as well, should receive any salary payments for periods when he did not work," (Initial Decision at p. 10), the Commissioner also must remain cognizant that the statutory directive governing this matter unmistakably mandates on its face:

> if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made.***" *N.J.S.A.* 18A:6-14.

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fully address and correctly resolve this issue and it will, therefore, not be readdressed herein.

As such, respondent's right to compensation is grounded in law and, therefore, considerations based on equitable principles, public policy, or the Commissioner's aversion to payment under circumstances such as are present herein, can be of no import. Unless and until the Legislature acts to change or modify this statutory provision, respondents in tenure matters before the Commissioner are entitled to restoration of salary beginning with the 121st day after certification of tenure charges against them. To the extent that the Board's exceptions attempt to charge or imply that prior decisions of the Commissioner and the State Board, imposing suspensions without pay at the conclusion of adjudication of tenure charges where the respondent was not dismissed from employment, in any way compromises or circumvents the clear directive of the statute, such a contention is misguided. In each of these cited cases, the penalty imposed had no impact or effect whatsoever upon respondents' entitlement to compensation from the expiration of the 120-day period up to the time of the Commissioner's ultimate resolution of the tenure charges but, rather, was *prospective* from the date of the respective decision.

Consequently, the Commissioner affirms the ALJ's Initial Decision conclusion that the Board must pay respondent his salary for the period from the 121st day following certification of tenure charges against him. The Commissioner does, however, clarify that, although the Initial Decision specifies that respondent's entitlement to compensation terminated with the determination of the ALJ in his Initial Decision on the tenure charge matter, such entitlement, rather, concluded on March 1, 1999, the date of the *Commissioner's* final decision in the tenure matter, as it is the Commissioner's determination, rather than the Initial Decision by the Administrative Law Judge, that is controlling in this administrative matter. (*See Peitrunti v. Bd. of Ed. of Brick Twp.,* 128 *N.J. Super.* 149 (App. Div. 1974), *certif. den.*, 65 *N.J.* 573 (1974),

cert. den., 419 *U.S.* 1057 (1974); *In re Uniform Adm. Procedures Rules*, 90 *N.J.* 85, 96 (1982; *Also see N.J.S.A.* 18A:6-14.

Turning to the issue of how principles of mitigation affect this matter, the Commissioner finds meritless, as did the ALJ, the Board's position that it is entitled to deduct mitigation for prospective earnings from the compensation due respondent. The "set off" a board may appropriately make to monies due respondents in matters of this nature is specifically delineated by the governing statute, *N.J.S.A.* 18A:6-14, as "pay or salary received from any substituted employment." Therefore, the Board may not seek to expand such statutory entitlement by invoking general common law concepts of mitigation of damages which are inapplicable here.[4] The Commissioner finds that existing case law provides guidance as to the intendment of the term "substituted employment" as employed in *N.J.S.A.* 18A:6-14. *See In the Matter of the Tenure Hearing of John Martz*, 1976 *S.L.D.* 773, *aff'd* State Board at 791; *In the Matter of the Tenure Hearing of Ernest E. Gilbert*, 1982 *S.L.D.* 674, *aff'd* State Board at 686; *Patrick Caporaso v. Board of Education of Belleville Township*, 1987 *S.L.D.* 1005. In that the Commissioner's review persuades him that the existing record is insufficient to determine whether employment respondent engaged in during the course of his suspension was "substituted employment" as contemplated by *N.J.S.A.* 18A:6-14, which would entitle the Board to set off a portion of the monies owed respondent, this matter will be returned to the OAL for further

[4]The Commissioner does observe, however that even if this matter were subject to common law principles of mitigation, under which a respondent would be under a duty to mitigate his damages during this period by making reasonable efforts to secure alternative employment, respondent's Reply Exceptions correctly point out that the burden of proof of this affirmative defense lies with the Board. (*See Goodman v. London Metals Exchange, Inc.*, 86 *N.J.* 19 (1981).) To sustain such burden, the Board would be required, by the preponderance of the credible evidence, to establish that, during the relevant period, comparable employment opportunities were available to respondent and he failed to take advantage of those opportunities.

proceedings to address and resolve this limited issue and determine the amount, if any, of the Board's set-off.[5]

In considering the Board's request that *N.J.S.A.* 18A:6-14 be harmonized with the higher education provision, *N.J.S.A.* 18A:6-18.1, to allow for recoupment of salary paid to a suspended respondent during the pendency of tenure charges should such charges ultimately be sustained, the Commissioner is compelled to deny the Board's request. Consideration of the legislative history surrounding each of these acts persuades the Commissioner that strong evidence against legislative intent for harmonization is readily apparent. In so determining, with respect to *N.J.S.A.* 18A:6-14, the Commissioner found the Court's discussion in *In the Matter of the Tenure Hearing of Paula M. Grossman, A/K/A Paul M. Grossman, School District of the Township of Bernards, Somerset County,* 127 *N.J. Super.* 13 (App. Div. 1974), both enlightening and instructive. Therein it was noted that, prior to February 10, 1972, *N.J.S.A.* 18A:6-14 provided

> Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, pending final determination of the same, *and if the charge is dismissed, the person shall be reinstated immediately with full pay as of the time of such suspension.* (emphasis added) (at 34)

As such, at this point in time, compensation for a person suspended without pay pending the adjudication of tenure charges was conditioned upon that individual ultimately prevailing on the charges. The *Grossman* Court further noted that, effective February 10, 1972, *N.J.S.A.* 18A:6-14 was amended by *L.* 1971, *c.* 435 to provide, in pertinent part:

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[5]The Commissioner clarifies that once the precise amount of the monies due and owing respondent has been determined by the Commissioner, such payment shall be made to him by the Board within a reasonable amount of time. The Commissioner finds the 15-day time period suggested by the ALJ unduly restrictive, but reminds the parties that respondent may invoke the regulations requiring the payment of post-hearing interest, *N.J.A.C.* 6:24-1.16, should the Board fail to satisfy its payment obligation within 60 days of the Commissioner's ultimate decision.

> ***[I]f the determination of the charge is not made within 120 calendar days after certification of the charges***then the full salary (except for said 120 days)***shall be paid***until such determination is made. *** Should the charge be dismissed and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal. *** Should the charge be sustained on the original hearing or an appeal therefrom, then the suspension may be continued unless and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension. (at 35)

Moreover, in discussing the reasons for the legislative amendment, the *Grossman C*ourt stated:

> It seems clear that in enacting it the Legislature must have had in mind the economic hardship endured by teachers and other board of education employees suspended without pay pending the outcome of charges filed against them and certified for hearing to the Commissioner of Education. We are certain, moreover, of the Legislature's awareness that in many instances, because of the volume of matters awaiting hearing, a prompt disposition of charges is not feasible. Thus, the obvious intent and purpose of the amendment was to alleviate the financial plight of those affected by providing for the payment of their full salary (less sums received from other employment during suspension) from the 121st day following the certification of charges until the determination thereof by the Commissioner, or in the case of an appeal by a board from a decision adverse to it, until the determination of the appeal. (at 35-36)

As such, the Commissioner finds that the Legislature's specific elimination of the requirement that resumption of salary for persons suspended pursuant to the imposition of tenure charges against them be conditioned on the ultimate outcome of such charges is unmistakable in its 1971 amendment of *N.J.S.A.* 18A:6-14, and evidences its intent to effect a change in policy on this issue with respect to the individuals affected by this provision. Further support for the Legislature's intent in this regard is found, as was pointed out by respondent in his reply exceptions, in the recently enacted *P.L.* 1998, *c.* 42, designed to expedite the tenure hearing process.

In sharp contrast, the legislative history of *N.J.S.A.* 18A:6-18.1, manifests a totally different situation. As the Board, itself, recognized in its exceptions, this legislation was initially proposed as a "mirror image" of the existing *N.J.S.A.* 18A:6-14, but was ultimately enacted by the Legislature with a significant number of modifications in response to the recommendations of Governor Kean. (See Governor's Recommendations to the General Assembly dated March 14, 1983.) The necessary implication here is that this statute was passed with full knowledge of the existing legislation in *N.J.S.A.* 18A:6-14 and, as there was no discussion or action taken to resolve the differences between the conflicting provisions of these statutes, it affirmatively appears that it was the intent of the Legislature to differentiate salary resumption provisions for higher education professionals from those available to individuals governed by *N.J.S.A.* 18A:6-14. The Commissioner, therefore, finds and determines that, contrary to the urging of the Board, the two statutory provisions should not be read *in pari materia* as it is apparent that, in enacting *N.J.S.A.* 18A:6-18.1, the legislative design was to depart from the general purpose policy surrounding the previous enactment, *N.J.S.A.* 18A:6-14.

The Commissioner can, additionally, find no justification whatsoever for considering the Board's argument that he should, on *equitable principles*, conclude that the Board, having prevailed on tenure charges against respondent, is entitled to recoupment of monies owed respondent for the period of his suspension. Given the legally established nature of the right, and because equity follows the law, *Dunkin' Donuts, supra*, equitable principles may not be invoked here to divest respondent of the legal right to resumption of his salary. Moreover, in the Commissioner's view, the within Board acted improperly and in contravention of the clear directive of the law by refusing to resume respondent's salary payments subsequent to the

expiration of the initial 120 days of his unpaid suspension. The Commissioner could not, as a matter of equity, consider condoning and rewarding such conduct.

Accordingly, the Initial Decision of the OAL is adopted as modified herein. The respondent's claim for salary payment for the period of his suspension while under indictment is denied. Respondent is entitled to salary payments, pursuant to *N.J.S.A.* 18A:6-14, for the period of his suspension during the pendency of tenure charges against him, up to March 1, 1999, the date of the Commissioner's decision on the tenure matter, less set off for substituted employment and less the 120-day suspension period without pay. This matter shall be returned to the OAL solely for expansion of the record to resolve the exact amount of set off, if any, the Board may deduct from these monies owed for compensation respondent received from substituted employment.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

October 13, 1999
Date of Mailing, October 13, 1999

323-99

P.D.M., on behalf of minor child, K.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning parent alleged the Board's action denying her minor child, K.M., credits for ninth-grade courses, which would have allowed her to move to tenth grade, was arbitrary, capricious and unreasonable.

ALJ found that petitioner failed to establish that the Board acted arbitrarily, capriciously and unreasonably in denying K.M. credits for classes in which she had absences which exceeded the maximum permitted. ALJ found that petitioner had not established "unforeseen factors that may have created hardships" which were sufficient so as to entitle her to credits for classes in which she had absences ranging from 24 to 28 days. ALJ concluded the Board's action denying K.M. credits due to said absences was proper. Thus, petition seeking to have K.M. given credits for ninth-grade courses to allow her to move to tenth grade was dismissed.

Commissioner adopted findings and determination in Initial Decision as his own.

October 12, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6706-98

AGENCY DKT. NO. 352-7/98

P.D.M. ON BEHALF OF A MINOR CHILD, K.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,

Respondent.

P.D.M., petitioner, *pro se*

Michael J. Rogers, Esq., for respondent (McDonald, Rogers & Rizzolo, attorneys)

Record Closed: July 27, 1999 Decided: August 27, 1999

BEFORE **JOSEPH F. MARTONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, petitioner contends that the action of respondent denying to her daughter, K.M., credits for ninth-grade courses which would allow her to move to tenth grade was arbitrary, capricious and unreasonable. Petitioner's petition was filed on July 30, 1998, together with a request for emergent relief, and the matter was transmitted to the Office of Administrative Law (OAL) on August 13, 1998, for a hearing as a contested case. A hearing on the emergent

relief application was held on August 19, 1998, and by an order entered on August 20, 1998, petitioner's request for emergency relief to have K.M. given credit for ninth-grade courses to allow her to move to tenth grade was denied on the basis that petitioner failed to establish the likelihood of prevailing on the merits and failed to establish irreparable harm. The matter was then scheduled for hearing and a hearing was held and concluded and the record closed on July 27, 1999.

FACTUAL DISCUSSION

The essential facts in this matter are not disputed and the following factual discussion sets forth my **FINDINGS OF FACT** with regard to this matter. These findings are based on facts which were not disputed at the emergent relief hearing as well as based on the testimony given at the plenary hearing in this matter.

Until recently, petitioner, P.D.M., and her daughter, K.M., lived in Somerville, New Jersey. K.M. attended ninth grade at Somerville High School during the 1997-98 school year and attended a repeat of her ninth grade year also at Somerville High School and at Somerset County Vocational Technical School during the 1998-99 school year.

Petitioner testified that K.M. was a "Renaissance" pupil in her ninth-grade year. She explained that this is similar to being on the honor roll, and that she attained this honor during the third marking period in her ninth-grade year. The school year consists of four marking periods. Petitioner indicated that K.M. was never late for any of her classes during the 1997-98 school year.

The petition as well as the testimony of petitioner was to the effect that K.M. had a very difficult freshman year during the 1997-98 school year. K.M.'s father was diagnosed with AIDS and K.M.'s experimentation led to an unwanted pregnancy. The petition indicates that a significant number of K.M.'s fourth marking period absences were the result of K.M.'s pregnancy. In addition, K.M. suffers from asthma and her asthma was extremely difficult during the 1997-98 school year. P.D.M. acknowledged that K.M.'s report card, a copy of which she

provided at the emergent hearing,, is accurate with respect to K.M.'s attendance. Under Attendance, absences for the fourth marking period as well as total absences for the year are shown. She also acknowledged that the total absences ranging from 24 to 28 days, is accurate.

P.D.M. testified that K.M. provided all necessary doctor's notes whenever she went to the doctor for her asthma and her pregnancy, and petitioner explained that K.M. completed all required paperwork upon her return to classes after being absent. This paperwork consisted of forms which are volunteered by the student explaining the basis or reason for the absence. P.D.M. also indicated that K.M. performed make-up work for all of the time that she missed from her classes. K.M. has no disciplinary problems and is a very pleasant child. P.D.M. indicated that she was aware that the policy of the school district is that if a student misses more than fifteen days the student will not be given credit for that year and must repeat the year.

P.D.M. provided a note from K.M.'s doctor dated July 17, 1998 (P-3) in which the doctor indicated that K.M. has asthma which can be exacerbated by allergies and viral infections, and, as an African American female, her asthma may be worsened more than usual by conditions. P.D.M. explained that K.M.'s asthma sometimes resulted in her constantly coughing during the night resulting in her inability to sleep. As a result, because she did not get enough sleep she would either not go to school or when she did go the school, her attitude was negatively affected. In addition, when her father was diagnosed with AIDS it was a very trying time and it was very difficult for all of her children. Finally, K.M.'s pregnancy caused her not only to be physically ill, but to be greatly troubled.

P.D.M. testified that the difficulty she had with respondent's appeal committee was that she attended an appeal hearing and presented evidence why the credits should be given for K.M.'s ninth-grade school year. She referred to the policy adopted by the school district concerning attendance (R-2). She pointed out that under Board of Education Regulation R5200.4I.3c. (R-2), the attendance review committee is required to decide the appeal and inform the pupil in writing within five days of the meeting. However, she indicated that in her daughter's situation, the committee did not issue a written decision until July 16, 1998, over one month after the hearing (P-2).

On cross-examination, P.D.M. admitted that her daughter missed eight days of school in October 1997 because of a planned family vacation in Florida. She also admitted that her daughter cut class on senior day in June 1998. P.D.M. denied that K.M. was verbally informed of the decision of the appeals committee on June 19, 1998, although she did acknowledge that K.M.'s guidance counselor may have told K.M. prior to the close of school in June 1998, that she would not receive credit for the courses involved. However, she wanted to receive something in writing. She explained that K.M. was told that it was necessary for her to take her final exams in order to be considered for summer school to make up these courses. K.M. did take the final exams and passed all but one (P-1).

K.M. testified that during the most recent school year, 1998-99, she was assigned to a ninth grade homeroom and attended two freshman classes. These consisted of English II, Science and Sophomore Gym in which she received Bs and Cs. She also attended Vocational Technical School in health occupations where she got a B and a C. She indicated that at the end of sixth period every day she would take a bus to the Vocational Technical School and attend those classes. She indicated that her attendance has been good and that as a result of her grades during the most recent school year she has been promoted to tenth grade. She indicated that she simply wants to get her credits for ninth grade so that she can graduate with her class.

William M. Roesch, testified that he is the Assistant Principal of the Somerville High School and has held that position for the past six years. He is familiar with the attendance appeal process. He also indicated that no more than two courses or a total of ten credits may be taken in summer school. He testified that the total number of absences by K.M. during the 1997-98 school year amounted to approximately 23 days. With respect to H.S.P.T. math, K.M. started that class in March 1998. However, because she has less than 15 absences, and where there is some question the benefit the doubt is always given to the student, K.M.'s transcript will be corrected to reflect that she passed H.S.P.T. math in her ninth-grade year and she will be given credit for passing this course.

Mr. Roesch, testified that no more than 15 unexcused absences are permitted in any school year. An attendance review committee is established to determine whether there is some

hardship caused by this policy and that committee heard K.M.'s appeal and denied it. He indicated that if K.M. did not take the days for a family vacation in October 1997 and if her senior cut day had not been taken, the attendance committee would have given her credit for any of the ninth-grade classes which she passed. He indicated that there was one course where she did not obtain a passing grade and she would not have received credit for that course in any event.

Mr. Roesch read into the record the student absence reports or "pink slips" filled out by K.M. during her 1997-98 school year (R-3). They are as follows:

September 25, 1997	Stomach ache
October 10-14, 1997	Back aches - in pain
October 16, 1997	I had to go to my cousin's funeral
October 21, 1997	Woke up late
October 22, 1997	Left school early
October 23-31, 1997	Had to go out of the State
January 20, 1998	Had bad stomach pains
May 1 and 2, 1998	Pink eye
April 20, 1998	Had very bad cramps
May 6, 1998	Was nauseous
May 12, 1998	Left early for illness
May 18, 1998	Doctor appointment
May 27 and 28, 1998	Surgery
June 5, 1998	Not well

Mr. Roesch testified that during the year, the student and the parent were given four warning letters concerning excessive absences (R-3). The first is dated November 11, 1997, indicating seven or eight absences through October 24, 1997. The second is dated November 19, 1997 and indicates 12 to 13 absences up to November 7, 1997. The next is dated December 18, 1997, and relates to the same 12 or 13 absences through December 5, 1997. The fourth is dated February 17, 1998, and relates to 12 and 13 absences in certain classes. The final one is a letter dated May 12, 1998, sent to P.D.M. by certified mail indicating that K.M.'s absences exceeded the attendance policy requirements for course attendance and indicating that an appeal from the

proposed grade of incomplete can be had by appealing to the appeals committee based upon "unforeseen factors that may have created hardships.".

Mr. Roesch testified that the appeals committee heard K.M.'s appeal and that at the conclusion of the hearing and after the parent and child were excused, the committee discussed the matter. A factor considered was K.M.'s absences because of a family vacation and her absence on senior cut day. He explained that if these absences had not occurred, K.M. would have had less than the number of absences and would have been qualified for passing grades. Her absences on these occasions were a factor considered by the appeals committee.

Mr. Roesch explained the procedure that is followed. The decision of the committee is given to Mr. Roesch as Assistant Principal and to Mr. Roy Woodten, C.M.'s guidance counselor, and it was Mr. Woodten who informed K.M. of the decision to deny her appeal before the end of the school year.

Mr. Roesch identified K.M.'s 1997-98 report card and her 1998-99 report card (R-4). She acquired 35 credits in the most recent academic year together with five credits for HSPT math so she presently has a total of 40 credits. She needs 120 credits to graduate.

On rebuttal, P.D.M. testified that her daughter is powerless over her vacations. P.D.M. has no one to baby-sit for her children when she takes a vacation and that is why she took her children with her in October 1997. She also indicated that if the appeals committee had rendered its decision within five days as it was required to do so, K.M. could have taken summer school classes during summer of 1998 and been able to attend tenth grade in the 1998-99 school year.

It is not disputed that K.M. signed that she received a copy of the Somerset High School Student Booklet (R-1) in September 1997. P.D.M. acknowledged that K.M. was given a copy of the Booklet (R-1).

LEGAL DISCUSSION AND ANALYSIS

Local boards of education are authorized to adopt policies and procedures for pupil promotion and remediation, notification to parents of policies and procedures for student promotion and remediation and procedures for parents and adult pupils to appeal promotion/retention decisions. *N.J.S.A.* 18A:35-4.9(a), (b) and (d). It is required by *N.J.A.C.* 6:8-7.1(a) that district boards of education adopt policies and procedures for pupil promotion and for such appeals.

In the present matter, it is undisputed that respondent Board has adopted policies and procedures for pupil promotion and remediation and procedures for appeals from such decisions pursuant to *N.J.S.A.* 18A:35-4.9 and *N.J.A.C.* 6:8-7.1. (R-2). These policies and procedures have the force and effect of law and govern the decision in this matter.

Somerville School District Regulation R 5200.4 regarding Attendance at Somerville High School provides at section E.2. that a secondary pupil will be denied course credit, when he or she has been absent fifteen days for full year courses. This same section goes on to provide that a secondary pupil denied course credit may attend a credit completion session to regain the denied credit, provided the pupil has not been absent from the class more than twenty times. This Regulation provide for appeals procedures at section I. Section I.2. provides that a pupil who has been retained at grade level for excessive absences may appeal that action in accordance with Policy No. 5410. Somerville School District Policy No. 5410 provides that pupils should be placed in the educational setting most appropriate to their social, physical and educational needs, and each pupil enrolled in the district is to be moved forward in a continuous program of learning in harmony with his or her own development. It further provides that the standard for promotion shall be related to district goals and objectives and to the accomplishments of pupils. High school pupils are to be promoted to the next grade when he or she has completed, in the current school year, the number of credits required for that grade as indicated in the current high school student handbook. The policy goes on to provide that school attendance shall be a factor in the determination of a pupil's promotion or retention.

The Somerset High School Student Booklet (R-1) also sets forth the attendance policy of the Somerville Board of Education, and indicates in paragraph 3 that students missing over eight classes in a semester course or 15 class periods in a full year course will not receive credit for that course. Paragraph 10 provides that the student must stay in class to receive a final grade of "Incomplete". If the student does not remain in the class, the final grade is "F". The Student Booklet also provides for a permanent five member Attendance Appeals Committee established to review cases involving pupils having extenuating circumstances for excessive absences. Decisions made by the Attendance Appeals Committee are final.

The purpose of any attendance policy is to establish requirements for passing of courses and graduating. It is not to punish a pupil or to retaliate against the pupil, but is to impose clear, uniform standards applicable to all pupils. Of significance is the Board's Policy 5200 which requires that the pupils enrolled in the schools of the district attend school regularly in accordance with the laws of the State. It further provides that the educational program offered by the district is predicated upon the presence of the pupil and requires continuity of instruction and classroom participation. The regular contact of pupils with one another in the classroom and their participation in a well-planned instructional activity under the tutelage of a competent teacher are vital to this purpose. The policy goes on to provide that prolonged or repeated absences, excused or unexcited, deprive the pupil of the classroom experience deemed essential to learning and may result in retention at grade level or loss of credit toward the high school diploma in accordance with policies of the Board.

As is indicated in the Student Handbook, it is necessary for a pupil seeking relief by way of appeal to the Attendance Appeals Committee to show extenuating circumstances for excessive absences.

In the present matter, K.M. had total absences for the 1997-98 school year ranging from a low of 24 to a high of 28 (P-1). It is significant that during the fourth marking period alone, K.M.'s absences ranged from 10 in English to 14 in World Cultures. It also appears that between the first and third marking periods, K.M. had a total of 14 absences in most of her classes and her total number of absences for the school year essentially doubled as a result of her absences during the fourth marking period.

Petitioner explained the extenuating circumstances in this matter as involving K.M.'s father being diagnosed with AIDS, K.M. suffering from asthma, and an unwanted pregnancy which impacted on K.M.'s attendance during the fourth marking period. An additional factor was a family vacation in October, 1997.

As difficult as these circumstances may have been for K.M., it is clear that a pupil who has been absent excessively is deprived of the classroom experience and class participation, and such absences interfere with the efforts of the teacher to provide proper instruction. In the present matter, K.M.'s absences in virtually all of her classes exceeded not only the 15 absence limitation for obtaining credit for the class, but also the 20 absence limitation for attending a credit completion session to regain the denied credit.

Under all of the circumstances in this matter, I **FIND** that petitioner has failed to establish that the respondent acted arbitrarily, capriciously and unreasonably in denying her credits for classes in which she had absences which exceeded the maximum permitted. I **FIND** that petitioner has not established "unforeseen factors that may have created hardships" which are sufficient so as to entitle her to credit for classes in which she has absences ranging from 24 to 28 days. Accordingly, I **CONCLUDE** that the action of respondent denying to K.M., credits for ninth-grade courses in which she had these absences so as to allow her to move to tenth grade was not arbitrary, capricious or unreasonable.

DECISION AND ORDER

Based upon the foregoing, it is hereby **ORDERED** that petitioner's petition of appeal seeking to have her daughter, K.M., given credit for ninth grade courses to allow her to move to tenth grade is hereby **DENIED** and **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 27, 1999
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

8/27/99
DATE

Debbie Antamarella/ps
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 31 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/lam

APPENDIX

WITNESSES

For petitioner:

P.D.M.

K.M.

For respondent:

William M. Roesch

EXHIBITS

For petitioner:

P-1 Report card of K.M. for school year 1997-98

P-2 Somerville High School letter of June 1998 advising of Attendance Appeals Committee decision

P-3 Somerset Pediatric Group report dated July 17, 1998

For respondent:

R-1 Excerpt from Somerset High School Student Booklet

R-2 Copies of Somerville Board of Education Policy 5200, Attendance; Regulation 5200.4, Attendance; Policy 5410, Promotion and Retention; Regulation R5410, Promotion and Retention

R-3 Copies of correspondence, attendance records, reports of student absence for K.M.

R-4 K.M. report card for 1998-99 school year and K.M. transcript.

APPENDIX

EXHIBITS

For petitioner:

P-1 Report card of K.M. for school year 1997-98

P-2 Somerville High School letter of June 1998 advising of Attendance Appeals Committee decision

For respondent:

R-1 Excerpt from Somerset High School Student Booklet

R-2 Copies of Somerville Board of Education Policy 5200, Attendance; Regulation 5200.4, Attendance; Policy 5410, Promotion and Retention; Regulation R5410, Promotion and Retention

OAL DKT. NO. EDU 6706-98
AGENCY DKT. NO. 352-7/98

P.D.M., on behalf of minor child, K.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon his careful and independent review, the Commissioner concurs with the determination of the Administrative Law Judge that the within petitioner has failed to establish that the Board's denial of credits for ninth grade to K.M, as a result of her absences exceeding the maximum number permitted, was arbitrary, capricious or unreasonable.

Accordingly, the Initial Decision of the OAL is affirmed for the reasons stated therein and the instant Petition of Appeal is hereby dismissed.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

October 12, 1999
Date of Mailing, October 13, 1999

325-99

IN THE MATTER OF THE TENURE	:	
HEARING OF EILEEN BROGAN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF BELMAR, MONMOUTH COUNTY.	:	
	:	

October 12, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 359-99

AGENCY DKT. NO. 565-12/98

IN THE MATTER OF THE TENURE HEARING OF EILEEN BROGAN SCHOOL DISTRICT OF BELMAR, MONMOUTH COUNTY,

---

Kenneth B. Fitzsimmons, Esq., for the School District of Belmar (Sinn, Fitzsimmons, Cantoli, West and Pardes, attorneys)

Stephen E. Klausner, Esq., for Eileen Brogan (Klausner, Hunter & Rosenberg, attorneys)

Record Closed: August 25, 1999 Decided: August 25, 1999

BEFORE **BEATRICE S. TYLUTKI**, ALJ:

This matter concerns the tenure charges brought against the respondent, Eileen Brogan, by the petitioner, School District of Belmar, Monmouth County. The respondent requested a hearing, and the matter was transmitted to the Office of Administrative Law (OAL) on February 1, 1999, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The matter was scheduled for a hearing on May 17, 18, 19 and 20, 1999. Prior to that date, the parties conferred and agreed to a settlement. The attached stipulation sets forth the terms of the settlement, and is incorporated herein.

I have reviewed the record and the settlement terms and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1, and that the settlement should be approved. I approve the settlement, and **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

August 25, 1999
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

Aug. 26, 1999
DATE

D. N. Contanaitis Jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 27 1999
DATE

Barbara A Hannah
OFFICE OF ADMINISTRATIVE LAW

cad

SETTLEMENT AGREEMENT

THIS AGREEMENT is made and entered into on this 24th day of June, 1999 by and between the Belmar Board of Education, having offices located at 1101 Main Street, Belmar, New Jersey 07719 ("Board")

and

EILEEN BROGAN, residing at 881-C Balmoral Court, Lakewood, New Jersey 08701 (hereinafter "Ms. Brogan")

WITNESSETH:

WHEREAS, Ms. Brogan is a tenured school nurse employed by the Board since September 1, 1983; and

WHEREAS, on October 16, 1998, the Board certified tenure dismissal charges against Ms. Brogan to the Commissioner of Education ("Commissioner") pursuant to N.J.S.A. 18A:6-11 ("Charges"); and

WHEREAS, the Commissioner transmitted the Charges to the Office of Administrative Law for a hearing; and

WHEREAS, on October 8, 1998, the Belmar Police Department filed a criminal charge against Ms. Brogan in which it alleged that she was "guilty" of theft by deception; and

WHEREAS, the Board suspended Ms. Brogan without pay for the 120-day period permitted by N.J.S.A. 18A:6-14 based upon the filing of said criminal charges; and

WHEREAS, the Monmouth County Prosecutor presented the matter to a Monmouth County Grand Jury on February 22, 1999; and

WHEREAS, the Monmouth County Grand Jury on February 22, 199 proved a "no bill" and determined not to indict Ms. Brogan; and

WHEREAS, the Board has determined that it is in the best interest of the Belmar School District to withdraw the Charges and enter into this Settlement Agreement with Ms. Brogan because this Agreement will help ensure the continued delivery of adequate and appropriate educational services to students under the Board's supervision, without the necessity of significant consumption of the time and energies of Board employees who must be called to testify in support of the Charges at any hearing conducted on the Charges, and who would thereby be taken away from their duties in the schools of the Belmar School District; and

WHEREAS, Ms. Brogan understands that N.J.A.C. 6:11-3.6 states, in part, that upon the decision of the Commissioner, cases contested before the Commissioner resulting in loss of tenure or dismissal of a teacher or teaching staff member for inefficiency, incapacity, conduct unbecoming a teacher, or other just cause, shall be forwarded to the State Board of Examiners for determination of possible revocation or suspension; and

WHEREAS, the within contested case has not resulted in loss of Ms. Brogan's tenure as the parties have agreed to settle this matter without a hearing; and

WHEREAS, Ms. Brogan further understands that, although the Commissioner is not required by the express language of N.J.A.C. 6:11-3.6 to forward this matter to the State Board of Examiners for determination of possible revocation or suspension, the Commissioner has the discretion to do so; and

WHEREAS, Ms. Brogan and the Board believe that this is not an appropriate matter for the exercise of the Commissioner's discretion as stated above because the Charges are based upon activity that the Board believed to be criminal in nature, but the Monmouth County Grand Jury determined not to indict Ms. Brogan on related criminal charges;

NOW, THEREFORE, the Board and Ms. Brogan, for the consideration herein specified, agree as follows:

1. The parties stipulate to the dismissal of the tenure charges brought by the Board against Ms. Brogan (Agency Reference No. 565-12/98) upon the execution of this Agreement by both parties.

2. The Board shall pay Ms. Brogan the amount of salary withheld from her subsequent to the filing of the Charges as described above.

3. The Board shall, upon the approval of the Commissioner of Education, immediately pay to Ms. Brogan the salary withheld for one hundred twenty (120) days, but shall deduct one thousand dollars ($1,000) therefrom as partial reimbursement to the Board for overpayments made to Ms. Brogan. This repayment shall not be part of Ms. Brogan's gross salary.

4. The Board shall deduct five hundred dollars ($500) from Ms. Brogan's salary each month between September and December 1999, to be applied toward reimbursing overpayments made to her. These repayments each month shall not be part of Ms. Brogan's gross salary.

5. The Board shall deduct two thousand nine hundred twelve dollars ($2,912) in equal semi-monthly amounts during the month of January, 2000, to be applied toward reimbursing overpayments made to Ms. Brogan. These repayment amounts shall not be part of Ms. Brogan's gross salary.

6. Upon the execution of this Agreement by both parties, Ms. Brogan shall be placed on medical leave of absence from her duties as school nurse in the Belmar School District, with pay, in accordance with the terms and conditions of the Agreement between the Board and the Belmar Education Association, for the period from September 1, 1999 through January 31, 2000, and with all benefits and emoluments Ms. Brogan is currently receiving in that capacity, for the remainder of the 1999-2000 school year until her retirement on January 31, 2000.

7. Ms. Brogan shall submit her written resignation from employment by the Board effective January 31, 2000; that is, said written resignation shall note that Ms. Brogan's last day of employment by the Board shall be January 31, 2000. The Board shall accept Ms. Brogan's resignation at its next scheduled regular action meeting subsequent to the Board's receipt of Ms. Brogan's written resignation. Ms. Brogan shall no longer be

entitled to any payments or benefits and emoluments from the Board as of January 31, 2000, subject to the U.S. Consolidated Omnibus Budget Reconciliation Act (COBRA). The Board shall provide any prospective employer of Ms. Brogan only with such information about her employment with the Board as is designated "public" information by New Jersey Executive Order No. 11 (November 15, 1974, Gov. Brendan Byrne).

8. Upon the execution of this Agreement, the parties shall exchange general releases.

9. The Board shall cooperate and assist in Ms. Brogan's application for a disability pension. Failure to obtain a disability pension by Ms. Brogan shall not void this Settlement Agreement.

WHEREAS this Agreement has been approved by a vote of the members of the Belmar Board of Education at its meeting on June 24, 1999 and has been made a part of the minutes of that meeting; and

WHEREAS, the Board has authorized its President and Secretary to execute this Agreement; and

WHEREAS, Ms. Brogan has had the opportunity to consult with her own independent counsel as to this Agreement and has consulted with counsel as to same; and

WHEREAS, Ms. Brogan has approved the terms and conditions of this Agreement;

IN WITNESS WHEREOF, the undersigned set their hands, and the Board has set its seal, to this Agreement, effective on the day and year first above written.

WITNESS:

Eileen Brogan

ATTEST:

BELMAR BOARD OF EDUCATION

Board Secretary

By

President

OAL DKT. NO. EDU 359-99
AGENCY DKT. NO. 565-12/98

IN THE MATTER OF THE TENURE	:	
HEARING OF EILEEN BROGAN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF BELMAR, MONMOUTH COUNTY.	:	
	:	

The record, Settlement Agreement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement.* Due to the nature of the charges, which arise from alleged misrepresentation of credentials, the record of this matter will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

October 12, 1999
Date of Mailing, October 13, 1999

326-99

MARIA LAZZARO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

October 14, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10738-97
AGENCY DKT. NO. 436-11/97

MARIA LAZZARO,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,
Respondent.

Alan S. Porwich, Esq., for petitioner
(Feintuch, Porwich & Feintuch , attorneys)

Charlotte Kitler, Esq., for respondent

Record Closed: August 11, 1999 Decided: August 23, 1999

BEFORE: **ELINOR R. REINER**, ALJ:

On November 6, 1997, petitioner, Maria Lazzaro, filed a verified petition of appeal with the Commissioner of Education alleging that respondent restore petitioner's sick days deducted from her sick leave bank for the period of October 1, 1997 through October 6, 1997. On November 19, 1997, respondent filed an answer alleging that petitioner was not entitled to sick leave benefits pursuant to *N.J.S.A.* 18A:30-2.1 for her absences on October 1, 2 and 3, 1997 since those absences were not due to an accident which arose out of and in the course of petitioner's employment. The matter

was transmitted by the Department of Education, Bureau of Controversies and disputes on December 15, 1997 to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The matter was assigned to the undersigned judge on January 8, 1998 and a prehearing conference held on February 10, 1998. During the conference, the parties requested that the matter be placed on the inactive list pending final hearing of petitioner's workers' compensation claim and a determination by the Division of Workers' Compensation as to the length of petitioner's temporary disability due to the accident in question. The request was granted by order dated March 17, 1998. As a result of the ruling of the Division of Workers' Compensation on the length of petitioner's temporary disability, the parties have agreed to a settlement. The parties filed the attached Consent Order on August 11, 1999, indicating the terms of settlement.

I have reviewed the record and settlement terms and **FIND:**

1. The parties have voluntarily agreed to a settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

August 25, 1999
DATE

ELINOR R. REINER, ALJ

Receipt Acknowledged:

Aug. 30, 1999
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 30 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

al

FEINTUCH, PORWICH & FEINTUCH
26 Journal Square
Jersey City, New Jersey 07306
(201) 656-8600
Attorneys for Petitioner

MARIA LAZZARO Petitioner vs. STATE OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, COUNTY OF HUDSON Respondent	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY Agency Ref. No. 436-11/97 OAL DKT NO. EDUOR-10738-97N CONSENT ORDER

THIS MATTER having been brought before the Office of Administrative Law by Feintuch, Porwich & Feintuch, attorneys for petitioner, and Charlotte Kitler, Esq., attorney for respondent, consenting hereto, and it appearing that the Division of Workers' Compensation has ruled on the length of petitioner's temporary disability in Maria Lazzaro vs. Jersey City Board of Education, C.P. No. 98-004926, and for good cause being shown,

IT IS on this day of , 1999,

ORDERED that Respondent shall restore all Petitioner's sick days deducted from Petitioner's sick leave bank from October 1, 1997 through October 6, 1997.

ELINOR R. REINER, A.L.J.

WE HEREBY CONSENT TO THE FORM AND ENTRY OF THE WITHIN ORDER.

FEINTUCH, PORWICH & FEINTUCH
Attorneys for Petitioner

By: _____
ALAN S. PORWICH
DATED: ~~June~~ Aug 10, 1999

_____
CHARLOTTE KITLER, ESQ.
Attorney for Respondent
DATED: ~~June~~ 8/6/99, 1999

3b

OAL DKT. NO. EDU 10738-97
AGENCY DKT. NO. 436-11/97

MARIA LAZZARO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, consent order, and initial decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the consent order.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

October 14, 1999
Date of MaILING, October 14,1999

327-99E

C.H., on behalf of minor child, S.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SPOTSWOOD, MIDDLESEX COUNTY AND BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION ON MOTION
RESPONDENTS.	:	

October 14, 1999

OAL DKT. NO. EDUOS 06750-99S
AGENCY DKT. NO. 258-8/99

C.H., on behalf of minor child, S.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SPOTSWOOD, MIDDLESEX COUNTY AND BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION ON MOTION
RESPONDENTS.	:	

The record of this emergent matter, which included an audiotape of the hearing conducted at the Office of Administrative Law (OAL) on September 3, 1999, and the Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner affirms the Order denying emergent relief as he concurs with the ALJ's hearing determination that petitioners have not satisfied the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). The Commissioner further concurs with the ALJ's recommendation, which was agreed to by the parties at hearing, that East Brunswick be severed as a party to this matter.

Accordingly, the within application for emergent relief is hereby denied. This matter shall move to plenary hearing on its merits as directed by the ALJ.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

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* This decision, as the Commissioner's final determination in this interim matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

October 14, 1999
Date of Mailing, October 14,1999

1999 SEP -7 A 10:47

SHORE & ZAHN, p.c.
5F Auer Court
P.O. Box 755
East Brunswick, NJ 08816
Tel.: 732-254-5500
Attorneys for Spotswood Board of Education

STEVEN HERNANDEZ, by his Guardian ad Litem, CAROL HERNANDEZ,	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION
Petitioner,	OAL DOCKET NO. EDUOS 06750-99S
-vs-	Agency Ref. No. 258-8/99
SPOTSWOOD SCHOOL DISTRICT and EAST BRUNSWICK SCHOOL DISTRICT,	
Respondents.	**ORDER**

THIS MATTER being opened to the Court upon application by the petitioner for emergent relief, and the Court having conducted a hearing on said application on September 3, 1999, in the presence of Harvey H. Rothman, Esq., attorney for the petitioner, Shore & Zahn, p.c., attorneys for respondent, Spotswood School District, Philip H. Shore, Esq. appearing, and Martin R. Pachman, Esq., attorney for respondent, East Brunswick School District, appearing, and the Court having heard and considered the arguments of counsel, and good cause appearing for the making of the within Order;

IT IS on this 10 day of September, 1999,

ORDERED that petitioner's application for emergent relief be and the same hereby is denied; and it is

FURTHER ORDERED that respondent, East Brunswick School District, be and hereby is dismissed from this action as said respondent is not a proper party to this action; and it is

FURTHER ORDERED that this matter shall be scheduled for a hearing by agreement between the remaining parties and the Court; and it is

FURTHER ORDERED that a copy of the within Order be served upon all counsel of record in this action within seven (7) days of the date hereof.

10 Sept. 99
Date

August E. Thomas T/A
AUGUST THOMAS, A.L.J.

This order on application for emergency relief may be adopted, modified or rejected by the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the COMMISSIONER OF THE DEPARTMENT OF EDUCATION does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

C:\DOCS\SP-382.ORD\c

328-99

IN THE MATTER OF THE TENURE	:	
HEARING OF DANITA WILSON,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF ELIZABETH, UNION COUNTY.	:	
	:	

October 18, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7378-99

AGENCY DKT. NO. 168-6/99

SCHOOL DISTRICT OF THE CITY OF ELIZABETH, UNION COUNTY

Petitioner,

v.

DANITA WILSON,

Respondent.

Mary E. Hennessy, Esq., for petitioner (Murray, Murray & Corrigan, attorneys)

Brian Kronick, Esq., for respondent (Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: August 25, 1999 Decided: September 1, 1999

BEFORE **ELINOR R. REINER,** ALJ:

On or about June 24, 1999, the School District of the City of Elizabeth certified charges of incapacity, incompetency, excessive absenteeism and unbecoming conduct due to unauthorized absence and abandonment of position against respondent, Danita Wilson, a tenured instructional enhancement teacher. On July 1, 1999, respondent filed an answer denying the charges.

On July 9, 1999, the Department of Education, Bureau of Controversies and Disputes transmitted this matter to the Office of Administrative Law for hearing as a

contested case pursuant to *N.J.S.A.* 52:14B -1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The matter was assigned to the undersigned Judge on July 14, 1999, and a telephone pre-hearing conference scheduled for July 20, 1999. During the pre-hearing conference held on that day, the issues were isolated, and a hearing scheduled for September 9 and 10, 1999 at 9:00 a.m. at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey. As a result of settlement conferences held between the parties, a settlement was reached and the hearing was adjourned.

The parties have agreed to settle this matter and have prepared the attached Settlement Agreement, indicating the terms of settlement.

I have reviewed the record and the settlement terms and I **FIND**:

1. The Settlement Agreement complies with the requirements of *Cardonic v. Brooklawn Board of Education*, 193 *S. L. D.* __ (St. Bd. April 6, 1983).

2. The parties have voluntarily agreed to the settlement, as evidenced by their signatures or their representatives' signatures.

3. The Settlement Agreement is in the public interest.

4. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision on this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.*52:14B-10.

September 1, 1999
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

Sept. 3, 1999
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 9 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

pb

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

AUG 25 8 22 AM '99

MURRAY, MURRAY & CORRIGAN
25 Sycamore Avenue
Little Silver, NJ 07739
(732) 747-2300
Attorneys for Petitioner, Elizabeth Board of Education

IN THE MATTER OF THE TENURE HEARING OF DANITA WILSON, BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY.

OFFICE OF ADMINISTRATIVE LAW

AGENCY REF NO. 168-6/99

OAL DOCKET NO. 7378-99

SETTLEMENT AGREEMENT

INTRODUCTION

Counsel for the Elizabeth Board of Education (hereinafter "Board") and counsel for its tenured employee Danita Wilson join in moving for an order finding that the following Settlement Agreement between the parties meets the requirement of N.J.A.C. 1:1-19.1, recommending that the attached Settlement Agreement be adopted by the Commissioner of Education, and ordering on condition that the Commissioner approves the Settlement Agreement without modification, that the Settlement Agreement be implemented and the tenure charges filed by the Board, be withdrawn and this matter be dismissed.

SETTLEMENT AGREEMENT IN THE ACTION PENDING
BEFORE THE COMMISSIONER OF EDUCATION

This Settlement Agreement is entered into by and between the Board and Ms. Wilson.

I. STATEMENT OF INTENT

On June 23, 1999, the Board filed tenure charges against Ms. Wilson with the Commissioner of Education captioned In the Matter of the Tenure Hearing of Danita Wilson, Board of Education of the City of Elizabeth, Union County, OAL Docket No. EDUTH 7378-99, Agency Ref. No. 168-6/99; and

WHEREAS this Agreement is the end product of settlement negotiations conducted by the parties and is intended to fully and finally depose of the issues in controversy as based upon the mutual understanding set forth below;

II. DISMISSAL OF TENURE CHARGES

The Board shall withdraw the pending tenure case against Ms. Wilson. The Board shall take all necessary actions to notify the Clerk of the Office of the Administrative Law and the Administrative Law Judge Elinor R. Reiner that it is withdrawing the tenure charges.

III. RESIGNATION OF EMPLOYMENT

It is agreed that Ms. Wilson shall submit a letter of resignation to the Elizabeth Board of Education's counsel upon full execution of this Settlement Agreement. The letter will be held and not released to the Board until this agreement is approved by the Commissioner of Education. Such resignation shall be effective June 30, 1999. It is further agreed that Ms. Wilson will not apply for any position of employment with the Elizabeth Board of Education in the future.

IV. SETTLEMENT

The parties have agreed to settle this case to save the time and expense of an expedited hearing. The Board also has agreed to settle this matter to ensure its ability to utilize Board employees and central staff during the opening of the 1999-2000 school year.

V. AGREEMENT MAY NOT BE USED AS EVIDENCE IN ANY SUBSEQUENT PROCEEDING

The Board and Ms. Wilson agree that this Agreement shall not be used as evidence in any subsequent proceeding should the Commissioner not approve the terms and conditions agreed hereto by the parties.

VI. VOLUNTARINESS OF AGREEMENT

The signatories to this Agreement certify that they have read the terms of this Agreement, that they have had the opportunity to discuss the terms with their respective attorneys, are satisfied with the services of their respective attorneys in connection therewith, and that they understand the terms of this Agreement and its effects. The signatories to this Agreement acknowledge further that they are executing it of their own volition, with full understanding of its terms and effects, and with the intention of releasing all claims herein for consideration which they acknowledge is adequate and satisfactory to them. The signatories to this Agreement further acknowledge that they have not received any representations concerning its terms and effects other than those contained herein. The signatories to this Agreement acknowledge that they enter into it with a full understanding of their rights.

VII. ENTIRE AGREEMENT

This Agreement represents the full and entire agreement between the Board and Ms. Wilson. It can only be modified by a written agreement between the parties. It is binding upon the Board and its officers, agents, servants and employees as well as their successors and assigns. It is binding upon Ms. Wilson as well as her heirs, executors and administrators.

VIII. BINDING AGREEMENT

Intending to be legally bound hereby, the Board and Ms. Wilson execute the foregoing Agreement.

FOR THE ELIZABETH BOARD OF EDUCATION

By: Mary E. Hennessy
Mary E. Hennessy, Esq.
Attorney for the Petitioner

Date: 8/20/99

FOR DANITA WILSON:

By: BKE
Brian Kronick, Esq.
Attorney for Respondent

Date: 8/12/99

Danita Wilson
Danita Wilson

Date: 8/18/99

OAL DKT. NO. EDU 7378-99
AGENCY DKT. NO. 168-6/99

IN THE MATTER OF THE TENURE	:	
HEARING OF DANITA WILSON,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF ELIZABETH, UNION COUNTY.	:	
	:	

The record of this matter, the settlement agreement and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Upon such review, the Commissioner is compelled to reject the agreement as it is currently structured since he cannot be satisfied by the present record that the proposed settlement meets the *Cardonick* standards for settlement of tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board of Education April 6, 1983, 1990 *S.L.D.* 842, 846. Specifically, there is no indication that the within teaching staff member was advised of the Commissioner's duty, pursuant to *N.J.A.C.* 6:11-3.6, to refer tenure determinations for possible revocation of certificate.

While the Commissioner does not preclude the possibility of settlement in this matter, he stresses that in order for him to meet his own obligation to the schools and children of this state, he must be assured that any settlement is consistent with appropriate standards for setting aside tenure matters as expressed in *Cardonick, supra.*

Accordingly, the proposed settlement is rejected for the reasons expressed herein. The Commissioner hereby remands this matter to the OAL for revision of the documents, consistent with the concerns set forth above. If the parties are unwilling or unable to reach

accord on a modified agreement for submission to the Commissioner, the matter shall proceed to a hearing on the merits.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

October 18,1999
Date of Mailing, October 18, 1999

329-99

ALASKA SERVICES, INC.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning unsuccessful bidder challenged Board's revised specifications regarding 1999-2000 contract to provide custodial services.

ALJ found that petitioner did not meet the requirements for bidders since bidders had to have three comparably sized school districts under contract. In addition, petitioner was not the lowest qualified bidder. Finding no genuine issue of material fact, the ALJ granted summary judgment to the Board.

Assistant Commissioner adopted findings and determination in Initial Decision as his own. Petition was dismissed.

October 18, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING
MOTION FOR SUMMARY JUDGMENT
OAL DKT. NO. EDU 4686-99
AGENCY DKT. NO. 171-6/99

ALASKA SERVICES, INC.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,

Respondent.

Abraham Borenstein, Esq., for petitioner (Bloom, Borenstein, attorneys)

Martin R. Pachman, Esq., for respondent

Record Closed: July 12, 1999 Decided: September 1, 1999

BEFORE: **KATHRYN A. CLARK**, ALJ:

PROCEDURAL HISTORY

Originally, this matter was opened by the petitioner, Alaska Services, Inc. ("Alaska") on an application for an order granting emergent relief, pursuant to *N.J.A.C.* 6:24-1.5. The relief requested was for a stay in the awarding and/or commencement of a contract for custodial services by respondent, East Brunswick Board of Education ("the Board").

The application was denied. The Commissioner of Education concurred. The present cross-motions for summary decision followed.

FACTUAL STATEMENT

The facts are substantially as presented on the application for emergent relief, and are herein restated.

On May 7, 1998, the Board issued an advertisement for bids to provide custodial services for its 9 schools and administration building, which were due May 29, 1998 (1998 bid). The advertisement for bids contained the following paragraph:

> **B. QUALIFICATIONS FOR BIDDERS**
>
> The following are the minimum requirements to qualify for bidding:
>
> * * * * *
>
> 8. Bidder must be doing business in a minimum of three (3) public school districts of equal or greater volume performing custodial services.

This contract (1998 contract) was awarded to Alaska, for the period July 1, 1998 through June 30, 1999.

On May 13, 1999, the Board issued an advertisement for bids to provide custodial services for its 9 schools and administration building, which were due May 28, 1999 (1999 bid). The 1999 bid specification contained the same language regarding qualifications for bidders as the 1998 bid specification:

B. QUALIFICATIONS FOR BIDDERS

The following are the minimum requirements to qualify for bidding:

* * * * *

8. Bidder must be doing business in a minimum of three (3) public school districts of equal or greater volume performing custodial services.

No contract was awarded, the bids were canceled, and the Board issued a revised advertisement for bids on June 4, 1999 (1999 rebid). The 1999 rebid specifications were revised:

B. QUALIFICATIONS FOR BIDDERS

The following are the minimum requirements to qualify for bidding:

* * * * *

8. Bidder must submit evidence at time of bid of currently being under contract to provide custodial services in a minimum of 2 public school districts equal or greater in size than the East Brunswick School District in number of buildings and square feet.

Only one bidder was qualified. This bidder was not petitioner, Alaska.

Alaska asks that the revised specifications be declared null and void, that the Board be required to readvertise the bid without the revised specification, and that it be awarded attorney's fees and such other relief as is just and proper.

Alaska's president, Kevin Fay, said at the emergent hearing that Alaska had responsibly performed the 1998 contract, and Fay alleges that he had been informed by Don Hewins that Alaska's contract would be renewed for 1999-2000, with an increase in the contract fee. Despite this, the Board advertised for bids, and Alaska entered a bid, which Fay believes was the lowest qualified and/or responsible bid. The bids were canceled, and Fay states that he was told by Mr. Hewins that the Board wanted to intentionally eliminate some bidders ("the riff raff"), but Fay claims he was told that Alaska would be eligible under the revised specifications. Alaska was not

eligible under the revised specifications, and Fay said that Alaska did not bid under the revised specifications.

Fay claims that Alaska will be forced to terminate the services of their 18 employees who presently service the East Brunswick School District. The petitioner claims respondent intentionally violated *N.J.S.A.* 18A:18A-15e, in that it knowingly revised the specification to exclude all but one company, and the revision was not directly related to the purpose, function or activity for which the contract was made.

The Board's witness, Donald Hewins, Director of Support Services, in his certification o ht emergent application stated that he had discussed a possible extension of Alaska's contract into 1999-2000 with Fay, and a possible price increase (per *N.J.S.A.* 18A:18A-42h), but that the District's Buildings and Grounds Committee decided that the 1999-2000 contract should be bid. Accordingly, the bid was advertised and 6 companies responded. One bidder showed more than 3 comparably sized districts under contract, and its bid was well over the amount budgeted for custodial services.. Another bidder showed 2 comparably sized districts under contract. Alaska showed only its contract with respondent East Brunswick as a contract of comparable size[1]. The other bidders could not show any comparable size contracts. All bids were rejected for failure to meet qualifications and price.

Hewins testified that the Buildings and Grounds Committee revised the specification in order to attract additional qualified bidders[2]. Hewins said that he had assured Fay that he would discuss Alaska's situation with them. However, the Buildings and Grounds Committee decided that, while it was comfortable with reducing the requirement to 2 comparably sized districts, it would not reduce its requirement to only 1.

[1] Alaska had lost its other two contracts of school districts of comparable size before the 1999 bid was advertised.

[2] In his certification, Hewins denied saying that the specifications were revised to eliminate "riff raff" or any potential bidders. He stated that the revision took place to expand the potential pool of qualified bidders. As the question of any violation of rights of the two lowest bidders is not before me (Alaska was the third lowest bidder), I make no findings regarding this question.

Hewins said that the change in the specifications were meant to clarify the specification, and to expand the number of qualified applicants, and to attempt to define "comparable size" in a meaningful way. Despite this effort, only one qualified bidder submitted a bid on the "rebid". This bidder's price is still in excess of the budgeted allocation for, custodial services. All bids were again rejected, and negotiations continued pursuant to *N.J.S.A.* 18A:18A-5(16)d.

DISCUSSION

The material facts are not in dispute. Alaska was not able to meet the original requirement in the May 13 advertisement for bids. Its situation was only alleviated by the revision to the Qualification for Bidders specification. The only issue that could possibly be in dispute is whether Hewins told Fay that the revised bid specifications would be such that Alaska could bid successfully. Even if (for purposes of this summary decision motion) Hewins did make such a statement (and I do not make any finding that he did), but giving every possible inference to Alaska, the Board would not be bound by such a statement, and Alaska could not rely on this to require that the Board tailor its bid so that Alaska could meet its specifications.

Alaska cannot demand that the Board reduce its requirement to 1 comparably sized school district. The Board had a right to ask to see at least 2 comparably sized school districts, to assure itself that the bidder had a likelihood of being able, not only do the job, but to be fiscally sound enough to be able to complete the contract.

The school district has a right to have a responsible, qualified bidder as its contractor. Alaska had no valid claim to the 1999-2000 contract.

FINDINGS OF FACT

I **FIND** the following as **FACT** by a preponderance of the credible evidence:

1. Alaska entered a bid for the 1999-2000 contract even though it did not meet the requirements for bidders, which were the same requirements for bidders as were in its earlier

1998-1999 contract. Alaska did not challenge the requirement for bidders of having 3 comparably sized school districts under contract.

2. Alaska was not the lowest qualified bidder for the 1999-2000 contract.

3. The revision of the Qualification for Bidders specification took place on the orders of the Buildings and Grounds Committee, and was approved by the School Board.

4. The Buildings and Grounds Committee consists of 3 School Board members, the President of the School Board (on an Ad Hoc basis), the School District Superintendent, and Donald Hewins, as Director of Support Services.

5. The revision of the Qualification for Bidders specification was intended to attract additional qualified bidders, clarified the specification, and tried to define "comparable size" in a meaningful way.

6. Respondent did not revised the Qualification for Bidders specification to exclude all but one company. That revision was directly related to the purpose, function or activity for which the contract was made.

LEGAL DISCUSSION

Summary decision is granted if, after considering the evidence presented in the light most favorable to the non-moving party, there exists no genuine issue of material fact. *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520, 523 (1995). The essential question is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one sided that one party must prevail as a matter of law" *Id.* at 533. The Court recognized that this necessarily involves the judge in the process of weighing the evidence presented. *Id.* When determining whether a genuine issue of material fact exists, "the court should be guided by the same evidentiary standard of proof . . . that would apply" at a hearing. *Id.* This weighing differs

from the weighing the judge would perform after a hearing in that "on a motion for summary [decision] the court must grant all the favorable inferences to the non-movant." *Id.* at 536.

"When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." *N.J.A.C.* 1:1-12.5(b). "If an adverse party does not so respond, a summary decision, if appropriate, shall be entered." *Id.*

CONCLUSION

The Board of Education of the Township of East Brunswick, Middlesex County, is entitled to summary decision.

ORDER

It is therefore **ORDERED** that respondent's motion for summary judgment be **GRANTED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9/1/99
DATE

Kathryn A Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

Sept. 2, 1999
DATE

D. M. Contomanitis Jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 3 1999
DATE

Barbara A Harnett
OFFICE OF ADMINISTRATIVE LAW

es

OAL DKT. NO. EDU 4686-99
AGENCY DKT. NO. 171-6/99

ALASKA SERVICES, INC.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the initial decision.

Upon his independent review of the record in this matter, which has been delegated to him for review, pursuant to *N.J.S.A.* 18A:4-34, the Assistant Commissioner concurs with the determination of the Administrative Law Judge that Petitioner Alaska had no valid claim to the 1999-2000 contract for custodial services with the within Board and, consequently, summary decision is appropriately granted to the Board.

Accordingly, the Initial Decision of the OAL is affirmed for the reasons stated therein and the instant Petition of Appeal is hereby dismissed.*

IT IS SO ORDERED.

John M. Sheeran

ASSISTANT COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

October 18, 1999
Date of Mailing, October 19, 1999

330-99

J.L. AND J.E.H., on behalf of minor child, T.H.L.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE HOPEWELL VALLEY REGIONAL SCHOOL DISTRICT, MERCER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parents alleged the Board impermissibly restricted the First Amendment rights of their son, T.H.L., and denied him procedural due process in its consideration of their appeal of a grade of zero for his biology assignment.

In light of the record and testimony of witnesses, the ALJ found that T.H.L. was given an opportunity to revise his assignment to remove all references to illegal drug use, but he refused to make the revisions. ALJ found that the assignment of a zero grade was an academic and not a disciplinary action. The teacher's direction to delete references normally associated with drug use and the drug culture was not inconsistent with the Board's antidrug program. Citing *Hazelwood*, the ALJ determined that the school is a nonpublic forum and that the gravamen of this case rests within the area of pedagogical control traditionally accorded to schools. ALJ found that the Board did not exceed the compass of its lawful authority nor did it violate any constitutional rights or substantive or procedural due process rights of T.H.L. Having put aside petitioners' First Amendment arguments, arbitrary and capricious treatment arguments, due process arguments and the use of grades as discipline arguments, the ALJ found the petition to be without merit. Petition was dismissed.

Citing *Hazelwood* and *Desilets*, among other cases, the Assistant Commissioner adopted findings and determination in Initial Decision as his own.

October 18, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2658-99

AGENCY DKT. NO. 34-3/99

J.L. AND J.E.H. ON BEHALF OF MINOR CHILD, T.H.L.,

Petitioners,

v.

BOARD OF EDUCATION OF THE HOPEWELL VALLEY REGIONAL SCHOOL DISTRICT,

Respondent.

J.L. and J.E.H., petitioners, *pro se*

Robert P. Martinez, Esq., and **Susan G. Steinman,** Esq., for respondent (Robert P. Martinez, attorney)

Record Closed: August 10, 1999 Decided: September 2, 1999

BEFORE **BRUCE R. CAMPBELL,** ALJ:

This is a grading dispute between the parents of a pupil and a district board of education. This matter was opened before the Commissioner of Education and was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 through -13. After notice, a prehearing conference was held by telephone on June 17, 1999. The

matter was heard on July 27, 1999 at the Office of Administrative Law, Trenton. Post-hearing submissions were timely filed by both parties and the record closed on August 10, 1999.

The factual background of the dispute is uncontroverted. T.L. was a student in an honors biology class at Hopewell Valley Central High School in the 1997-98 school year. In early February 1998, the teacher assigned the creation of a "project kingdom" brochure due on the following Monday. Each pupil was assigned a kingdom from which the pupil was free to select an organism. T.L.'s assigned kingdom was fungi.

Each pupil was provided an assignment sheet (J-1a). The student was directed to play the role of an advertising agency and design a "creative, neat and well-organized brochure that catches the eye" for the organism the pupil had chosen. Among other things, the assignment sheet directed that the brochure include discussion of prey/predators and the use of at least three resources, of which two were to be periodicals and one a text. A bibliography had to be provided.

T.L. selected the Psilocybe mushroom as the subject for his brochure, completed the assignment and submitted it on time.

On or about Tuesday, February 17, 1998, the teacher directed T.L. to redo his brochure without "any references to illegal activity" and notified T.L. that pending a revision, the brochure was given a grade of zero out of seventy possible points.

T.L.'s brochure was not displayed in class. On February 17, T.L.'s mother telephoned the school office and left a request that the teacher call her and her husband at home that evening. T.L. discussed the situation with his mother and father and they agreed that unless the teacher could justify his decision, the brochure would not be redone.

T.L.'s parents did not hear from the teacher on February 17. On the next day, J.L., T.L.'s father, wrote to the teacher (J-3) stating that T.L. would not revise the brochure. The letter requested that the teacher assign the brochure a grade and suggested that the teacher consider apologizing to T.L. T.L. delivered the letter to the school office on the morning of February 18.

The teacher telephoned the parents that morning. He explained that, although the brochure was creative and well written, T.L.'s references to illegal drug use were inappropriate. T.L.'s parents pointed out that high school students do not live in a vacuum and that references had to be judged in context. They insisted that the brochure made clear that T.L. was not advocating use of illegal drugs. Rather, he was mocking drug use.

On Thursday, February 19, the science supervisor telephoned T.L.'s father to suggest that he and his wife come to the school to discuss the situation. T.L.'s father stated he was unwilling to do so because the teacher's decision to give the brochure a grade of zero was unacceptable. The situation required prompt rectification, not discussion. The petitioner's father further stated that when the petitioner's parents had spoken to the teacher, the teacher had been unable to justify himself and that if the supervisor thought his actions could be defended, she should do so in writing. If she chose to do so, T.L.'s father would provide her with his written response.

On March 1, 1998, J.L. wrote a letter to the school principal (J-4) appealing the teacher's and supervisor's decisions. J.L. supplied the principal with "background to assist his review of the situation." Petitioner's brief at 4.

On March 3, the principal wrote to J.L. (J-5). The principal supported the teacher. He further reported that on February 23, 1998, he had met with the superintendent who also supported the teacher. The principal's letter, among other things, noted that the district and community had done much to discourage drug and alcohol use among students and had taken a firm stand against clothing that advertised or highlighted drug, tobacco or alcohol use. A school-wide, community-based educational program that began in ninth grade and extended through high school had been implemented.

T.L.'s father, J.L., wrote again to the superintendent on March 8 (J-6) because the superintendent "had made his February 23rd decision without benefit of the March 1st letter from Petitioner's Father." Petitioner's brief at 5. Shortly thereafter, and unrelated to this case, the superintendent resigned.

On March 24, J.L. wrote a letter to the Board of Education (J-7) requesting the Board to overrule the school administration. He received a reply from the Interim Superintendent under date of May 11 (J-11). The Interim Superintendent said that, at the request of the Board, she had reviewed the matter and agreed with the former superintendent's decision not to overrule the teacher. She stated that T.L. enjoyed no constitutional right to freedom of expression under the circumstances, that the teacher's decision was not arbitrary or capricious, that denying credit until work is revised is not an unusual procedure and that such an approach was reasonable and appropriate under the circumstances in view of the fact that the work in question could be construed as promoting drug use. The letter concluded stating the Interim Superintendent would refer the matter to the Board's Curriculum Committee for review.

J.L. again wrote to the Board on May 16 (J-12). He repeated his perceived violation of T.L.'s right to freedom of expression by the school district and stated that no one had identified how T.L.'s project did not satisfy "completely and masterfully" the requirements of the assignment. Petitioner's brief at 6. The Board, after the Curriculum Committee review, scheduled a hearing on the matter (J-13).

T.L.'s father then gave the Board written notice, to "correct the record," that he did not request a hearing nor did he have anything to bring to the Board's attention except that which he had already submitted in writing (J-14). He offered to "attend and assist" the Board upon certain conditions. The Board did not accept his conditions. J.L. did not attend the scheduled hearing and the Board proceeded to make a determination without J.L.'s assistance. See, Exhibit J-15. The Board considered the matter and rendered a written decision, fully dispositive of the issues (J-17).

PAROL AND DOCUMENTARY EVIDENCE

T.L. testified in his own behalf. He identified the assignment he was given (J-1a) approximately one week before the due date of February 9, 1998. He visited a library on the following Saturday to accomplish the necessary research. He wrote his paper using sources he had found. His brochure was designed to capture the eye. He applied "advertising" technique. It was a creative presentation and poked fun at drug use. The witness stated that the only predators

the Psilocybe has are humans not smart enough to not eat it. He also discussed the organism's reproduction and indigenous area. He made references to *Alice in Wonderland* and indirectly referred to illegal status in the United States. There was no intent to promote use of this or any drug. T.L. stated he learned a lot about the mushroom.

T.L. said his teacher was upset about references to illegal activity. The teacher told him to redo the assignment and stated that credit would be withheld until it was redone. Student brochures were displayed in class and a question and answer period dealing with the brochures was held. T.L.'s brochure was not displayed. T.L. eventually received a zero for the assignment which, in turn, lowered his marking period grade from ninety-two to eighty-three. It affected his biology course grade and his grade point average.

The witness spoke with the teacher when the paper was returned. The teacher seemed upset and perhaps embarrassed, but not angry. The teacher made clear that credit would be given if the assignment was redone and references to illegal activity removed. T.L. understood what the teacher wanted. Later that day, he deemed the teacher's demands "absurd." T.L. told his parents and they called and wrote to the teacher.

T.L. later spoke to the teacher again. The teacher asked if T.L. were comfortable with what his parents were doing and T.L. said that he was. T.L. told his guidance counselor of the incident, completed the course and had no other problems. The same teacher graded other assignments and T.L. had no problems.

The teacher testified. Upon reading T.L.'s submission, he decided not to give a grade. Extraneous references to illegality are inappropriate. T.L. was assigned the kingdom fungi and could have used any organism in the kingdom. He chose Psilocybe.

The witness identified T.L.'s brochure (J-2). Aztec Indians arguably were predators of the mushroom and the last paragraph suggests that humans today are predators of the Psilocybe. The witness stated he objected more to the tone of the brochure than anything else.

The brochure could be read as suggesting drug use or at least not disapproving it. Some sections did have academic merit. The witness conceded he did not display this brochure. He considered its effect on younger pupils, thirteen-and-fourteen-year-olds. In general, the witness had several considerations in mind. The brochure was nonscientific, it could be considered by younger pupils as not disapproving of drug use, it appeared to be outside normal school work guidelines and the witness was aware of his responsibility as a teacher to uphold drug use policies of the school and district. The brochure could be read as winking at the use of the Psilocybe mushroom and, therefore, was inappropriate.

On the first page, T.L. discussed the effects on the central nervous system by using the word "high." The teacher saw attempts at humor, but did not view the biology classroom as a forum for dissemination of drug information younger pupils might not already know. The teacher did not discuss this assignment with the principal before grading.

He met with T.L. and went over the assignment. All pupils received the instruction sheet (J-1) and were told it was to be handed in with the assignment. T.L. seemed clear on what the witness said and T.L. asked no questions.

The witness received J.L.'s letter of February 18 to him on or about February 18. He may have spoken to J.L. or J.E.H. before he received the letter. They told him he should have had their letter by that time.

The witness stated he often helps pupils rewrite work. This is often accomplished through dialogue. He gives his reasons for editing and holds this to be a teaching responsibility. T.L.'s grade was not punitive because he had the chance to bring his work up to standard. The teacher expected the work to be rewritten and he hoped T.L. would realize what he expected. The tone of T.L.'s work simply was not scientific.

After receiving T.L.'s parents' letter of February 18, the teacher told T.L. that he still could resubmit the work if he wanted to, provided he omitted the references to drug use. T.L. responded that his father was dealing with it now and said, "It's not my issue," or words to that

effect. The witness had several conversations with administrators including the science coordinator and the principal.

T.L. could have looked more deeply and found other predators. It would have involved some work, but not much, to eliminate sections mentioning illegal activity. T.L.'s approach to the assignment was creative and interesting, but the material was inappropriate in part.

The letter the teacher received (J-3), made the following points:

1. Not one word of this assignment will be redone.

2. You are to send his brochure home with [T.] with a grade commensurate with the exceptional quality of work embodied in it no later than this Friday, February 20th. (I also think an apology to [T.] would be the decent thing to do, although this is optional rather than mandatory. Let your conscience be your guide.) [*sic*]

3. If you fail to satisfy point 2 above, I will immediately appeal your behavior as far as necessary within the school system, and if this process does not promptly result in appropriate redress, I will sue, in a court of competent jurisdiction, you and everyone within the school system who supports you.

The science supervisor testified. Upon being aware of the situation, she discussed it with the teacher and with the principal. She also spoke to the parents and asked for a meeting. J.L. refused to meet. He wanted the teacher simply to regrade the paper; there was nothing to discuss. T.L.'s responses were curt.

The witness is the next step, after the teacher, in disputes such as this. She read over Exhibit J-2, T.L.'s brochure and agreed with the teacher. The principal, as next in the chain of command, had to be advised. J.L. told her that T.L.'s parents had spoken with the teacher and had gone over the points in Exhibit J-3. The witness met with the teacher and the principal early on in order to bring the matter to the principal's attention. After J.L. refused a conference, the principal was again advised.

The witness identified Exhibit R-1, the Honors Biology Curriculum Guide in effect at the time for the course involved.

J.E.H., mother of T.L., testified. She stated she had a telephone conversation with the teacher and asked his logic and rationale for the decision to give no credit unless the work was redone. The teacher repeated what he had told T.L. The parents' response was that the piece could not be rewritten because humans do consume the mushrooms. She and the teacher discussed the references J.L. cited. They were appropriate in her opinion. The parents raised the issue of using humor. They did not understand why, if humans are using this mushroom, this could not be mentioned.

The witness also called the Mercer County Superintendent of Schools in March 1998. By that time, the matter had gone to the principal and the decision to support the teacher had been made. The witness inquired of the County Superintendent what the administrative appeal procedure was.

The high school principal for the 1997-98 school year testified. He learned of the matter when the teacher came to him on February 19, 1998 with the February 18 letter (J-3). The teacher recounted his conversation with the parents. The witness asked the teacher for the assignment sheet and asked about the demand to delete references to the psychedelic properties of the mushroom.

The witness also contacted the science supervisor and discussed the matter with her. The witness thought that the brochure was clever and sought a meeting with T.L.'s parents. He believed the references to head shops and air heads to be superfluous. They did not add to the presentation, but detracted from it. What T.L. may have seen as tongue-in-cheek was inappropriate.

The witness identified Board Policy 6214, Controversial Subject Matter, adopted November 4, 1996 (P-1). Teachers are responsible for classroom discussions. The policy advises teachers to go up the chain of command if they are concerned, need guidance or have questions about the maturity level of pupils. Time consumption is also mentioned. The witness did not

apply this in the 1998 incident. After he discussed the matter with the supervisor and the parents refused a meeting, the witness called the superintendent and gave him the assignment (J-1) and the February 18 letter (J-3). It was decided the principal would respond if T.L. wrote again.

The principal received a letter dated March 1 from J.L. (J-4). J.L. expected the matter to be resolved as he said it should be resolved. On March 3, the witness wrote to J.L. (J-5). Among other things, the witness suggested a meeting, but J.L. refused. At this point, the principal again advised the superintendent.

The witness also testified about a school- and community-based program, including a dress code, directed at certain problems perceived in the district. Much of the information collected before the policy was written was taken from a questionnaire filled out by former pupils. The dress code now forbids clothing that advertises, promotes or glorifies drugs, drug use, alcohol, alcohol use, tobacco or tobacco use. T.L.'s brochure was not appropriate for reading by other pupils. In fact, the mere presentation could be considered as school sanction of its contents. In response to a question whether there were other instances where an assignment fulfilled all qualifications but received a mark of zero, the answer was that it happened only where the assignments were submitted exceedingly late.

The witness discussed Exhibit J-4, the four-page letter to him by J.L. dated March 1. He received it on March 3 and considered it in writing his response, J-5, under date of March 3. Among other things, the witness stated that he found the assignment to be an excellent one in that it gave pupils a certain latitude of exploration and allowed for a great degree of creativity. He agreed with the teacher and supervisor that references to "head shops," "conscious raising high," and "Alice in Wonderland" were inappropriate. The letter also stated, "As a school district and community, we have been doing a great deal to discourage drug and alcohol use among our students and have taken a firm stand against clothing that highlights drug, tobacco, and alcohol use. Mr. [H.] is perfectly willing to accept and grant full credit for [T.'s] work, with appropriate revisions." The witness then recited the 1994 initiative based on a pupil survey, community meetings and much Board study. The witness stated clearly that all of this was in mind when the present case arose. The direction to T.L. to delete references to drugs was consistent with district

policy. Drug references were superfluous, although the quality of the brochure was good. T.L. was not disciplined because of this.

The brochure met the requirements of the assignment and would have been so graded if the objectionable material were removed. The policy on drugs and alcohol and tobacco are zero tolerance policies. There is no acceptance of use, possession or influence. Classroom teachers were involved and the entire curriculum was examined and, where necessary, supplemented.

The former principal believes the brochure was not humorous. It was not the same as a T-shirt featuring a beer can, but the witness still had concern about the effect of the brochure. T.L.'s intent may not have been to advocate the use of psychedelic substances. The influence of the brochure, however, could have been less than positive.

It would have been virtually impossible to teach from the brochure as submitted and not identify the writer. Honors students are competitive and would certainly look at the grade the brochure had received. They might also look to see what someone had got away with.

The acting superintendent at the time of this matter testified. She had been the assistant superintendent prior to being named interim superintendent. She identified a letter she wrote to J.L. under date of May 11, 1998 (J-11). The second paragraph states

> Asking a student to revise work and to deny credit until the work is revised is not an unusual academic procedure. In this instance, where [T.'s] project could be construed as promoting drug use, I believe Mr. [H.'s] decision to use this approach was reasonable and appropriate.

It is not at all unusual for a teacher to return work to a pupil for rewriting. The work may require editing, expansion or removal of superfluous material. T.L.'s brochure could have described effects more scientifically. As presented, the witness did not believe J-2 was a creative presentation. So far as the witness knows, Board Policy 6241 was not applied. The witness did not believe the policy was related to the circumstances at the time. It was not a question of a controversial subject, it was a matter of a teacher's right to return pupil work for rewriting.

This assignment was returned to a pupil to delete certain references. This is clearly a teacher's right. Certain content in T.L.'s submission could be construed as promoting drug use. The witness agreed with the teacher because the teacher was working within his prerogatives. If the student deleted references to human consumption, the witness could not say with certainty that the submission would have addressed predators. The piece was not footnoted and the witness could not say what part of the brochure came from which reference.

The witness identified a letter from the Chair of the Curriculum Committee to J.L. under date of June 4, 1998. The letter carefully lays out what has happened, the fact of Committee review and what the Committee considered. In the Committee's view, the requested edits did not interfere with T.L.'s First Amendment rights. In short, the Board Committee found that the teacher acted within his authority.

Judith R. Gordon testified. She was a member of the Board of Education at the time pertinent here. She wrote a two-page letter to other Board members on June 1, 1998 (J-24). She disagrees with the findings and determinations of other Board members. Significantly, she suggests further discussion as amelioration. The document contains other tangents not directly pertinent.

The witness stated that, although she read a photocopy of the assignment, her general recall of the document after more than a year is not clear. She believed she had a point of view for the Board to consider. The parents were not present when her thoughts were presented. In the witness' view, the issue is not the intent or creativity of the brochure. The issue is discouraging discussion of issues in a public school. The topic of the psychedelic drug was possibly more appropriate to a social studies or English class. The witness saw the role of the Board and Board members as balancing competing interests. She believes she engaged in a process that did that. It is always perilous to overturn staff decisions and the Board needs a very good reason to do that. There is a tendency of many to challenge a school decision too abruptly. The witness did not believe that Board Policy 6214 was relevant to this question.

In the paragraph beginning at the bottom of the first page of her letter, she mentions that the assignment does not indicate that papers must be free from irony or that references to illegal use of drugs or other illegal practices would not be tolerated. At hearing, she stated that no assignment can list all that is out of bounds. Something must be expected of the student.

The witness still favors establishing a process for working out disagreements. While no credit for an assignment that a pupil refuses to amend is harsh, she cannot say that it is never appropriate. The witness also stated that her initial view was that the teacher was right. She suggested that the parents and school authorities meet and confer. She now understands that that avenue was cut off by the family in this case.

DETERMINATION

The petitioner argues that the Board's grade of zero for T.L.'s brochure is arbitrary, capricious and in violation of due process. The petitioner also asserts that the Board's grade of zero illegally misrepresents T.L.'s academic achievement. Further, the Board impermissibly infringed T.L.'s right to free of speech under the Constitutions of the United States and of New Jersey. Finally, the Board's grade of zero for T.L.'s brochure punished him academically for a nonacademic reason. This was a disciplinary procedure requiring a due process hearing that the Board did not provide.

The Board asserts that its treatment of T.L. was reasonable, not arbitrary and capricious and did not offend the requirements of substantive due process. Further, the Board asserts that the petitioner challenges the substance of the Board's decision making. This involves questions of substantive due process, not procedural due process.

The grade given to T.L. does not misrepresent his academic achievement, but was a consequence of a determination to abandon the academic process in favor of litigation. The Board has not impermissibly infringed T.L.'s First Amendment rights. The petitioner relies on inapposite cases. Most importantly, the Board's actions satisfied the requirements of due process.

The short answer is that the Board and its agents have not exceeded the compass of their lawful authority nor have they violated any constitutional rights or substantive or procedural due process rights of the petitioner.

In support of his first argument, the petitioner puts forward *Lucia v. Duggan*, 303 *F. Supp.* 201 (D.C. Ma. 1969), *Ochsner v. Board of Trustees of Washington Community College District No. 17*, 811 *P.*2nd 985 (Wash. App. 1991) and *Sylvester v. Texas Southern University*, 957 *F. Supp.* 944 (S.D. Tex. 1997). As the Board correctly points out, these authorities arise in a higher education or employment setting, involve questions of procedural due process and arise in foreign jurisdictions. Although there is obviously overlap, courts nation-wide distinguish between the college student on one hand and the elementary or secondary pupil on the other.

The Commissioner of Education has, since at least 1903, had the first word in education cases, even those having a constitutional dimension. *Desilets v. Clearview Regional Board of Education*, 137 *N.J.* 585, 594-597 (1994). *N.J.S.A.* 18A:6-9 provides that all controversies arising under the school laws shall be tried first to the Commissioner of Education.

The analysis begins with the determination that the matter simply is not in the posture the petitioner suggests. Unlike the expression of a political belief, the gravamen of this case rests squarely within the area of pedagogical control traditionally accorded to school corporations. Even if this matter had arisen from the context of a journalism class, *Hazelwood School Dist. v. Kuhlmeyer*, 489 *U.S.* 260 (1988), makes clear that school officials may, indeed, exert strict control over the content of class work. Justice White, for the majority, held that the school is a nonpublic forum and, further, that there is no protection for curricular speech. The no protection holding springs from *Bethel School Dist. No. 403 v. Fraser*, 478 *U.S.* 675 (1986). *Fraser* dealt with a seventeen-year-old high school senior who delivered a nominating speech on behalf of a classmate running for a student government office. Fraser used humorous sexual innuendos in his speech. The curricular speech doctrine extended in *Hazelwood* raises further questions. Most fundamentally, when is student expression part of the educational program. At least one of the criteria is whether or not credit is awarded for the work or activity. In today's case, the answer is clearly yes.

This judge concedes that *Fraser* and *Hazelwood* have moved the United States Supreme Court considerably away from the path indicated by *Tinker v. Des Moines Independent Community School Dist.*, 393 *U.S.* 503 (1969). Whether one chooses to explain this in terms of appointments of more conservative justices or a disenchantment with student activity and social upheavals of the 1960s, the fact remains that it exists. Before leaving this part of the discussion, however, it must be noted that the shift in United States Supreme Court holdings may simply reflect the tension that exists in reconciling the mission of the schools to inculcate social values in young persons with the need to avoid the strictures of orthodoxy and the suppression of legitimate debate in the classroom.

A grading dispute, which is all that the present matter is, is strictly a local matter and is left to the administration and the policy making elements of the local board of education. "The school law vests the management of the public schools in each district in the local boards of education, and unless they violate the law, or act in bad faith, the exercise of their discretion in the performance of the duties imposed on them is not subject to interference or reversal." *Kenney v. Board of Education of Montclair*, 1938 *S.L.D.* 647 (1935), aff'd State Board of Education, 1938 *S.L.D.* 649, 653 (1935).

The context in which this matter arose includes a district and community rededication to what has been called a Healthy Community Program. The direction to T.L. to delete references normally associated with drug use and the drug culture was not inconsistent with the antidrug program. Nor was the ultimate grade given a punishment. The key to academic credit lay in T.L.'s hands at all times. T.L.'s intent may not have been to advocate the use of psychedelic substances. The teacher could have included the brochure in the class discussion that addressed other brochures. However, this would have required disagreement with the approach that T.L. took. That, in turn, would open the door to other possible arguments--and even litigation--based on disparate treatment or making an example of a pupil. It would have been virtually impossible to teach from the brochure and not identify the writer.

The school was faced with a delicate balance. The issue is how to appear not to promote or even condone drug use while preserving open debate. In fact, this is a question faced to a

greater or lesser extent in every public school every day. The majority of the decisions teachers make will be correct, as in this case. But no assignment can list all that is out of bounds. The petitioner states he was not told that the brochure had to be free of irony. That is a true statement, but not on point. Irony is not what was objectionable in the finished product.

Having considered the record and the arguments, I **FIND** that the assignment of a zero grade to T.L.'s brochure was an academic and not a disciplinary action. This, together with the fact that the petitioner has mistakenly argued procedural due process abuse where he has asserted substantive due process abuse, puts to rest the due process arguments.

Although student choice in courses, curriculum materials, assignments, teachers and even schools is increasing in some school districts, these are matters of educational policy and not constitutional rights. No court has ruled that students have a right to determine courses, texts, or teaching methods. The United States Court of Appeals for the Seventh Circuit has held that students have no constitutional right to challenge a school board's decision to eliminate a popular course. *Zykan v. Warsaw Community School Corp.*, 631 *F.*2d 1300 (C.A. 7 1980). Students do not have a right to academic freedom as that term is contemplated in academia. Academic freedom, to the extent it exists in the public schools inheres to teachers, not pupils.

In the present case, the petitioner at most asserts a difference of opinion about a matter that lies within the sound discretion of a teacher. The Board's brief discusses this point well, but is not necessary to determination of the question. The assignment and the treatment of T.L.'s brochure were both legitimate pedagogical concerns. If the petitioner's argument were accepted, use of any creative element would have obliged the teacher to accept the product whether or not relevant to the subject. The Board argues, and I agree, that however ironic, humorous, clever or entertaining T.L.'s material may have been, the teacher was charged with authority to make, and correctly made, the judgment that the presentation was not sufficiently scientific and required reworking. Board's brief at 13.

The petitioner also urges that the grade given misrepresents his academic achievement. The Board counters that the grade does not misrepresent academic achievement, but is a result of abandoning the usual route of a school dispute through the chain of command for the more

confrontational arena of litigation. The petitioner cites two cases, one from Pennsylvania and one from Indiana, that dealt with grade reduction. They are inapposite in that in those cases, grades were reduced for disciplinary reasons, not academic performance. Further, the pupils in those cases were not given the opportunity to make up missed work. That opportunity was offered to T.L. more than once.

Having considered and put aside the petitioner's First Amendment arguments, arbitrary and capricious treatment arguments, due process arguments and use of grades as discipline arguments, I **FIND** the petition of appeal to be without merit. The petitioner was a freshmen enrolled in an honors biology class at Hopewell Valley Central High School in the 1997-98 school year. In response to an assignment requiring description of a selected organism including kingdom, metabolism, mobility, habitat, predators, feeding habits and reproduction, T.L. submitted a work product entitled "Conscious Dreams." His teacher, after reviewing the paper, spoke with T.L. and directed him to rewrite his submission without references to illegal activity. The teacher believed that the paper, as submitted, was grade level inappropriate, did not meet the teacher's expectations for a scientific presentation and went beyond the limits of the intended assignment. Further, it ran against the district's policies and broad efforts to discourage messages about illegal drug use. These extended even to clothing that pupils were permitted to wear to school.

The teacher anticipated that T.L. would resubmit the assignment. However, the teacher received a written communication from T.L.'s father. The language in the letter (J-3), to be generous, is imperious. Efforts by persons above the teacher in the hierarchy to discuss the situation with the parents were rebuffed. A series of letters, described above, ensued. The matter eventually reached the Board level. The tone of later letters (J-7, J-12 and J-13) cannot be described as generously as J-3. The Board of Education fully considered the matter, which consideration included the expression of dissenting and differing views, and rendered a written decision that addressed the issues on June 4, 1998 (J-17). This appeal followed.

The petitioner having failed to carry the burden of proof on any of the issues implicated, I **CONCLUDE** that a decision must be entered in favor of the Board of Education. Accordingly, the petition of appeal is **DISMISSED**. It is so **ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 2, 1999
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

Sept. 3, 1999
DATE

D.M. Centanni/jc
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 3 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

WITNESSES

For petitioner:

T.L.

Andrew J. Harrison

Gertrude Iwanski

Jane E. Harris

David G. Oliver

Carol Roche

Judith R. Gordon

For respondent:

None

EXHIBITS

For petitioner:

P-1 Board policy 6214, Controversial Subject Matter

For respondent:

R-1 Honors Biology Course Description, 1992

Joint:

J-1 Redacted class assignment sheet

J-1a Class assignment sheet returned to T.L.

J-2 T.L. assignment, February 8, 1998, 4 pp.

J-3 Letter, J.L. to Harrison, February 18, 1998

J-4 Letter, J.L. to Oliver, March 1, 1998, 4 pp.

J-5 Letter, Oliver to J.L., M arch 3, 1998

J-6 Letter, J.L. to Thomas, March 8, 1998

J-7 Letter, J.L. to Board, March 24, 1998, 2 pp.

J-8 Letter, Nemeth to J.L., April 8, 1998

J-9 Memorandum, Oliver to Roche, April 20, 1998

J-10 Letter, J.L. to Board, April 29, 1998

J-11 Letter, Roche to J.L., May 11, 1998

J-12 Letter, J.L. to Board, May 16, 1998

J-13 Letter, Nemeth to J.L., May 19, 1998

J-14 Letter, J.L. to Board, May 28, 1998

J-15 Letter, Nemeth to J.L., June 1, 1998

J-16 Letter, J.L. to Nemeth, June 3, 1998

J-17 Letter, Board to J.L., June 4, 1998, 2 pp.

J-18 Letter, J.L. to Rubino, November 12, 1998, 3 pp.

J-19 Letter, Rubino to J.L., December 8, 1998

J-20 Letter, J.L. to Rubino, December 27, 1998

J-21 Letter, Rubino to J.L., January 22, 1999

J-22a Closed Minutes excerpt, May 18, 1998, 3 pp.

J-22b Closed Minutes, excerpt, June 3, 1998, 5 pp.

J-22c Closed Minutes, excerpt, March 8, 1999, 4 pp.

J-23 Memorandum, Erickson to Board, June 3, 1998

J-24 Memorandum, Gordon to Board, June 1, 1998, 2 pp.

J-25 Note, Goldschmidt to Board, undated, 2 pp.

OAL DKT. NO. EDU 2648-99
AGENCY DKT. NO. 34-3/99

J.L. AND J.E.H., on behalf of minor child, T.H.L.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HOPEWELL VALLEY REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Assistant Commissioner in rendering the within decision.

Upon careful and independent consideration of the record in this matter, which has been delegated to him for review, pursuant to *N.J.S.A.* 18A:4-34, the Assistant Commissioner concurs that the within matter may fairly be considered a grading dispute, and, contrary to petitioners' continued assertion, the Board's decision to uphold the teacher's assignment of a zero was not intended to "serve disciplinary purposes." (*Gustave M. Wermuth and Sylvia Wermuth v. Julius C. Bernstein, Principal of Livingston High School, and Board of Education of the Township of Livingston, Essex County*, 1965 *S.L.D.* 121) This is not a case where a student who "cut" his honors Biology class was, consequently, penalized with a zero on an assignment. (*See, for example, J.B. on behalf of W.B. v. Board of Education of the Township of Pequannock, Passaic County*, 93 *N.J.A.R.* 2d (EDU) 664, where the Commissioner held that a

grading policy which automatically reduced a high school senior's grade to failing for cutting physical education class on the last day of school was arbitrary.) Rather, this case concerns a student whose work product, although perhaps *technically* complete, contained superfluous material which was, in content and tone, inappropriate for the high school setting.[1] Such a determination was well within the purview of T.L.'s teacher, Mr. Harrison. Notwithstanding repeated opportunities to revise his assignment in order to obtain a grade, T.L. declined to address his teacher's concerns. As the ALJ noted, "[t]he key to academic credit lay in T.L.'s hands at all times." (Initial Decision at p. 14) Moreover, like the ALJ, the Assistant Commissioner finds that petitioners' due process arguments are without merit.

Further, the Assistant Commissioner concurs that the Board's action in this instance did not offend First Amendment principles. The *Hazelwood* Court determined that the school is a nonpublic forum, and distinguished between a school's need to tolerate a student's personal expression, which happens to take place on school premises, as in *Tinker, supra*, and a school's obligation to promote particular student speech. The Court found that, in the latter instance, educators are entitled to exercise greater control "over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Hazelwood, supra,* at 270, 271. The Court recognized that such control was necessary "to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school." (*Id.*) The Court further noted that:

> A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent

[1] The Board noted, and petitioners do not specifically dispute, that inappropriate references in T.L.'s brochure consume approximately 200 words of the approximately 647 words of text, or about 31% of the brochure's content. (Board's Post-Hearing Brief at p. 4)

> with 'the shared values of a civilized social order,' *Fraser, supra*, at 683, or to associate the school with any position other than neutrality on matters of political controversy. (*Id.* at 272)

Thus, the *Hazelwood* Court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[2] (*Id.* at 273)

Here, petitioners do not deny that the dispute arises within the context of curricular speech, rather than personal, political expression. Further, the Board's pedagogical concern is that the District, attentive to student substance use/abuse, is committed to its prevention:

> Mr. Oliver [the Superintendent of Schools] in particular noted [in his testimony] that the district and high school policy strongly discouraged messages that treated illegal drug use lightly or frivolously. As a basis for that policy, he cited a recent study conducted in his building by the Search Institute, an independent research organization, indicating that over 49% of high school seniors in the Hopewell Valley Regional School District were "at risk" for serious drug or alcohol abuse problems or both. He further testified that these and similar startling statistical returns for the lower secondary grades had resulted in a community-wide effort to counter a casual attitude toward the illegal use of substances. *** Mr. Oliver noted that as part of this community-wide response to a documented problem, the school district substantially revised its drug and alcohol policies and building practices, to the point of undertaking such initiatives as eliminating drug messages displayed on clothing. Mr. Oliver saw Mr. Harrison's decision as both appropriate pedagogically and consistent with the high school's anti-substance abuse initiative. (Board's Post-Hearing Brief at pp. 6-7)

[2] To the extent petitioners object to the ALJ's observation that *Hazelwood* stands for the proposition that "there is no protection for curricular speech," (Initial Decision at p. 13), the Assistant Commissioner acknowledges this deviation and does not affirm any principle which is contrary to the Court's holding in *Hazelwood.*

The Assistant Commissioner agrees with the Board. Whether T.L. *intended* to advocate illegal drug use is irrelevant; the Board need only be concerned that the text of T.L's brochure "might reasonably be perceived" by anyone to advance a position contrary to its interest in preventing substance use among students. *Hazelwood, supra.* Its position is consistent with its legal obligation to develop a policy and related programs to combat substance abuse among students. (*N.J.S.A.* 18A:40A-10) In this nonpublic forum, the Board may reasonably limit activities and expression to those which are "compatible with the intended purpose of the property," *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 *U.S.* 37, 49 (1983). In this respect, the instant matter is readily distinguishable from *Desilets*, *supra*, where the New Jersey Supreme Court held that the exclusion of a student's reviews of R-rated movies from a junior high school newspaper violated the First Amendment, since the district's policy concerning such material was found to be "vaguely defined and loosely applied and that its underlying educational concerns remained essentially undefined and speculative." *Desilets*, *supra,* at 593.

Accordingly, the Initial Decision of the ALJ is affirmed for the reasons expressed therein and amplified above. The within Petition of Appeal is dismissed.[3]

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

[3] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

330-99

EDU #2658-99
C's # 330-99
SB # 50-99

J.L. AND J.E.H., on behalf of minor child, T.H.L.,	:	
PETITIONERS-APPELLANTS	:	STATE BOARD OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE HOPEWELL VALLEY REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, October 18, 1999

For the Petitioners-Appellants, Joseph Longino and Jean E. Harris, pro se

For the Respondent-Respondent, Robert P. Martinez, Esq. and
Susan G. Steinman, Esq.

For the reasons expressed by the Commissioner of Education, we affirm his decision in this matter. In doing so, we stress that the brochure at issue was produced in response to an assignment given as part of the educational curriculum. We further stress that judging the content of such assignments is part of the core of a school's educational mission.

February 2, 2000

Date of mailing FEB 04 2000

331-99L

State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

CHRISTINE TODD WHITMAN
Governor

DAVID C. HESPE
Commissioner

October 20, 1999

Stephen R. Fogarty, Esq.
Fogarty & Hara
16-00 Route 208 South
Fair Lawn, NJ 07410

Robert M. Schwartz, Esq.
Monroe Centre at Forsgate
12 Centre Drive
Jamesburg, NJ 08831

Dear Counsel:

Having received the papers filed pursuant to the Board's request for interlocutory review in the matter entitled, *In The Matter of The Tenure Hearing of Joseph Graceffo, School District of the Township of Wayne, Passaic County,* OAL Dkt. No. EDU 5519-99, Agency Dkt. No. 113-5/99, and having determined to review the transcript of the oral order of the Administrative Law Judge (ALJ) as issued on October 5, 1999, pursuant to my discretion under *N.J.A.C.* 1:1-14.10(c), I hereby set aside said order, for the reasons set forth below.

In the course of the tenure hearing currently in progress in connection with the above-noted matter, counsel for respondent objected to questions asked by the Board's counsel in the direct examination of Gary P. Hall, Human Resource Specialist for the Board. These questions concerned respondent's alleged "pattern of conduct of not drug testing students at Wayne Valley High School prior to the 1995-1996 school year." (Fogarty Certification at p. 2) Respondent argued that such evidence is outside the scope of the tenure charges; the ALJ sustained respondent's objection, thereby precluding the Board from bringing to the record any evidence of those prior incidents. The Board, however, asserts that although the incidents in question took place in 1991 and 1994, and the *captions* of the tenure charges allege that respondent is guilty of unbecoming conduct by virtue of events which transpired in the 1995-96, 1996-97 and 1998-99 school years, the *content* of its charges contained references to these two prior incidents, albeit without specific student names and dates, and the documentation accompanying the charges placed respondent on notice that the Board was aware of the incidents prior to the 1995-96 school year. (*Id.* at p. 5)

Upon review of the papers submitted, I find that the questions to which respondent's counsel raised objections involve incidents which are set forth in the Board's tenure charges and accompanying statements of evidence in a manner sufficient to apprise respondent of the charges

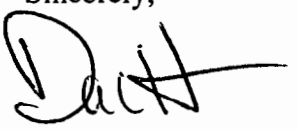
against him so as to enable him to prepare his defense. *In the Matter of the Tenure Hearing of James Andrews, School District of the City of Newark*, 1991 *S.L.D.* 1286, 1298. Indeed, as the Board has demonstrated, in addition to the charges and accompanying documentation filed before me, respondent and his counsel were fairly notified in the course of proceedings before the Office of Administrative Law of the Board's intent to bring into evidence the two incidents in question, and were, prior to the hearing, made aware of the precise dates of the incidents and the students involved.

In determining to set aside the ALJ's order, I recognize that

> the Commissioner will not automatically dismiss tenure charges on procedural grounds, and has declined to do so where the defect at issue did not prejudice respondent's rights or represent an egregious and unwarranted disregard of tenure proceeding law. *** *In re Andrews, supra*, at 1298. (Citations omitted)

Under these circumstances, where respondent cannot credibly claim that he has been prejudiced by the Board's introduction of this evidence, I find that no purpose would be served by placing form over substance. Accordingly, I hereby set aside the ALJ's order issued on October 5, 1999 dismissing from the within tenure charges the 1991 and 1994 incidents, as identified herein.*

Sincerely,



David C. Hespe
Commissioner

VIA TELEFAX AND REGULAR MAIL
DCH/DG/DA/JB/interloc/graceffo2
c: Mumtaz Bari-Brown, ALJ
Clerk, OAL
County Superintendent

* This decision, as the Commissioner's final determination in this interim matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

332-99L

State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

CHRISTINE TODD WHITMAN
Governor

DAVID C. HESPE
Commissioner

October 21, 1999

Ben Montenegro, Esq.
Wilbert & Montenegro
531 Burnt Tavern Road
P.O. Box 1049
Brick, New Jersey 08724

Anthony B. Vignuolo, Esq.
Borrus, Goldin, Foley, Vignuolo,
Hyman, Stahl & Clarkin
2875 U.S. Highway #1
P.O. Box 7463
North Brunswick, New Jersey 08902

Dear Counsel:

I have reviewed the papers filed in connection with respondent's Motion to Dismiss in the matter entitled *In the Matter of the Tenure Hearing of Daniel McHarris, School District of the Township of North Brunswick, Middlesex County,* Agency Dkt. No. 283-9/99, wherein respondent moves for dismissal of the tenure charges due to procedural deficiencies with respect to the Board's certification of such charges. Respondent further requests payment, pursuant to *N.J.S.A.* 18A:6-8.3, of salary withheld by the Board since the beginning of the 1999-2000 school year. For the reasons set forth below, I determine that the Board's action to approve certification of the instant charges prior to the expiration of the 15-day period afforded by law to respond to such charges constituted a substantial failure to comply with the procedural mandates governing the institution of tenure charges, necessitating the dismissal, without prejudice, of these charges.

I initially note that the procedural requirements with respect to tenure charges are set forth in *N.J.S.A.* 18A:6-11 and *N.J.A.C.* 6:24-5.1 and, in pertinent part, specify: Any charges made against a tenured employee shall be filed with the secretary of the board of education in writing and accompanied by a written statement of evidence under oath. *N.J.S.A.* 18A:6-11, *N.J.A.C.* 6:24-5.1(b)1; The board of education shall provide the employee with a copy of the charges and the statement of evidence. *N.J.S.A.* 18A:6-11; The employee must be given an opportunity to submit a written statement of evidence under oath with respect to the charges. *N.J.S.A.* 18A:6-11; The employee has 15 days from receipt of the tenure charges to make the submission. *N.J.A.C.* 6:24-5.1(b)3; Upon expiration of the 15-day period, the board of education

submission. *N.J.A.C.* 6:24-5.1(b)3; Upon expiration of the 15-day period, the board of education shall determine whether there is probable cause to credit the evidence in support of the charges and whether such charges, if credited, are sufficient to warrant the dismissal or reduction of salary. *N.J.S.A.* 18A:6-11, *N.J.A.C.* 6:24-5.1(b)4.

The within Board does not dispute that respondent was entitled to 15 days from his receipt of the tenure charges on August 27, 1999 to file an Answer to such charges, nor does it deny that its action to consider the charges on September 7, 1999 occurred prior to the expiration of the period allotted for respondent's Answer. Rather, the Board defends the propriety of its action by virtue of the fact that respondent's former attorney, subsequent to her receipt of the charges, advised the Board, by letter dated August 25, 1999, that respondent would not be filing a reply to the tenure charges, pursuant to the rights granted him under *Ott v. Hamilton Twp. Bd. of Ed.*, 160 *N.J. Super.* 333 (App. Div. 1978), *cert. den.* 78 *N.J.* 336 (1978). Subsequent to receipt of this notice, Board consideration of the charges was scheduled for September 7, 1999. The Board, therefore, takes the position that respondent's waiver, upon which it reasonably relied, legally binds respondent to his position and he is estopped from attempting to alter his waiver.

I find such a defense wholly unpersuasive under the circumstances of the within matter. The record evidences, and the Board does not dispute, that on or before August 31, 1999, the law firm of Wilbert & Montenegro was officially substituted as respondent's counsel in this matter and, no later than September 2, 1999, the Board's attorney was advised of this substitution, advised that respondent's new counsel would not waive respondent's right to respond to the charges, and further advised that if the Board moved forward on this matter on September 7, 1999, prior to the expiration of the response period, it would be in contravention of respondent's rights. Having been clearly placed on notice, well in advance of the Board's scheduled meeting, that respondent intended to exercise his right to respond to the charges, the Board was obligated to postpone consideration of the tenure charges to a date subsequent to the expiration of the response period.[1]

I note that the within tenure charges, alleging 6 counts of unbecoming conduct on the part of the respondent, are serious in nature. I am further cognizant that dismissal of tenure charges is not required for technical, unsubstantial failure to follow statutory and regulatory procedural requirements. *In the Matter of Tenure Hearing of Cowan*, 224 *N.J. Super.* 737 (App. Div. 1988). However, it is well established that failure to provide a respondent with the time accorded him to answer tenure charges is a fatal procedural defect requiring dismissal of the charges. *In the Matter of the Tenure Hearing of Marilyn Feitel*, 1977 *S.L.D.* 451, *aff'd* State Board 458; *In the Matter of the Tenure Hearing of Carol Beam*, 93 *N.J.A.R.* 2d (EDU) 320; *In the Matter of the Tenure Hearing of William Wenisch,* decided by the Commissioner January 15, 1998, *aff'd* State Board July 1, 1998. Notwithstanding, although I have no alternative but to dismiss the instant charges as procedurally defective, this determination does not serve to preclude the Board from reconsidering them following proper compliance with the applicable statutory and regulatory mandates.

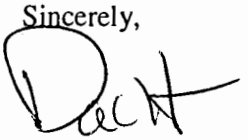
---

[1]Respondent advances other procedural deficiencies in the Board's certification process, which are disputed by the Board. In light of the mandated result herein, I find it unnecessary to consider or address these additional allegations.

Finally, addressing respondent's claim that he has not received salary since the beginning of the school year, the Board is reminded that, pursuant to *N.J.S.A.* 18A:6-8.3, absent an indictment or validly certified tenure charges, a board may not suspend a tenured employee without pay. As the within respondent has not, at this point in time, been indicted nor has the Board validly certified tenure charges against him, he is entitled to full salary and emoluments for the school year until such time as either of these events may occur.

Accordingly, the within tenure charges are hereby dismissed, without prejudice, and the Board is directed to compensate respondent in accordance with this decision.[2]

Sincerely,



David C. Hespe
Commissioner

DCH/DBG/DA/MH

[2]This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.* within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.
Date of Mailing, October 22, 1999

332-99

C # 332-99L
SB# 45-99

IN THE MATTER OF THE TENURE	:	
HEARING OF DANIEL McHARRIS,	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
TOWNSHIP OF NORTH BRUNSWICK,	:	
MIDDLESEX COUNTY.	:	

Decided by the Commissioner of Education, October 21, 1999

Decision on motion by the Commissioner of Education, November 18, 1999

For the Petitioner-Appellant, Borrus, Goldin, Foley, Vignuolo, Hyman, Stahl & Clarkin (Anthony B. Vignuolo, Esq., of Counsel)

For the Respondent-Respondent, Wilbert & Montenegro (Ben Montenegro, Esq., of Counsel)

On or about August 16, 1999, Daniel McHarris (hereinafter "respondent"), a tenured teaching staff member employed by the Board of Education of the Township of North Brunswick (hereinafter "Board"), was arrested and charged with criminal sexual contact involving two female students and official misconduct. Shortly thereafter, the Board filed tenure charges of unbecoming conduct against the respondent, which were mailed to him on August 24, 1999. The Assistant Superintendent/Board Secretary advised the respondent in a letter accompanying the charges that he had 15 days from receipt of those charges to submit a written response to the Board.

Apr. 5, 2000

In a second letter dated August 24, 1999, the Superintendent of Schools notified the respondent that the Board would be meeting on September 7 to consider suspending him without pay "based upon the fact that you have been charged with indictable criminal offenses which may result in the forfeiture of your public office." The Superintendent requested that the respondent advise the Board if he wished to have that matter discussed in an open session.

By letter dated August 25, 1999, the counsel for the Board sent a copy of the tenure charges to Gidian R. Mellk, Esq., then the counsel for the respondent, and requested that Ms. Mellk advise "as to your client's position on filing a response to the enclosed initial charge." In a response dated August 25, Ms. Mellk advised the counsel for the Board that she had received a copy of the tenure charges and that the respondent "will not be responding to the Board's charges, without prejudice, as provided for in Ott v. Hamilton Township Board of Education, 160 N.J. Super. 333 (App. Div. 1978), cert. den. 78 N.J. 336 (1978)."

By letter dated August 26, counsel for the Board notified Ms. Mellk that the tenure charges would be considered by the Board on September 7. He further indicated that "[b]ased upon your letter of August 25, 1999 it is our understanding that no response will be received from Mr. McHarris and the Board will proceed based upon the record before it at that time."

By letter dated August 31, 1999, Ben Montenegro, Esq., the current counsel for the respondent, notified the counsel for the Board that he had been retained to represent the respondent in this matter. In response to the Superintendent's letter of August 24, Mr. Montenegro stated that any action by the Board on September 7 to

suspend the respondent without pay would violate N.J.S.A. 18A:6-8.3, which provides that a board employee suspended other than by reason of indictment or certification of tenure charges is entitled to full pay during the period of such suspension. In that regard, Mr. Montenegro pointed out that the respondent had not been indicted and that tenure charges had not yet been certified against him.

At a special meeting held on September 7, 1999, the Board voted to certify the tenure charges to the Commissioner of Education and to suspend the respondent without pay. Those charges were transmitted to the Commissioner on September 20 and received by the Commissioner on September 21.

On or about September 29, 1999, the respondent filed a motion with the Commissioner to dismiss the tenure charges for procedural defects or, in the alternative, to stay the tenure proceedings. The respondent argued that the Board had not provided him with 15 days to submit a written response to the charges as required by N.J.S.A. 18A:6-16, alleging that Mr. Montenegro had advised the counsel for the Board on September 2, 1999 that he would not waive his right to respond during the 15-day period. The respondent further alleged that the Superintendent had failed to submit the charges to the Board under oath as required by N.J.A.C. 6:24-5.1(b) and that the Board had failed to determine by a majority vote of its full membership whether there was probable cause to credit the evidence in support of the charges as required by N.J.S.A. 18A:6-11.

In the event that the tenure charges were not dismissed for the reasons set forth above, the respondent requested that his "right to respond to the charges and statement

of evidence pursuant to N.J.S.A. 18A:6-1 be stayed pending completion of the criminal case" pursuant to Ott, supra.

In briefs filed in response to the respondent's motion, the Board argued that the respondent had waived his right to respond to the tenure charges and had not rescinded that waiver. The counsel for the Board averred in a certification that Mr. Montenegro had "never provided me with any written statement from Mr. McHarris regarding...his rescission of his earlier waiver. He further failed to advise that it was his intention to file any document with the Board in opposition to the Charges to be considered on September 7, 1999." The Board "requested that the applications of the Respondent, except his request for a stay of the proceeding pending the outcome of the criminal charges against him, be denied in their entirety."

In a letter decision dated October 21, 1999, the Commissioner granted the respondent's motion and dismissed the tenure charges without prejudice. Stressing that the Board's failure to provide respondent with 15 days to respond to the tenure charges was a fatal defect requiring dismissal of the charges, the Commissioner found that:

> [t]he record evidences, and the Board does not dispute, that on or before August 31, 1999, the law firm of Wilbert & Montenegro was officially substituted as respondent's counsel in this matter and, no later than September 2, 1999, the Board's attorney was advised of this substitution, advised that respondent's new counsel would not waive respondent's right to respond to the charges, and further advised that if the Board moved forward on this matter on September 7, 1999, prior to expiration of the response period, it would be in contravention of respondent's rights. Having been clearly placed on notice, well in advance of the Board's scheduled meeting, that respondent intended to exercise his right to respond to the charges, the Board was

> obligated to postpone consideration of the tenure charges to a date subsequent to the expiration of the response period.

Commissioner's Decision, slip op. at 2.

The Commissioner added that the respondent was entitled to his full salary until such time as he was indicted or tenure charges were properly certified against him.

On November 1, the Board filed the instant appeal to the State Board.

In light of the Commissioner's decision to dismiss the tenure charges, the Board served the respondent with a second set of charges, and on November 17, 1999, after giving the respondent 15 days to respond, the Board certified those charges to the Commissioner and once again suspended the respondent without pay.

On November 18, 1999, the Commissioner denied the Board's motion for a stay of his decision of October 21. On November 30, the Board filed a motion for a stay of the Commissioner's decision with the State Board.

After a careful review of the record, we reverse the Commissioner's determination to dismiss the August 1999 tenure charges, but, as more fully detailed herein, we restrain the Board from completing certification of those charges pending disposition of the criminal charges filed against the respondent.

In Ott, supra, a tenured teacher was arrested and charged with possession of marijuana and hashish. The district board thereupon filed tenure charges of unbecoming conduct against the teacher, who sought a court order restraining the board from acting to certify the charges to the Commissioner while the criminal charges were still pending. A trial judge granted the teacher's request, and the Appellate Division affirmed the imposition of such a restraint. Noting the teacher's dilemma in having to choose between filing a sworn statement which might be used to incriminate

him in connection with the pending criminal charges and jeopardizing his tenured position by failing to file such a statement, the Court found that there was:

> a sufficient showing of inequity and unfairness if the disciplinary proceeding is permitted to continue, because of the potential prejudice to plaintiff from the dilemma of foregoing his defense therein or risking self-incrimination. Thus the relief granted by the court by way of restraint is warranted within its equitable powers. Such relief is appropriate not because of the violation of any constitutional or fundamental rights but simply as an equitable solution to an intolerable situation.
>
> Nevertheless, it does not follow that such a reasonable resolution of plaintiff's dilemma should result in an order that he be paid his salary during the period of suspension.
>
> Under N.J.S.A. 18A:6-14, the board may suspend an employee with or without pay upon certification of a charge to the Commissioner. And such suspension, whether with or without pay, continues for a maximum of 120 days to permit a determination by the Commissioner. If the latter delays his decision beyond the period of 120 days, the employee is to be paid his salary thereafter, until disposition of the charge.
>
> Significantly, the provision for reinstatement of salary after 120 days excludes in the time computation "all delays which are granted at the request of such person."
>
> In view of this expression of legislative intent and the application of basic equitable principles, we conclude that plaintiff's application for the restraint of the disciplinary process for his own purposes and protection bars him from entitlement to the continued receipt of his salary in the meantime. Since his action has produced the delay the board should not be compelled to continue to pay his salary while unemployed. A contrary conclusion would reward him with receipt of salary without service during the pendency of the criminal charge and the potential extensive delay in its disposition. In the absence of such criminal involvement, on the other hand, the board could suspend his salary for 120 days within which the Commissioner would be able to dispose of the charge. Plaintiff should not be in a better position because the infraction involves a crime than that

> which would obtain if the charge were non-criminal. Since the delay is brought about by him and his interest, the board should not be burdened with interim salary payments. Of course, in the ultimate, if plaintiff is cleared of the disciplinary charges, he will be entitled to reinstatement with full back salary.

Ott, supra, at 341-42.

In the matter now before us, the respondent asserted his rights under Ott on August 25, 1999 when Ms. Mellk, his counsel at that time, indicated that the respondent would "not be responding to the Board's charges, without prejudice, as provided for in Ott...." Although Ms. Mellk did not explicitly request that the Board restrain from transmitting the tenure charges to the Commissioner pending disposition of the criminal charges, it is evident from her letter–and particularly from her citation to Ott–that she was asserting such a right on respondent's behalf. There is nothing in the subsequent correspondence from Mr. Montenegro, who replaced Ms. Mellk as the respondent's counsel, that would evince a waiver of that judicially-created right. We therefore restrain the Board from transmitting the tenure charges to the Commissioner for further action until such time as the criminal proceedings against the respondent are concluded.[1]

In so doing, we reject the respondent's contention that the Board failed to comply with the requirements of N.J.A.C. 6:24-5.1(a)1, which provides that tenure charges and the supporting statement of evidence must be executed under oath by the individual instituting the charges. When the Superintendent of Schools instituted the charges which are now before us, he included a sworn statement. We reject the respondent's contention that the inclusion of a single sworn statement for both the charges and the statement of evidence requires dismissal of the charges. Nor do we find any merit in

[1] We note that the record before us does not indicate the current status of the criminal charges.

the respondent's argument that the charges were rendered fatally defective by virtue of the fact that the statement was notarized by the Assistant Superintendent/Board Secretary. Accordingly, we reject the respondent's contention that the charges were invalid.[2]

As a further consequence of the respondent's assertion of his rights under Ott, the Board did not act improperly when it suspended him without pay pending disposition of the criminal charges. As the Court explained in Ott, supra, at 342, "plaintiff's application for the restraint of the disciplinary process for his own purposes and protection bars him from entitlement to the continued receipt of his salary in the meantime. Since his action has produced the delay the board should not be compelled to continue to pay his salary while unemployed." The Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq., provides that a district board may suspend a staff member with or without pay "[u]pon certification of any charge to the commissioner...." N.J.S.A. 18A:6-14 (emphasis added). In Ott, certification of the tenure charges was not completed since the district board had not yet transmitted those charges to the Commissioner when the trial judge restrained the board from so acting. Nonetheless, in upholding that restraint, the Appellate Division firmly held that the staff member could be suspended without pay pursuant to N.J.S.A. 18A:6-14 during the pendency of the criminal charges.

In the instant matter, the Board took formal action to certify the tenure charges on September 7, 1999 and to suspend the respondent without pay. It subsequently

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[2] Given our determination that the Board should not have completed certification of the tenure charges once the respondent asserted his rights under Ott, we need not address the respondent's allegations that the Board failed give him 15 days to respond to the charges or that the Board, in certifying the charges,

transmitted those charges to the Commissioner. In view of the respondent's assertion of his Ott rights, the Board should have restrained from completing certification of the charges. However, it is also clear from Ott that, during the period of such restraint, the respondent could properly have been suspended without pay. He would, of course, be entitled to "reinstatement with full back salary" if he ultimately is cleared of the tenure charges. Ott, supra, at 342.

We therefore reverse the Commissioner's decision to dismiss the August 1999 tenure charges, but restrain the Board from completing certification of those charges until the criminal proceedings against respondent have been concluded. Given the respondent's assertion of his Ott rights, we also uphold his suspension without pay as of September 7, 1999. We stress in that regard that the Board must provide the respondent with the opportunity to respond to the tenure charges following the conclusion of the criminal proceedings. After consideration of the respondent's response, the Board may then determine to complete certification of the charges by transmitting them to the Commissioner.

In view of our determination, we need not address the Board's motion for a stay of the Commissioner's decision.

Attorney exceptions are noted.

April 5, 2000

Date of mailing APR 7 2000

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had failed to make a determination as to whether the evidence was sufficient to find that there was probable cause to credit the charges.

333-99

J.T. AND M.T., on behalf of S.T.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

October 22, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6300-99
AGENCY DKT. NO. 214-8/99

J.T. & M.T. ON BEHALF OF MINOR CHILD, S.T.,
Petitioner,
v.
BOARD OF EDUCATION OF HAMILTON TOWNSHIP, MERCER COUNTY,
Respondent.

Richard Haws, Esq., for petitioners (Paglione & Massi, attorneys)

Dennis M. DeSantis, Esq., for respondent (Destribats, Campbell, DeSantis, Magee & O'Donnell, attorneys)

Record Closed: August 30, 1999 Decided: September 2, 1999

BEFORE **ROBERT S. MILLER,** ALJ:

This matter was transmitted to the Office of Administrative Law on August 3, 1999, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to 13.

The parties have agreed to a settlement and have prepared a stipulation indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore I **ORDER** that the parties comply with the settlement terms and that these proceedings be and are hereby concluded.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** which by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

September 2, 1999
Date

Robert S. Miller
ROBERT S. MILLER, ALJ

Receipt Acknowledged:

9-7-99
Date

Robert Weinstein Esq
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 8 1999
Date

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

tmp

TOWNSHIP SCHOOL DISTRICT TO INCLUDE ANY SUBSEQUENT YEARS OF ATTENDANCE AFTER THE 1999-2000 school year

3. THE PETITIONER SCOTT TAYLOR MUST BE ON-TIME FOR THE COMMENCEMENT OF ALL CLASSES WHICH HE IS SCHEDULED TO ATTEND.

4. THE PETITIONER SCOTT TAYLOR SHALL HAVE NO UNEXCUSED ABSENCES DURING HIS ATTENDANCE AT SCHOOL IN THE HAMILTON TOWNSHIP SCHOOL DISTRICT.

5. SHOULD THE PETIONER SCOTT TAYLOR VIOLATE PARAGRAPHS 2, 3, OR 4 OF THIS ORDER THEN HE SHALL ~~NO LON~~ BE EXPELLED FROM THE HAMILTON TOWNSHIP SCHOOL DISTRICT WHICH EXPULSION SHALL BE PERMANENT.

Robert S. Miller, ALJ
Robert S. Miller, ALJ

CONSENT IS HEREBY GIVEN TO THE FORM AND ENTRY OF THE FOREGOING ORDER.

JAMES TAYLOR, PETITIONER

MARIE TAYLOR, PETITIONER

SCOTT TAYLOR, PETITIONER

DENNIS M. DESANTIS, ESQ
FOR THE RESPONDENT

JAMES TAYLOR AND MARIE TAYLOR AS GUARDIANS AND PARENTS OF SCOTT TAYLOR PETITIONER V. THE BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON RESPONDENT	BEFORE THE COMMISSIONER OF EDUCATION OAL DOCKET NO.: EDUC 06300-95 AGENCY REF. No.: 214-8/95

THIS MATTER BEING OPENED TO THE COURT ON AUGUST 30, 1995, BY RICHARD HAWS, ESQ., OF THE FIRM OF PAGLIONE AND MASSI, ATTORNEY FOR THE PETITIONER, AND DENNIS M. DESANTIS, ESQ, OF THE FIRM OF DESTRIBATS, CAMPBELL, DESANTIS, MAGEE AND O'DONNELL, APPEARING ON BEHALF OF THE RESPONDENT, AND THE PARTIES HAVING ENTERED INTO AN AGREEMENT,

IT IS ON THIS 30th DAY OF AUGUST, 1995, ORDERED AS FOLLOWS:

1. THE PETITIONER SCOTT TAYLOR SHALL BE PERMITTED TO RE-ENTER THE HAMILTON TOWNSHIP SCHOOL DISTRICT AS AN 11th grade STUDENT (JUNIOR.) IN SEPTEMBER 1995.

2. THE PETITIONER SCOTT TAYLOR SHALL NOT ATTEND OR PARTICIPATE IN ANY EXTRA-CURICULAL ACTIVITIES OR EVENTS OR ANY SCHOOL SPONSORED ACTIVITIES OR

OAL DKT. NO. EDU 6300-99
AGENCY DKT. NO. 214-8/99

J.T. AND M.T., on behalf of S.T.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record, settlement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.*

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

October 22, 1999
Date of Mailing, October 22, 1999

335-99

IN THE MATTER OF THE TENURE	:	
HEARING OF ALBERTA BLACKWELL,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

October 25, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9844-97

AGENCY DKT. NO. 340-9/97

IN THE MATTER OF THE TENURE HEARING OF ALBERTA BLACKWELL, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY

Charles I. Auffant, Esq., for petitioner

Cherie L. Maxwell, Esq., for respondent (Sills, Cummis, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: September 2, 1999 Decided: September 10, 1999

BEFORE **EDITH KLINGER**, ALJ:

On October 21, 1997, this matter was transmitted to the Office of Administrative Law for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13. After an adjournment, a hearing was subsequently scheduled for July 8, 1999.

Prior to the hearing date, the parties resolved this matter. On September 2, 1999, the parties submitted the attached Voluntary Settlement Agreement, Waiver and Release indicating the terms of agreement which are incorporated herein by reference.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced on the record and by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

3. The agreement conforms with the *Cardonick* standards and with the concerns of the Commissioner of Education as set forth in his decision. *In re Cardonick*, decided by Commissioner, April 7, 1982, *affirmed*, State Bd. of Ed., 1990 *S.L.D.* 842, 846 (April 6, 1983).

I **CONCLUDE** that the agreement meets the safeguard requirements of *N.J.A.C.* 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

September 10, 1999
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

9/14/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 20 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
SEP 2 9 19 AM '99

CHARLES I. AUFFANT, ESQ.
661 Franklin Avenue
Nutley. New Jersey 07110
(973) 661-4545
Attorney for Respondent

COMMISSIONER OF EDUCATION
OAL Docket No. EDUOA 09844-97N
Agency Reference No. 340-9/97

In the Matter of the Tenure Hearing of	**VOLUNTARY SETTLEMENT AGREEMENT, WAIVER AND RELEASE**
ALBERTA BLACKWELL	

The State-Operated School District of the City of Newark ("Newark" or "District") and Alberta Blackwell ("Blackwell"), agree to the following terms in full resolution of this matter:

WHEREAS, the parties dispute the allegations of the tenures charges, and

WHEREAS, the parties agree that it is in the public interest to enter into this agreement in resolution of said charges in order to avoid the uncertainty and expense of litigation, and

WHEREAS, the parties further agree that the terms of this agreement will not present any risk of harm to students and/or the safe operation of the school district,

NOW, THEREFORE, the parties agree as follows:

1. Blackwell agrees to submit to the District, in writing and upon approval of this

Agreement, a resignation from her employment effective June 30, 1999.

2. Blackwell shall be placed on paid administrative leave through June 30,1999.

3. Blackwell shall file an application for retirement, with the Division of Pensions and the District shall assist in completing the necessary paperwork to process said application. However, the District makes no representations with respect to how Blackwell's pension shall be handled by the Division of Pensions. In addition, the District shall not be liable to Blackwell and Blackwell holds the District harmless with respect to any pension benefits which Blackwell does or does not receive at any time in the future.

4. Blackwell acknowledges that the payments reflected in this agreement constitute the full financial obligation of the District and that she shall receive no additional payments. In exchange for the above consideration, Blackwell, on behalf of herself, her heirs, successors and assigns, hereby fully releases and forever discharges the District, its representatives, agents, officers and employees, for any and all actions claims and liabilities of whatsoever kind in character, that she has had or may now have against any of them arising from this matter including without limitation, any and all claims related to her employment with the District or the termination of that employment

5. Blackwell acknowledges as required under *In re Cardonick*, that despite the approval of this agreement, the issue of possible revocation of her teaching certificate may be considered by the State Board of Examiners.

6. This agreement is subject to the approval of the State District Superintendent and the Commissioner of Education. Upon approval of this agreement, the District agrees that the tenure charges against Blackwell shall be withdrawn.

7. The parties enter this agreement voluntarily and without coercion, after consultation with their respective counsel.

State-Operated School District of the City of Newark

Alberta Blackwell

By:

Dated: 6/29/99

Dated:

OAL DKT. NO. EDU 9844-97
AGENCY DKT. NO. 340-9/97

IN THE MATTER OF THE TENURE	:	
HEARING OF ALBERTA BLACKWELL,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

The record, Voluntary Settlement Agreement, Waiver and Release and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement.* A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

October 25, 1999
Date of Mailing, October 25, 1999

IN THE MATTER OF THE TENURE	:	
HEARING OF BARBARA DIRK, SCHOOL	:	
DISTRICT OF MANCHESTER REGIONAL	:	COMMISSIONER OF EDUCATION
HIGH SCHOOL , PASSAIC COUNTY.	:	DECISION

MANCHESTER REGIONAL HIGH SCHOOL BOARD OF EDUCATION, PASSAIC COUNTY,	:	
RESPONDENT,	:	
AND	:	PERC DKT. NO. CO-H-99-325
MANCHESTER REGIONAL HIGH SCHOOL DISTRICT EDUCATIONAL SECRETARIES ASSOCIATION,	:	
CHARGING PARTY.	:	

October 25, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5169-99
AGENCY DKT. NO. 78-4/99

IN THE MATTER OF THE TENURE HEARING OF BARBARA DIRK,

and

BOARD OF EDUCATION OF THE PASSAIC COUNTY MANCHESTER REGIONAL HIGH SCHOOL, PASSAIC COUNTY,

---

MANCHESTER REGIONAL HIGH SCHOOL BOARD OF EDUCATION,

Respondent,

and

OAL DKT. NO. Unassigned
AGENCY DKT. NO. CO-H-99-325

MANCHESTER REGIONAL HIGH SCHOOL DISTRICT EDUCATIONAL SECRETARIES ASSOCIATION,

Charging Party.

Stephen R. Fogarty, Esq., for the Board (Fogarty & Hara, attorneys)

Sheldon Pincus, Esq., for the Association and Barbara Dirk (Bucceri & Pincus, attorneys)

Record Closed: September 7 , 1999 Decided: September 7, 1999

BEFORE **THOMAS R. VENA,** ALJ:

STATEMENT OF THE CASE

The matter designated OAL Docket No. EDU 5169-99 was transmitted to the Office of Administrative Law (OAL) from the Department of Education on May 5, 1999, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to-15 and *N.J.S.A.* 52:14F-1 to 13.

By orders dated August 9, 1999 and August 3, 1999 the Commissioner of Education and the Public Employment Relations Commission directed the consolidation of EDU 5169-99 with the unfair labor practice captioned above bearing Agency Docket No. CO-H-99-325.

A hearing was scheduled to begin on September 7, 1999.

Prior to that date, the parties settled the matter and on September 2, 1999, they submitted the attached Settlement Agreement. Having reviewed the record and the settlement terms, I **FIND:**

1. The Settlement Agreement complies with the requirements of *Cardonic v. Brooklawn Bd. of Ed.*, 193 *S. L. D.* _____ (St. Bd. April 6, 1983).

2. The parties have voluntarily agreed to the settlement, as evidenced by their signatures or the signatures of their representatives.

3 The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** and the **PUBLIC EMPLOYMENT RELATIONS COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** and/or the **PUBLIC EMPLOYMENT RELATIONS COMMISSION,** who by law are authorized to make a final decision on this matter. If the Commissioner of the Department of Education and/or Public Employment Relations Commission does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.*52:14B-10.

Sept. 7, 1999
DATE

Thomas R. Vena
THOMAS R. VENA, ALJ

Receipt Acknowledged:

Sept. 10, 1999
DATE

D. N. Gratsanitis/fe
DEPARTMENT OF EDUCATION

Sept. 15, 1999
DATE

Millicent A. Hasell
PUBLIC EMPLOYMENT RELATIONS COMMISSION

Mailed to Parties:

SEP 20 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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FOGARTY & HARA, ESQS.
1600 Route 208 South
Fair Lawn, New Jersey 07410
(201) 791-3340
Attorneys for Petitioner,
Manchester Regional High School
District Board of Education

IN THE MATTER OF THE TENURE HEARING OF BARBARA DIRK,	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
MANCHESTER REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, PASSAIC COUNTY	O.A.L. DOCKET NO.: EDU 5169- AGENCY REF. NO.: 78-4/99

SETTLEMENT AGREEMENT

WHEREAS, the respondent, Barbara Dirk (hereinafter referred to as "Dirk"), has been employed by the petitioner, Manchester Regional High School District Board of Education (hereinafter referred to as the "Board") as a secretary since 1983 and has obtained tenure in that position; and

WHEREAS, on or about December 11, 1998, the Board served Dirk with charges of inefficiency together with a written statement of evidence in support thereof; and

WHEREAS, the Board informed Dirk in writing that, unless the inefficiencies were corrected within ninety (90) days, the

Board intended to certify the charges of inefficiency to the Commissioner of Education; and

WHEREAS, on or about March 23, 1999, the administrator responsible for bringing the charges of inefficiency to the attention of the Board notified the Board in writing that Dirk had not corrected the charges of inefficiency. Furthermore, as a courtesy to Dirk, the administrator also notified Dirk on March 23, 1999 that she had failed to correct said inefficiencies; and

WHEREAS, on or about March 26, 1999, the Board formally served Dirk with the tenure charges of inefficiency, written statement of evidence and affidavits in support thereof; and

WHEREAS, the Board advised Dirk that she had fifteen (1 days in which to file with the Board a written response to the charges of inefficiency; and

WHEREAS, on or about April 8, 1999, Dirk notified the Board that she would not be responding to the tenure charges; and

WHEREAS, on or about April 15, 1999, the Board voted to certify the tenure charges to the Commissioner of Education and suspended Dirk without pay effective April 16, 1999; and

WHEREAS, said charges of inefficiency were filed by petition with the Commissioner of Education on April 16, 1999; and

WHEREAS, on or about April 22, 1999, the Manchester Regional High School District Educational Secretaries Association (hereinafter referred to as the "Association"), on

behalf of Dirk, filed an Unfair Practice Charge with the Public Employment Relations Commission (hereinafter referred to as "P.E.R.C."), Docket No. CO-99-325, alleging that the certification of tenure charges and related suspension were undertaken to discriminate against Dirk and to discourage her from exercising the rights guaranteed under the Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.; and

WHEREAS, on or about May 4, 1999, the Board notified Dirk that she would not receive her salary increment increase for the 1999-2000 school year on the same bases described in the tenure charges; and

WHEREAS, on or about May 14, 1999, the Association amended the Unfair Practice Charge to include the Board's action in withholding Dirk's salary increment for the 1999-2000 school year; and

WHEREAS, on or about May 17, 1999, the Association filed a Verified Petition, appealing the increment withholding, with the Commissioner of Education (Agency Dkt. No. 119-5/99); and

WHEREAS, on or about June 9, 1999, the Association again amended the Unfair Practice Charges to include various actions which Dirk undertook as president of the Association and which the Association alleged created the impetus for the Board to seek the withholding of Dirk's salary increment for the 1999-2000 school year; and

WHEREAS, on or about June 14, 1999, the Association moved to consolidate the three proceedings (Tenure Charges, Appeal of

Salary Withholding, and Unfair Practice Charge) and have P.E.R.C. declared the agency with the predominant interest; and

WHEREAS, the Board concurred with the request to consolidate but requested that the Department of Education be declared the agency with the predominant interest; and

WHEREAS, by Order dated July 7, 1999, Judge Vena denied the motion to consolidate and, accordingly, declined to consider which agency holds the predominant interest; and

WHEREAS, on or about July 15, 1999, the Association filed an interlocutory appeal of this decision before P.E.R.C. and the Commissioner of Education; and

WHEREAS, on or about July 19, 1999, the Board filed exceptions of this decision before the Commissioner of Educati and P.E.R.C.; and

WHEREAS, on or about July 28, 1999, the Commissioner of Education informed the Board and the Association that the Order denying consolidation is being reviewed by P.E.R.C. and the Commissioner of Education pursuant to N.J.A.C. 1:1-17.7 and that the parties' moving papers are deemed as exceptions to the Judge Vena's Order; and

WHEREAS, further litigation of these charges would necessitate the disruption of the Board's educational program due to the necessary absence of administrators, and others who would be called to testify at the hearing, said hearing expected to require at least four days to conclude; and

WHEREAS, the Board would incur substantial financial costs

by continuing this litigation that would significantly exceed the cost of this settlement; and

WHEREAS, the parties agree that a settlement would be in the best interests of the Manchester Regional High School District Board of Education and, therefore, the public; and

WHEREAS, the parties wish to amicably resolve their differences without the need to resort to any further litigation;

NOW, THEREFORE, in consideration of the aforementioned mutual premises and promises and in exchange for the consideration more particularly set forth below, the parties hereby agree as follows:

1. Dirk hereby resigns her position of employment with the Board, together with all tenure and seniority rights, effective June 30, 2000, or the effective date she commences alternative employment, whichever date occurs first, subject only to approval of this Agreement by the Board, the Office of Administrative Law and the Commissioner of Education. Dirk submits her resignation knowingly, voluntarily and irrevocably, free of coercion or duress, after consulting with counsel and receiving advice as to its ramifications. Dirk will sign an irrevocable letter of resignation from all employment with the Board. The form of Dirk's irrevocable letter of resignation is attached hereto as Exhibit A.

2. The Board, by resolution, will publically approve and accept the resignation of Dirk at its next regularly scheduled

meeting, effective June 30, 2000 or the effective date she begins alternative employment, whichever date is sooner. The form of the Board's resolution is attached hereto as Exhibit B.

3. Dirk hereby requests a leave of absence with pay commencing July 1, 1999 and ending on June 30, 2000, or the effective date that she begins alternative employment. The form of Dirk's letter requesting a leave of absence with pay is attached hereto as Exhibit C.

4. The Board, by resolution, will publically approve and accept Dirk's requested leave of absence with pay beginning July 1, 1999 and ending June 30, 2000, or the effective date she begins alternative employment, whichever date is sooner. The form of the Board's resolution is attached hereto as Exhibit

5. The Board agrees to withdraw, with prejudice, its tenure charges in the above-captioned matter bearing O.A.L. Docket No. EDU-5169-99 and Agency Ref. No. 78-4/99, subject to the approval of this Agreement by the Office of Administrative Law and the Commissioner of Education.

6. Dirk agrees to withdraw, with prejudice, the Unfair Practice Charge, as amended, bearing Docket No. CO-99-325.

7. Dirk agrees to withdraw, with prejudice, the Verified Petition before the Commissioner of Education, bearing Agency Docket No. 119-5/99, regarding her increment withholding.

8. In consideration for Dirk's resignation effective June 30, 2000 or the effective date she commences alternative employment, whichever date occurs first, the Board agrees to pay

Dirk the following compensation during her leave of absence with pay:

(a) $37,741.13 less the usual and customary deductions for withholding taxes and charges, which represents salary between July 1, 1999 and June 30, 2000, inclusive of Dirk's $900.00 longevity payment to which she is legally entitled under Section "J" of the parties' collective negotiations agreement, payable upon the approval of the Office of Administrative Law and the Commissioner of Education.

(b) $1701.18 less the usual and customary deductions for withholding taxes and charges, which represents payment for ten (10) days of vacation and three (3) floating holidays earned during the 1998-1999 school year, to which Dirk is legally entitled regardless of whether or not her separation from the Board's employ is voluntary or involuntary, payable upon the approval of the Office of Administrative Law and the Commissioner of Education.

If Dirk subsequently secures alternative employment in the public sector prior to June 30, 2000, the Board will pay in a lump sum the remaining balance of the salary which is still owed to her.

All monies due to Dirk under this Agreement will be paid, after normal payroll deductions, upon final approval of this Agreement by the Office of Administrative Law and the Commissioner of

Education.

9. The Board will continue to provide Dirk with health, medical, prescription and dental insurance in accordance with the parties' negotiated contract through June 30, 2000, saubject to the approval of the Office of Administrative Law and the Commissioner of Education. If, however, Dirk secures alternative employment which provides health and medical insurance benefits, the Board will have no further obligation to provide health, medical, prescription and dental benefits to Dirk after the conclusion of any eligibility waiting period.

10. During Dirk's leave of absence with pay, between July 1, 1999 and June 30, 2000, no benefits (such as sick days, personal days, and bereavement days that would accrue during the life of this agreement), other than those specifically addressed in paragraphs 8 and 9 above, shall accrue to Dirk or become an obligation of the Board.

11. Dirk will receive no compensation by the Board for any accumulated sick days earned during her period of employment with the Board.

12. Dirk shall be solely responsible for the reimbursement of any unemployment compensation or benefits she received while in the employ of the Board and for which she is required to repay.

13. The Superintendent of Schools agreed to provide Dirk with a statement of professional strengths; however, no

statement will be provided which is inconsistent with the evaluations that Dirk received while in the employ of the Board or with the tenure charges certified by the Board.

14. Neither Dirk nor the Board shall make any statements about the other which would tend to disparage or defame the other. Neither party shall undertake any act constituting a reprisal against the other for having instituted or defended the subject matter of these actions.

15. In response to any inquiries from Dirk's prospective employers, the Board agrees to the release onlly that which is authorized as public information by Executive Order No. 11; specifically, Dirk's name, title, position, salary, payroll record, length of service, date of separation from service and the reason therefore, and the amount and type of pension she is receiving.

16. The compensation and benefits specified in paragraphs 8 and 9 above of this Agreement are to be provided in consideration for Dirk waiving any and all claims she has, or could have, against the Board, its agents, officers, employees, servants, representatives and attorneys, or any one of them, including, but not limited to, claims for discrimination, contract, tort or constitutional violations, or attorney's fees. Dirk shall execute a General Release in favor of the Board releasing the Board, its officers, agents, servants, attorneys or employees or any one of them, from all claims, liabilities or expenses to which it may be subject, arising from any claims or

rights of Dirk. The form of the General Release is attached hereto as Exhibit D. Nothing in this Agreement or the documents referenced herein shall preclude either party from bringing an action to enforce performance of any term of this Agreement should there be a default in performance.

17. The Board and John Petrelli, Superintendent of Schools, Manchester Regional High School District Board of Education; Hank Sinatra, Principal of Manchester Regional High School, Diane White, Supervisor of Guidance and Special Services at Manchester Regional High School shall execute a General Release in favor of Dirk releasing her from all claims, liabilities, or expenses to which she may be subject, arising from any claims or rights of any of them. The form of Gener RElease is attached hereto as Exhibit E.

18. Dirk may return to Board property for legitimate purposes consistent with the rights of any other member of the public subject to the policies and regulations of the Board.

19. The parties acknowledge that this Agreement shall be submitted to the Office of Administrative Law and the Commissioner of Education for review and approval, and that the terms of this Agreement are expressly made subject to and contingent upon such review and approval. In the event that either agency disapproves and/or rejects any of the terms contained herein, this Agreement shall be null and void and the parties shall return to the same positions which they held prior to this Agreement.

20. The parties acknowledge that each has consulted with an attorney or a representative of their own choosing prior to signing this Agreement and that each sign this Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein.

21. This Agreement shall be subject to the laws of the State of New Jersey.

22. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Agreement and bind the Board to its terms.

23. Dirk hereby declares that she is of sufficient physical, mental and emotional capacities to understand and agree to all of the terms and conditions of this Agreement and agrees that she is and will continue to be bound by these terms and conditions in the future.

24. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

IN WITNESS, WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

WITNESS:

By: _____
Paul Stabile, Board Secretary/School Business Administrator

Dated: 8/26/99

MANCHESTER REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION

By: _____
Anthony Griffo
Board President

Dated: 8/26/99

WITNESS:

_____
Sheldon Pincus

Dated: 8/25/99

_____
Barbara Dirk

Dated: 8/23/99

BARBARA DIRK
137 Elizabeth Place
Totowa, New Jersey 07512

August 23, 1999

Mr. Anthony Griffo, Board President
Manchester Regional High School
District Board of Education
70 Church Street
Haledon, New Jersey 07508

Re: Letter of Resignation

Dear Mr. Griffo:

Pursuant to the terms of the Settlement Agreement between the Manchester Regional High School District Board of Education and myself, I hereby submit my irrevocable resignation from the position of secretary, effective June 30, 2000 or the effective date in which I commence alternative employment, whichever date occurs first. This resignation is expressly conditioned upon the Board's compliance with the aforesaid Settlement Agreement and the terms of my general release and is of no force or effect, even if accepted, unless said Agreement and the general release which I have executed are fully performed by the Board.

Sincerely,

Barbara Dirk

RESOLUTION

BE IT RESOLVED by the Manchester Regional High School District Board of Education as follows:

1. The request of Barbara Dirk to resign her employment by the Board, effective June 30, 2000, is approved and accepted.

2. The request of Barbara Dirk for a leave of absence for personal reasons from July 1, 1999 to June 30, 2000, is hereby granted and approved pursuant to N.J.S.A. 18A:30-7.

3. The terms, stipulations and conditions as established in a Memorandum of Agreement, annexed to this Resolution, dated August 26, 1999 are hereby adopted and approved by the Board of Education. The President and Secretary of the Board of Education are hereby authorized and directed to execute the attached Memorandum of Agreement, and any other documents necessary to effect said Memorandum of Agreement.

ROLL CALL VOTE:

AYES: 8

NAYS: 0

ABSENT: JEFF Fischer

CERTIFICATION

I hereby certify that the within Resolution was adopted by the Manchester Regional High School District Board of Education at a meeting held on August 26, 1999, by a majority of the Board.

Paul J. Stabile
Board Secretary
School Business Administrator

BARBARA DIRK
137 Elizabeth Place
Totowa, New Jersey 07512

August 23, 1999

Mr. Anthony Griffo, Board President
Manchester Regional High School
District Board of Education
70 Church Street
Haledon, New Jersey 07508

Re: Letter Requesting Leave of Absence

Dear Mr. Griffo:

I hereby request of the Board that I be granted a leave of absence with pay according to the terms of the Memorandum of Agreement dated August 23, 1999. I request that this leave begin July 1, 1999 and end on June 30, 2000, or the effective date that I begin alternative employment.

Thank you for your consideration of my request.

Sincerely,

Barbara Dirk

RELEASE

This Release, dated August 23, 1999, is given BY the Releasor(s) Barbara Dirk, referred to as "I",

TO Manchester Regional High School District Board of Education, its officers, agents, servants, attorneys or employees or any one of them, referred to as "You". If more than one person signs this Release, "I" shall mean each person who signs this Release.

1. **Release.** I release and give up any and all claims and rights which I may have against you. This releases all claims, including those of which I am not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now. I specifically release the following claims:

More particularly any and all claims arising out of the employment relationship between Barbara Dirk and the Manchester Regional High School Board of Education, including but not limited to, any cause of action pursuable before any state or federal court or agency, any pension claim(s) arising with the New Jersey Division of Pensions and Teachers' Pension and Annuity Fund, or grievance through a collective negotiations agreement which allege a violation of the Older Workers' Benefits Protection Act, 29 U.S.C. 621, et seq., or any other federal or state statutory provision, administrative regulation or other act that has the force and effect of law.

This Release does not apply to any rights which Barbara Dirk may have under the terms of the Settlement Agreement between Barbara Dirk and the Manchester Regional High School District Board of Education.

2. **Payment.** I have been paid a total of $1.00, and other good and valuable consideration as set forth more specifically in the Memorandum of Agreement dated August 23, 1999, in full payment for making this Release. I agree that I will not seek anything further including any other payment from you.

3. **Who is Bound.** I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities, such as your heirs or the executor of your estate.

4. **Signatures.** I understand and agree to the terms of this Release. If this Release is made by a corporation its proper corporate officers sign and its corporate seal is affixed.

Witnessed or Attested by:

Barbara Dirk (Seal)

Barbara Dirk

STATE OF NEW JERSEY)

SS:

COUNTY OF PASSAIC)

BE IT REMEMBERED that on this 23rd day of August ,1999, before me personally appeared Barbara Dirk, who I am satisfied is the person mentioned in and who executed the within Agreement and who knows the contents thereof and thereupon I acknowledge that she signed, sealed and delivered the same as his/her voluntary act and deed for the uses and purposes therein expressed.

(Print name and title below signature

Stephen R Fogarty
An Attorney at Law of NJ

Prepared by:

Fogarty & Hara, Esqs.

Stephen R. Fogarty

RELEASE

This Release, dated August , 19 , is given

BY: the Releasor(s) John Petrelli, Superintendent of Schools for the Manchester Regional High School District Board of Education; Hank Sinatra, Principal, Manchester Regional High School; and Diane White, Supervisor of Guidance and Special Services, Manchester Regional High School District Board of Education, its officers, agents, servants, attorneys or employees or any one of them, referred to as "I". If more than one person signs this Release, "I" shall mean each person who signs this Release.

TO: Barbara Dirk, referred to as "I".

1. **Release.** I release and give up any and all claims and rights which I may have against you. This releases all claims, including those of which I am not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now. I specifically release the following claims:

More particularly any and all claims arising out of the employment relationship between Barbara Dirk and the Manchester Regional High School Board of Education, including but not limited to, any cause of action pursuable before any state or federal court or agency, or any other federal or state statutory provision, administrative regulation or other act that has the force and effect of law.

This Release does not apply to any rights which Barbara Dirk may have under the terms of the Settlement Agreement between Barbara Dirk and the Manchester Regional High School District Board of Education.

2. **Payment.** I have been paid a total of $1.00, and other good and valuable consideration as set forth more specifically in the Memorandum of Agreement dated August , 1999, in full payment for making this Release. I agree that I will not seek anything further including any other payment from you.

3. **Who is Bound.** I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities, such as your heirs or the executor of your estate.

4. **Signatures.** I understand and agree to the terms of this Release. If this Release is made by a corporation its proper corporate officers sign and its corporate seal is affixed.

MANCHESTER REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION

(Seal)
John Petrelli,
Superintendent of Schools

MANCHESTER REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION

MANCHESTER REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION

(Seal)
Anthony Griffo,
Board President

(Seal)

School

Hank Sinatra, Principal
Manchester Regional High

Witnessed or Attested by:

MANCHESTER REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION

Paul J. Stabile, School Business Administrator/ Board Secretary

(Seal)
Diane White, Supervisor of Guidance and Special Services

STATE OF NEW JERSEY)
SS:
COUNTY OF PASSAIC)

BE IT REMEMBERED that on this day of , 1999, before me personally appeared John Petrelli, who I am satisfied is the person mentioned in and who executed the within Agreement and who knows the contents thereof and thereupon I acknowledge that she signed, sealed and delivered the same as her voluntary act and deed for the uses and purposes therein expressed.

OAL DKT. NO. EDU 5169-99
AGENCY DKT. NO. 78-4/99

IN THE MATTER OF THE TENURE	:	
HEARING OF BARBARA DIRK, SCHOOL	:	
DISTRICT OF MANCHESTER REGIONAL	:	COMMISSIONER OF EDUCATION
HIGH SCHOOL, PASSAIC COUNTY.	:	DECISION
	:	
MANCHESTER REGIONAL HIGH SCHOOL BOARD OF EDUCATION, PASSAIC COUNTY,	:	
RESPONDENT,	:	
AND	:	PERC DKT. NO. CO-H-99-325
MANCHESTER REGIONAL HIGH SCHOOL DISTRICT EDUCATIONAL SECRETARIES ASSOCIATION,	:	
CHARGING PARTY.	:	

The record, settlement agreement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed in these matters which were consolidated in August 1999 by joint order of the Commissioner of Education and the Chair of the Public Employment Relations Commission.

Upon consultation with the Chair of the Public Employment Relations Commission, the Commissioner approves the settlement on behalf of both agencies having

jurisdiction in this consolidated matter since the terms of the settlement comport with the *Cardonick* standards for review of settlements in tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The settlement is, therefore, adopted as the final decision in this consolidated matter which is, accordingly, dismissed, subject to the parties' compliance with the terms of the settlement.* A copy of this final decision shall be forwarded to the Chair of the Public Employment Relations Commission.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* Term 7 of the settlement agreement indicates that Ms. Dirk has agreed to withdraw a related matter entitled *Barbara Dirk v. Board of Education of Manchester Regional High School District, Passaic County*, Agency Dkt. No. 119-5/99, OAL DKT. No. EDU 07365-99. Given that the settlement agreement has been approved herein, the aforementioned matter is hereby deemed withdrawn by Ms. Dirk.

October 25,1999
Date of Mailing, October 25, 1999

337-99R

IN THE MATTER OF THE TENURE	:	
HEARING OF BENJAMIN SEABROOK,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
TRENTON, MERCER COUNTY.	:	DECISION ON REMAND
	:	

October 25, 1999

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10213-98S

AGENCY DKT. NO. 51-2/97

(On Remand From EDU 2446-97S)

IN THE MATTER OF THE TENURE HEARING OF BENJAMIN SEABROOK and THE SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.

Thomas W. Sumners, Jr., Esq., for petitioner (Sumners, George & Dortch, attorneys)

Arnold M. Mellk, Esq., for respondent (Wills, O'Neill & Mellk, attorneys)

Record Closed: September 8, 1999 Decided: September 16, 1999

BEFORE **BARBARA A. HARNED**, CHIEF ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on November 12, 1998, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The transmittal was from the Commissioner of the Department of Education who

rejected a previous settlement agreement between the parties and remanded the matter to the OAL for further proceedings.

The parties have negotiated another settlement agreement which they submit addresses the concerns raised by the Commissioner in his decision rejecting the prior agreement. I have reviewed the agreement and **CONCLUDE** that this agreement addresses the concerns raised by the Commissioner.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

3. The settlement is in the public interest in light of the Board's lack of credible evidence to prove the charges against respondent and its desire to avoid the costs of further litigation. *See, In re Cardonick,* decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 850/

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

9/16/99
DATE

Barbara A. Harned
BARBARA A. HARNED, CHIEF ALJ

Receipt Acknowledged:

Sept. 21, 1999
DATE

D. M. Gintaraites/jc
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 22 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

ms

SUMNERS GEORGE & DORTCH, P.C.
209 East Front Street
Trenton, New Jersey 08611
(609) 393-6604
Attorneys for the Petitioner, Trenton Board of Education

IN THE MATTER OF THE TENURE CHARGES AGAINST BENJAMIN SEABROOK, SCHOOL DISTRICT OF THE CITY OF TRENTON, COUNTY OF MERCER.	:	BEFORE THE COMMISSIONER OF EDUCATION Agency Docket No. 51-2/97 OAL Docket No. EDU 2446-97S
	:	***AMENDED*** SETTLEMENT AGREEMENT

This ***Amended*** Settlement Agreement is made between the Petitioner, Board of Education of the City of Trenton ("Board"), and Respondent, Benjamin Seabrook.

WHEREAS, the Board filed tenure charges with the Commissioner of Education, Agency Docket No. 51-2/97, OAL Docket No. EDU 2446-97S; and

WHEREAS, the charges allege that some time in December, 1994 at Stokes Elementary School, in the City of Trenton, Respondent committed a sexual assault upon student, P.F., which resulted in an indictment by a Mercer County Grand Jury, Indictment No. 96-09-1055I; and

WHEREAS, the charges allege that some time during the 1994-95 school year, the Respondent committed a sexual assault upon a student, R.M., at Washington Elementary School, City of Trenton, resulting in an indictment by a Mercer County Grand Jury, Indictment No. 96-09-1055I; and

WHEREAS, the tenure charges against the Respondent were based solely on the criminal indictments against him; and

WHEREAS, in an Order dated December 11, 1997, Superior Court Judge Andrew J. Smithson, dismissed all criminal charges against Respondent arising out of the indictments, based

upon alleged sexual assaults against students, P.F. and R.M., due to insufficient evidence as a result of his determination that P.F. was not legally competent to testify; and

WHEREAS, the parties acknowledge that there is good cause which is relevant to and warrants this Settlement Agreement, in particular that:

1. The tenure charges against the Respondent were based solely upon the criminal indictment against Respondent and the evidence gathered thereto;

2. The Petitioner has insufficient evidence to sustain the charges against Respondent.

3. The only alleged eyewitness of any alleged sexual assaults against students P.F. and R.M. is Rose Cowell. However, Petitioner feels that Ms. Cowell's testimony has significant credibility problems. Investigation has revealed that there are conflicting statements between Ms. Cowell and Barbara Beaston, the teacher who Ms. Cowell allegedly informed of Respondent's alleged inappropriate conduct. Ms. Cowell did not fill out a Board required form regarding the alleged incident. Ms. Cowell never told anyone other than Ms. Beaston about alleged incident. Ms. Cowell indicated that she feared for her safety but never filed a report or informed anyone, including the police. Ms. Cowell's allegation that students had previously been "scared" of Respondent is not credible because she never reported it or made any note of it in an investigation by the City of Trenton Police Department. Moreover, Ms. Beaston has stated that students never expressed any fear of Respondent and she was almost always in the classroom when Respondent was teaching music. Lastly, in reaching its decision to pursue the criminal charges against the Respondent, the Mercer County Prosecutor's Office also determined that Ms. Cowell's alleged observations caused some credibility concerns and allegations against the Respondent could not be established through her testimony alone. Despite the different standard of proof, the Petitioner has concluded likewise.

4. Respondent has been employed by the Board since January 27, 1986 and prior to the allegations of sexual assault against Respondent, there were no such allegations of inappropriate conduct towards or dealing with students;

5. Respondent denies the above charges;

6. Respondent understands that the Commissioner has the authority pursuant to *N.J.A.C.* 6:11-3.6 to refer tenure decisions to the State Board of Examiners for possible revocation of his certificate; and

7. The expeditious resolution of this matter will save both parties the cost and uncertainty of continued litigation.

THEREFORE, in consideration of the foregoing, the parties agree that the matter should be resolved based upon the following terms:

1. Petitioner agrees to dismiss the tenure charges against Respondent.

2. Respondent shall be returned to employment with all back pay and emoluments since October 29, 1996 when the Petitioner suspended Respondent without pay as a result of the criminal indictments.

3. Petitioner is entitled to receive a credit towards unpaid wages for unemployment benefits which Respondent received during his suspension without pay.

4. The parties agree and covenant that neither party, nor any person, organization, or other entity on their behalf will file any charge, claim, lawsuit against either party based upon the fact that Petitioner filed tenure charges or that Respondent defended those charges.

5. The parties recognize that each of them had input into drafting this Agreement and agree that if there should arise a dispute as to its terms, this Agreement shall not be construed against either party based upon the identity of its drafter(s).

6. The parties understand that this Agreement is contingent upon the approval of

Administrative Law Judge Barbara A. Harned and the Commissioner of Education, and if such approval is denied, the terms and contents of this Agreement shall not be admissible in any legal or administrative proceedings of any nature, and will be without prejudice to their positions in such proceedings, and that in such event the parties may again attempt to settle the matter in a manner which is satisfactory to the Commissioner of Education.

7. Respondent requests that the tenure hearing be held in abeyance in order to obtain approval of this Settlement Agreement by Administrative Law Judge Barbara A. Harned and the Commissioner of Education.

8. The parties warrant that this Agreement is entered into voluntarily, without any duress, or without any other promises or agreement not expressed herein, and with the understanding that neither party is compelled to do so, and that by entering into this Agreement each party waives their right to a hearing and disposition on the merits of the charges.

4/23/99
Date

Charles R. Milewski, Board Secretary
Trenton Board of Education, Petitioner

4/23/99
Date

Abdul-Malik Ali, President
Trenton Board of Education, Petitioner

8/24/99
Date

Arnold M. Mellk, Esq.
Attorney for Respondent

8-20-99
Date

Benjamin Seabrook
Respondent

OAL DKT. NOS. EDU 10213-98 AND EDU 2446-97 (ON REMAND)
AGENCY DKT. NO. 51-2/97

IN THE MATTER OF THE TENURE	:	
HEARING OF BENJAMIN SEABROOK,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
TRENTON, MERCER COUNTY.	:	DECISION ON REMAND
	:	

The record, Amended Settlement Agreement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement.* A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

October 25, 1999
Date of Mailing, October 25, 1999

338-99

RONNIE STANDRIDGE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ROXBURY, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

October 25, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DOCKET NO. EDU 9123-97
AGENCY DOCKET NO. 284-8/97

RONNIE STANDRIDGE,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF ROXBURY, MORRIS COUNTY,

Respondent.

Edward J. Bilinkas, Esq., for petitioner (Lorber, Schneider, Nuzzi, Bilinkas & Mason, attorneys)

Vito A. Gagliardi, Jr., Esq. for respondent (Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen, attorneys)

Record Closed: August 30, 1999 Decided: September 13, 1999

BEFORE **ARNOLD SAMUELS,** ALJ:

On August 4, 1997, the petitioner, Ronnie Standridge, filed a verified petition with the Commissioner of Education challenging the respondent Board of Education's decision not to renew his contract as Athletic Director for the 1997-98 school year. The petitioner was not tenured.

The respondent filed an answer on August 26, 1997 denying the substantive allegations of the petition and asserting various affirmative defenses. On September 19, 1997, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to 13. After several adjournments and conferences relating to procedural matters, such as discovery, a hearing was scheduled for April 5, 1999. The parties appeared at that time, but the plenary hearing did not proceed because some procedural difficulties had arisen. After considerable discussion, on the record, the period of permissible discovery was extended for thirty days, and the hearing was rescheduled for two days in August and two days in October, 1999.

On the first hearing day, August 30, 1999, the parties and counsel appeared and engaged in settlement discussions before any testimony was taken, and a mutually satisfactory agreement was reached. A written agreement, containing the settlement terms in full, was signed by the parties and by their attorneys. A copy of the Agreement, along with Exhibit A, referred to therein, was filed with the OAL on September 7, 1999.

A copy of the Settlement Agreement, along with Exhibit A, is attached hereto and made a part hereof.

Having reviewed and considered the issues involved in this dispute, it is **CONCLUDED** that the parties have voluntarily and knowingly agreed to the settlement, as evidenced by the attached document. It is further **CONCLUDED** that the settlement is fair and fully dispositive of all issues in controversy.

It is therefore **ORDERED** that the withdrawal of the petition of appeal, with prejudice, based on the Settlement Agreement attached hereto, be approved, subject to approval of the Commissioner of Education.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

September 13, 1999
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

Sept. 20, 1999
DATE

D. N. Contanzotis/jc
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 22 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

pb

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

SEP 7 1 21 PM '99

RAVIN, SARASOHN, COOK,
BAUMGARTEN, FISCH & ROSEN,
A Professional Corporation
103 Eisenhower Parkway
Roseland, New Jersey 07068-1072
(973) 228-9600
Attorneys for Respondent
Roxbury Township Board of Education

RON STANDRIDGE,	x	BEFORE THE COMMISSIONER OF EDUCATION
Petitioner,	:	OF THE STATE OF NEW JERSEY
v.	:	Agency Docket No.: 284-8/97
ROXBURY TOWNSHIP BOARD OF EDUCATION,	:	OAL DOCKET NO.: EDUOA 09123-97N
Respondent.	:	

This matter having come before the Commissioner of Education on Petition of Appeal filed by Petitioner through his counsel Edward Bilinkas, Esq. of Lorber, Schneider, Nuzzi, Bilinkas and Mason; and Respondent having filed an answer denying the allegations of the Petition; and the parties having amicably resolved this matter, it is hereby agreed as follows:

1. Respondent Roxbury Township Board of Education ("Board") hereby agrees to make payment to Petitioner in the amount of $25,000.

2. The parties agree that they will limit their public comments in connection with this matter to the joint statement attached hereto as Exhibit A.

3. In exchange for the above, Petitioner agrees to withdraw the within Petition of Appeal with prejudice and to dismiss with prejudice his civil claim pending in another forum against Superintendent of Schools Angela Krass.

4. The Board shall make the above described payments to Petitioner within 20 days of the Commissioner of Education's approval of the within settlement, said approval being understood to be a prerequisite to this settlement.

5. For and in consideration of the mutual promises set forth herein, Petitioner, for himself, and for his agents, heirs, executors, administrators, and assigns, fully, irrevocably, and unconditionally releases and discharges Respondents from any and all claims, demands, causes of action and liabilities of any kind, including claims for fees and expenses, related to the matters at issue in this action. This release specifically includes any claim of entitlement to a tenured position, or any other type of employment, with the Board.

6. The parties recognize and agree that the making of this Stipulation of Settlement is not intended to and does not constitute imply an admission of liability of any type of wrongdoing by any party, or of any violation of any federal, state or local statute, regulation or ordinance, or violation of any other right by any party, upon any legal or equitable theory, whether contractual, common law, statutory or otherwise. The parties agree that this Stipulation of Settlement may not be used to establish precedent in any future proceeding of any type whatsoever and that it shall be inadmissable in any such proceeding, other than a proceeding to enforce or prove the existence of same.

7. This Agreement is contingent upon its adoption by the Board by recorded role call vote at a public meeting.

VITO A. GAGLIARDI, JR., ESQ.
RAVIN SARASOHN COOK BAUMGARTEN
FISCH & ROSEN
Attorneys for Respondent
Roxbury Township Board of Education

EDWARD BILINKAS, ESQ.
Attorneys for Petitioner
Ronald Standridge

RONALD STANDRIDGE

DATED: August 30, 1999

F:\WPDOCS\PLDG\5406\2\701998.1

JOINT STATEMENT

When the Roxbury Township Board of Education decided over two years ago not to renew the contract of untenured Athletic Director Ron Standridge, he filed suit before the Commissioner of Education seeking to have that decision declared "arbitrary and capricious" and to be returned to his position. Additionally, he commenced a civil suit against a number of parties in Superior Court, which included a defamation claim against former Superintendent of Schools Angela Krass. The Board and Mr. Standridge are pleased to announce that they have reached a settlement in which Mr. Standridge has agreed to dismiss his suit before the Commissioner of Education and drop his defamation claim against Mrs. Krass. Mr. Standridge no longer seeks to become reemployed by the Roxbury Township Board of Education and will pursue his career elsewhere.

As evidenced by its public vote, the Board will be paying Mr. Standridge $25,000 in connection with his dismissal of his suit seeking reinstatement from the Commissioner and of his defamation claim against Mrs. Krass.

The Board is making this settlement, and Mr. Standridge is accepting this settlement, because both parties wish to move beyond the acrimony which marked this dispute. The Board has maintained that its decision was not "arbitrary and capricious." Of course, Mr. Standridge disagrees. The issue at this point is not who was right or wrong; it is time to resolve this dispute and focus instead on the future.

F:\WPDOCS\DOCS\5406\2\701961.1

RAVIN, SARASOHN, COOK, BAUMGARTEN,
FISCH & ROSEN
A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW
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WEB SITE: www.ravin-sarasohn.com
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NEW YORK, NEW YORK 10169-0146
(212) 687-3435
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DAVID N. RAVIN*
JEFFREY H. FISCH**
MARK BAUMGARTEN
JOSEPH L. COOK
PETER R. SARASOHN*
BERNARD SCHENKLER+
KENNETH A. ROSEN*
PAUL KIZEL*
SHARON L. LEVINE
THOMAS W. ACKERMANN*
JEFFREY D. SINGER+
ROBERT D. TOWEY
MITCHELL B. SEIDMAN*
SHERYL M. SCHWARTZ+
IRA M. LEVEE*
JOHN K. SHERWOOD
RICHARD L. RAVIN△

NORMAN D. KALLEN
STEVEN E. BRAWER*
TERRY L. TRANTINA++
VITO A. GAGLIARDI, JR.
BRUCE BUECHLER*
CHRISTOPHER E. HARTMANN
MICHAEL S. ETKIN*
JEFFREY D. PROL*
MARC P. PRESS*
DAVID G. TOMEO
SANDRA L. BOGRAD<

OF COUNSEL
HERMAN D. MICHELS

TERRI JANE FREEDMAN*
VINCENT A. D'AGOSTINO
JORDAN A. FISCH

CAROLE B. RAVIN
DAVID A. VAN GROUW
CAROLYN M. STOCKDALE
RICHARD S. ROBINSON*
SHAUN ROBIN SIMON<
HEATHER L. BROWN
JENNIFER S. MANHEIM*
CHRISTINE FADER
DEBORAH A. HOLZMAN
DORIT T. ROBBINS
THOMAS J. RATTAY
TAMMY FAHMI*
ROBERT T. BONSIGNORE*
ANDREW J. PINCUS*

*N.J. & N.Y. BARS
**N.J. & FL. BARS
+N.J. N.Y. & D.C. BARS
△N.J. N.Y. FL. & D.C. BARS
*N.J. & PA. BARS
++N.J. N.Y. & CA. BARS
<N.J. & D.C. BARS

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
SEP 7 1 21 PM '99

September 1, 1999

Honorable Arnold Samuels, A.L.J.
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

Re: Ron Standridge v. Roxbury Township Board of Education
Agency Docket No. 284-8/97
OAL Docket No. EDUOA 09123-97N

Dear Judge Samuels:

We are pleased to report that the Roxbury Township Board of Education voted to approve the proposed settlement in the above-referenced matter at its August 30, 1999 Board meeting. Enclosed please find fully revised and executed copies of the parties' settlement agreement.

It is our understanding that Your Honor will accept the settlement and recommend same to the Commissioner. Upon approval by the Commissioner, the Board will issue a check made out to Ron Standridge for $25,000 and will file the Stipulation of Dismissal in the civil case which we are presently holding in escrow.

Thank you for your kind assistance in resolving this matter.

Respectfully,

Vito A. Gagliardi, Jr.

VAG:er
cc: Edward Bilinkas, Esq. (w/encl.)
Marshall Sigall, Board Secretary/School Business Administrator (w/encl.)
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OAL DKT. NO. EDU 9123-97
AGENCY DKT. NO. 284-8/97

RONNIE STANDRIDGE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ROXBURY, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

October 25,1999
Date of Mailing, October 25, 1999

NORTH BERGEN FEDERATION OF TEACHERS, LOCAL 1060, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, AND EILEEN WENDE,	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning clerk, along with her union, contested the withholding of her increment for the 1997-98 school year.

ALJ found Petitioner Wende to be a credible witness and the Board's witness to be less credible. Moreover, based on the fact that Wende's records do not show a record of excessive absenteeism and that her work that was criticized as poor was work she had been rarely required to do, the ALJ concluded that the Board's determination not to give Petitioner Wende an increment in 1997-98 was patently arbitrary and capricious. ALJ concluded that the Board's determination was not for good cause and must not be upheld. ALJ ordered the Board's denial reversed and directed the Board to reinstate the increment retroactive to the proper date.

Commissioner set aside the Initial Decision since the gravamen of the challenge at the OAL ultimately concerned the Board's discretionary authority to withhold pursuant to *N.J.S.A.* 18A:29-14. Given the established case law in this area, and mindful of the amendments to *N.J.S.A.* 34:13A-1 et seq., the New Jersey Employer-Employee Relations Act, which appear to provide for binding arbitration of disputes over withheld increments for noncertified employees within a bargaining unit, the Commissioner was not persuaded that he has the jurisdiction to hear and determine this matter. Therefore, the Commissioner remanded this matter to OAL for briefing and argument on the issue of jurisdiction, and for additional fact-finding, as may be necessary upon the exploration of such jurisdictional issues, in order to resolve this matter.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9838-97

AGENCY DKT. NO. 290-8/97

NORTH BERGEN FEDERATION OF TEACHERS, LOCAL 1060, AMERICAN FEDERATION OF TEACHER, AFL-CIO, AND EILEEN WENDE

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN,

Respondent.

Victor Mullica, Esq., appearing for petitioners (Mullica & Mullica, attorneys)

Keith J. Roberts, Esq., appearing for respondent (Giblin & Giblin, attorneys)

Record Closed: July 22, 1999 Decided: September 8, 1999

BEFORE **MARGARET M. HAYDEN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Eileen Wende (petitioner) is a tenured employee of the Board of Education of the Township of North Bergen (Board). On June 27, 1997, the Board

passed a formal resolution withholding petitioner's increment. Petitioner here appeals the Board's action.

Petitioner, along with her union, filed a Verified Petition of Appeal with the Commissioner of Education on August 6, 1997. The Board filed an Answer on October 3, 1997. On October 21, 1997, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) for a hearing on the issue of the withholding of the increment[1] as a contested case pursuant to *N.J.S.A.* 5:14-1 to -13. The OAL held a hearing on September 16, 1998; February 22, March 24 and June 8, 1999. The record remained open to allow the parties to submit findings of fact and legal briefs. The final brief was received on July 22, 1999, at which time the record was closed.

DISCUSSION OF EVIDENCE AND TESTIMONY

Undisputed Facts

Certain facts are undisputed and I **FIND** them as follows.

Petitioner Eileen Wende, who has worked in the school District since 1984, has been one of two clerks in the main office at Horace Mann School in the District since 1994. Eileen Wende first began to work for the Board in September 1984 as a Data Control Operator where she was responsible for data concerning budgeting and financing. In September 1987 she was promoted to Data Entry Supervisor where she remained until July 1991 when she was terminated. In September 1992, she was reinstated but she was transferred from the central office to work at Horace Mann as a clerk. At that time Ms. Wende had no typing skills, which was known to the central

[1] During hearing petitioner sought to raise the issue of whether Ms. Wende was getting the proper salary under collective bargaining agreement for obtaining various certificates. I ruled that this issue was not before me under the verified petition challenging the denial of the increment but rather appeared to be a disagreement of the parties to the collective bargaining agreement. Hence, no determination will be made by this tribunal concerning this salary adjustment issue.

office as well as to the principal. As part of the reinstatement, arrangements were made for her to do non-typing work.

The collective bargaining agreement between the Board and the North Bergen Federation of Teachers Local 1060 provided for vacations for support staff according to seniority as well as four absences per year for personal days and 11 days of absence for sick leave. Ms. Wende received 23 vacation days per year. In the event that a full-time clerk's absences exceed 10 days more than their accumulated sick leave they are fined pursuant to the collective bargaining agreement. Any employee absent for 10 or more consecutive work days is required to submit medical evidence substantiating the illness. No deduction are made from the salary for absences for death in the immediate family, including parents, not exceeding five days.

Ms. Wende had accumulated 34 sick and personal days as of July 1, 1996, the beginning of the school year. According to Ms. Wende's attendance record for the 1995-96 school year, she used six sick days, four personal days and 23 vacation days. For the 1996-97 school year, Ms. Wende used 11.5 sick days, three personal days and 22 vacation days. On January 17, 1997, Ms. Wende's father became gravely ill and was rushed to the hospital. Ms. Wende went to the hospital to be by his side and remained there for the next week, at which time he passed away. Ms. Wende then took off five days for the funeral and because of her emotional reaction to the sudden illness and death of her father she took another week off for what her doctor diagnosed as anxiety state crisis and adjustment stress reaction. Thus, Ms. Wende was absent from January 17 until February 10 due to the illness and death of her father. Out of the 11.5 sick days, Ms. Wende has doctor's notes for eight and a half of those days.

Contested Facts

Jorge Prado

Jorge Prado, the principal of Horace Mann since November 1996, began supervising Ms. Wende at that time. When he starting working there Ms. Wende had a poor attendance record with frequent absences. The typing had to be done by the other clerk in the office because Ms. Wende had difficulty typing. He noted that Ms. Wende lacked initiative and she did not stay at her desk. Ms. Wende extensively used the telephone for personal reasons.

On February 5, 1997, Mr. Prado sent a memorandum to Leo C. Gattoni, Jr., the Superintendent of the Board. He noted that Ms. Wende's

> "extremely poor attendance is causing tremendous problems for a school this size. The current enrollment of this school demands a minimum of two full-time clerks. I have review Ms. Wende's attendance and find that her absences for the current year will total 21.5 days as of this Friday, February 7, 1997.
>
> 9/11 - sick
> 10/4 - personal
> 11/12 - court
> 12/5 - personal
> 12/16, 12/17 - vacation
> 1/16 - 1/2 day
> 1/17 through 2/7
>
> In reviewing her past attendance record I find that Ms. Wende appears to have a pattern of excessive absences.

On March 20, 1997, Mr. Prado again sent a memorandum to Mr. Gattoni concerning Ms. Wende. The memo related that a training session had been scheduled to assist Ms. Wende in the daily operations of the computer and that she was aware of the time, date and importance of the training. The training session began

approximately 11:00 a.m. and at 12:02 Ms. Wende punched out and left for the day because she was not feeling well. "Ms. Wende's poor attendance jeopardizes the daily function of the school this size. It has become increasingly difficult to fulfill the daily clerical duties, registration and reports with basically one clerk. Mr. Prado asked the Board to review Ms. Wende's attendance.

On April 24, 1997, Mr. Prado sent a memo to Mr. Gattoni concerning the quality of Ms. Wende's work. He enclosed drafts of two memos which he had given Ms. Wende to type on April 22, 1997. Ms. Wende took an hour and a half in the morning to produce an unacceptable memo; it took her two hours in the afternoon to produce a second version still containing errors . Mr. Prado stated in the memo that Ms. Wende's poor job performance made it increasingly difficult to run the daily operations of the office.

On April 23, 1997, Mr. Prado evaluated Ms. Wende, rating her unsatisfactory in work quality, filing, attendance, dependability, judgment, initiative and attitude, needs improvement under computer skills and appearance and satisfactory as far as punctuality. He noted that Ms. Wende put little effort into her work and she takes more time than required to complete a task, and was highly uncooperative. On May 1, 1997, there was an evaluation conference with Ms. Wende. Mr. Prado stated in the interview memo that she needed additional training and additional supervision. Ms. Wende had previously been evaluated by the previous principal, Joanne M. Colello-Harrington, who found that Ms. Wende needed improvement in everything except for attendance and punctuality, which were unsatisfactory.

On June 24, 1997, Mr. Prado wrote to Mr. Gattoni concerning Ms. Wende's work quality, requesting that the Board withhold a pay increment for Ms. Wende and prepare a Notice of Discipline for her because of her excessive absenteeism and poor and unacceptable job performance. Mr. Gattoni recommended to the members of the Board of Education based on this memo that they withhold the increment. The Board by

resolution dated June 27, 1997, resolved that the employment and adjustment increments for the 1997-98 school year be withheld from Eileen Wende.

In the beginning of June, the union requested a meeting with Mr. Prado and members of the central office because Ms. Wende and Terry Schroeder, the other clerk in the main office, claimed that Mr. Prado was harassing them. At the meeting both employees stated their grievances and Mr. Prado denied that he was harassing them.

On cross-examination Mr. Prado testified that when he wrote the memo to the superintendent concerning Ms. Wende's absenteeism on February 5, 1997, he did not know that Ms. Wende's father had become gravely ill and passed away. He only recalled a vague conversation with Ms. Wende that she was using some vacation days because her father was dying. In typing the memos in April, Ms. Wende only used the typewriter and refused to use a word processor even though her typewriting skills were not good and there were two computers fully functioning in the main office at all times. He agreed that the final written memos that were produced by petitioner were business-like form but he did not remember who typed the final memo for him. Generally, the initials e.w. at the bottom of a memo indicated Ms. Wende typed it.

As far as Mr. Prado was concerned, both clerks who worked in the main office were responsible for all duties including typing even though he was told Ms. Wende did not do typing. Ms. Schroeder was transferred and now there is a new clerk. Ms. Wende has been doing minimal typing due to the new clerk's need to learn office procedures. Although Ms. Wende's typing skills were not good, she did fine with the registration. After the computer training session in April when Ms. Wende left Mr. Prado asked her what had happen. Ms. Wende told him that she had become very ill and also submitted an appropriate medical form.

Mr. Prado evaluated Ms. Wende's appearance as needing improvement because she violated the dress code by wearing very tight spandex pants at least once

and maybe up to three times. He spoke to her about the problem the first time Ms. Wende wore the spandex clothes and gave her a copy of the dress code but she wore them again.

Ms. Wende never asked for personal or vacation days prior to taking them. He had only found out after the fact why she was absent. Before taking a personal or vacation day, an employee puts a written request to the Board but he would have liked as a courtesy to have been informed by her. He felt her attendance record was totally unacceptable and interfered with her job.

Victor M. Continere

Victor M. Continere, the Vice Principal at Horace Mann since April 1994, had supervised Ms. Wende since that time. When Mr. Prado began working Mr. Continere informed him that Ms. Wende did not type as that had been the arrangement with the former principal. Mr. Continere had only asked Ms. Wende to type one time late April or May 1996 because the other clerk was bogged down. He gave her a memo which took her several days to type.

Mr. Continere had observed that Ms. Wende had a tendency to wander away from her desk especially in the morning. When he spoke to Mr. Prado about it, they changed the break procedure so that clerks had set break times. He felt that Ms. Wende's attendance prior to the increment denial was unsatisfactory. On cross examination he reviewed a letter dated April 30, 1996, which was basically the same content as the draft memo Ms. Wende typed for him in May 1996 but in final professional business-like form. The memo had Ms. Wende's initials on it but he was not aware that this was the memo that went out. He was aware that subsequent to the increment withholding against Ms. Wende she took a typing course. He has given her some memos at the end of the next year which were acceptable. Mr. Continere had performed Ms. Wende's evaluation in 1998, which was satisfactory.

Since she began working in the main office, Ms. Wende's duties essentially consisted of being in charge of registration and reports, keeping the attendance records, answering telephones, and assisting parents and children who come into the office. When he supervised her work the registration was satisfactory as well as her preparation of reports. She put all of the attendance records into the computer in a satisfactory manner. Her telephone skills were also satisfactory.

Eileen Wende

Ms. Wende testified that according to the Board's policy concerning vacation days, she had to make a request in writing which had to be approved by the Board Secretary and the principal. An employee did not have to put a personal day request in writing but when possible had to notify Mr. Prado a few days before hand. All of her vacation and personal days in 1996-97 had been approved. When her father became gravely ill and was rushed to the hospital on January 16, 1997, she took off a half a day and when he was fighting for his life in the hospital she called Mr. Prado and asked if she could take vacation days to be with him, and Mr. Prado agreed. She also informed the office about her father's death and the subsequent absence. When she returned on February 10, 1997 no one complained to her about the time she had taken off when her father died. She never saw the memo of February 5, 1997 complaining about her attendance until after the increment denial.

In March 1997, a training session on how to use the attendance software was given by a person from the software company. The training was scheduled to assist her and a clerk from another school. On that day, Ms. Wende woke up very sick but she came to work anyway. The training started at 8:30 a.m. and had run all morning. Ms. Wende found that as she had already been using the software she knew a lot about what was going on although the software was totally new for the clerk from the other school. Ms. Wende stayed at the training until noon although she was very sick

but finally left after reporting her illness to Mr. Continere. She then went immediately to the doctor, who, after examining her told her to stay out of work for at least the next two days. When Ms. Wende came back to work she brought a doctor's note and nothing was said about her absence.

At the end of April 1997, Ms. Wende received an evaluation from Mr. Prado. This was the second evaluation she had ever had since she had been employed, the first being the previous June. Ms. Wende asked Mr. Prado to explain the evaluation and to give examples of her poor work quality and attitude but he refused. For instance, she asked him to give her examples of why her computer skills needed improvement. She had an IBM computer on her desk which had a special software program and where she was a test site for this absenteeism software. Her job was to feed information into the computer, although she did not do word processing. Mr. Prado had never commented on her lack of ability to operate the computer and he refused to tell why he said that it was unsatisfactory. He had never spoken to her about her appearance and she has never worn or ever owned anything that was made of spandex. She had no reason to believe and did not believe that she had ever violated the dress code.

Ms. Wende did not believe that she used the phones a lot for personal reasons. Mr. Prado had never spoken to her about it. In fact she did not have time during the day to use the phone for personal business as she was busy performing her work.

Ms. Wende felt that Mr. Prado for some reason since he came there has had it in for her. For instance, two time Mr. Prado had followed her and waited outside the ladies' room to tell her he had something for her to do. It is common practice for people to be able to go to the restroom and he did not explain why he had to wait outside of it. No one had ever complained that she did not get her work out. From 1992 on, the main office had been set up that Terri Schroeder did all of the typing and Ms. Wende did all of the registrations and attendance work as well as other tasks. At no time was she

ever told that being able to type memos was a requirement of her job. Neither prior principal had ever asked her to type. No one ever asked her to take a typing course or to acquire typing skills.

Ms. Wende was only asked once by Mr. Continere to type something in April 1996. When he gave it to her he told her he knew she had no typing experience but to do the best that she could. When she gave the final product back to Mr. Continere it was not in the draft form that was shown to the Superintendent and Board as an example of her work but rather it was in final form, which was introduced into evidence at the hearing.

In April 1997, Mr. Prado gave her two memo to type. It was the only time he ever asked her to type anything. When Mr. Prado gave Ms. Wende the memo she could have them typed them in 10 to 15 minutes with no interruptions but the typing was in addition to all of the other work that she was doing in the busy office so it did take her most of the morning. Ultimately, Ms. Wende did final drafts which were business-like and presentable.

The April 23, 1997 evaluation from Mr. Prado stated that she needed additional training and supervision. He would not tell her what she needed nor was she ever given any additional training or supervision. As a result of the criticism, however, Ms. Wende decided to take a basic typing course. In the Fall of 1997 for three months she went two nights a week for two hours so that she would have basic typing skills. Since that time, she has not been asked to do any typing.

Phillip Steinberg

Phillip Steinberg, the President of Local 1060, testified that sometime in April 1997 both Ms. Wende and Schroeder complained to him they felt that they were being harassed by Mr. Prado. The women gave examples of facetious remarks that Mr.

Prado made about them. They also complained that Mr. Prado eavesdropped on their conversation. After having several conversations with Ms. Wende and Schroeder concerning Mr. Prado, Steinberg spoke to Mr. Prado who denied that he was harassing the employees. Shortly thereafter the union president spoke to Mr. Gattoni, the superintendent at the time, and asked for a meeting to discuss the matter. The meeting lasted for about an hour in a half to two hours where the women gave examples of how they were being harassed and discussed their negative evaluations. Steinberg felt that management was very cavalier with the complaints and laughed at the women's comments. There were no resolutions to any of the complaints at the meeting nor was there any follow-up.

LEGAL DISCUSSION AND CONCLUSION

A Board of Education may withhold a teacher's salary increment for inefficient or other good cause. *N.J.S.A.* 18A:29-14. Salary increments are not rights but rather rewards for meritorious service. *See Probst v. Haddonfield Board of Education,* 127 *N.J.* 518 (1992). Decision to withhold an increment is a matter of management prerogative which the Legislature has delegated to the local school Board. *See North Plainfield Education Association v. North Plainfield Board of Education,* 96 *N.J.* 587 (1984).

The scope of review on an appeal from the denial of the salary increment is limited to whether there exist a reasonable basis for the Board's decision. It is well settled that the local Board's exercise of discretionary power may not be upset unless it is patently arbitrary, capricious or induced by improper motive. *See Kopera v. West Orange Board of Education,* 60 *N.J. Super.* 288 (App. Div. 1975).

The Board may consider the absences of the teachers to be excessive on a case by case basis inquiring into both the reason for the absences and the impact of the absences on the continuity of instructions. *See Kochman v. Board of Education of*

Keansburg, 94 *N.J.A.R.* 2d. (EDU) 141. Even where the employee has the time and has legitimate excuses, the Board may consider absences excessive in certain circumstances. *Id.*

Here the Board had no evidence before it that Ms. Wende's absence interfered with continuity of the students' education as if Ms. Wende was a teacher who had these absences. A review of the record of absences shows that Ms. Wende took a 15-day vacation from July 29 to August 16 and then another vacation day on August 23. Ms. Wende took two vacation days on December 16 and 17, 1996. Ms. Wende took four vacation days when her father was ill as well as five days off for his funeral. In February, Ms. Wende took the week after her father's funeral off as a sick day with a medical excuse. She became sick at work and took two and a half day off in March, one day off sick in May. Subtracting the five days Ms. Wende took off sick for her father she was out sick six and a half days. Ms. Wende testified without dispute that she have received clearance for vacation from the central office except for the emergency vacation she took during her father's illness and she got permission from Mr. Prado. Mr. Prado also had a vague recollection of her asking him for vacation days while her father was ill.

When deciding to withhold an increment due to excessive absences it is necessary for a Board to inquire as to the reason for the excessive absences. Mr. Prado's memo of February 5, 1997, to the superintendent reported that since the beginning of school in September 1996 Ms. Wende had been absent 21.5 days as of February 7, 1997. No where did Mr. Prado say that all but six of those days the absence was for a one time event, Ms. Wende's father's sudden illness and death. In April 1997 after Ms. Wende had been out ill for two and a half more days Mr. Prado counted the total absence as 24 days without once again noting the nature of one time event, which amounted to over half the absences. Nor was the nature of the absences reported to the Board nor did the Board inquire as to the reason for the absences.

The Board apparently has no policy defining "excessive" absences. The collective bargaining agreement for support staff puts covered staff on notice that using 10 days more than accumulated sick leave subjects them to a fine, which might be argued provides notice of what the Board considers excessive absences for support staff. The Board argues that for two years, 1995-96 and 1996-97 the petitioner had a total of 24.5 sick and personal days but does not explain why this amount of absences was excessive when under the collective bargaining agreement. Ms. Wende was entitled to 22 sick and eight personal days for that period. Many of the cases supporting the fact that salary increment can be denied for excessive absences involve massive long-term absences 10 and 20 time the amount involved here. (See *e.g. Kochman, supra* at 143).

Based upon the above, I **FIND** that once Ms. Wende's absences for the father's illness and funeral is subtracted, Ms. Wende did not have an extraordinary or even unusual number of absences. I **FIND** no evidence of a pattern of absences such as taking off days before or after a weekend or holiday. I further **FIND** that to hold a three week period of absence against an employee when her father is suddenly takes ill and dies is arbitrary and unreasonable. I further **FIND** that her six sick days and four personal days in 1995-96 do not show a pattern of excessive absences. Moreover, I **FIND** for Mr. Prado to write to the superintendent about this alleged pattern of excessive absences in 1997 and not mention that over half of it was due to this one time tragic event undermines Mr. Prado's credibility.

Another major factor in the increment withholding, according to Mr. Prado's memo of June 24, 1997, was the poor quality of Ms. Wende's work as evidenced by drafts of three memos, one for Mr. Continere and two for Mr. Prado. Yet the final product on letterhead with the office signature as well as Ms. Wende's initials indicating she typed it were shown to be perfectly acceptable business letters. Moreover, these drafts, the product of sudden demands for Ms. Wende to type when her job responsibilities to date had never call for her to type, were an inappropriate

measurement to use to evaluate the overall quality of her work. It was totally arbitrary to evaluate the quality of what she was not required to do in the regular performance of her duties rather than she had been required to do for many years. If her job duties were to change, since Mr. Prado and Mr. Continere both knew that she could not type, a request for her to get typing skills would seem a fair way to go about the filling the need of the office for another typist. Furthermore, Mr. Prado gave no specific criticism or examples of poor performance as to Ms. Wende's performance of her regular duties, *i.e.,* the registration, reports, attendance, handling phone calls and dealing with parents and students. Indeed, Mr. Continere stated that when he was supervising her she performed satisfactorily in all of those areas.

Where the facts are contested, the trier of fact must weigh the credibility of the witnesses in order to make factual findings concerning the disputed facts. Credibility is the value that a fact finder gives to a witness's testimony, requiring an overall assessment of the witness's story in light of its rationality, internal consistency, and manner in which it hangs together with other evidence. *Carbo v. United States*, 314 *F.*2d 718 (9th Cir. 1963). Credible testimony must proceed from the mouth of a credible witness and must be such as common experience, knowledge, and common observation can accept as probable under the circumstances. *State v. Taylor*, 38 *N.J. Super.* 6, 24 (App. Div. 1955). A fact finder is expected to base credibility decisions on common sense, which is also referred to as intuition or experience. *Barnes v. United States*, 412 *U.S.* 837, 93 *S. Ct.* 2357, 37 *L. Ed.* 2d 380 (1973).

Having had an opportunity to observe the witnesses and hear their testimony, I **FIND** Ms. Wende to be a very believable witness. Additionally, I **FIND** the witnesses for the Board, particularly Mr. Prado, to be less credible, especially in light of the lack of candor that Mr. Prado showed to the Board by not explaining reason for the absenteeism between January 16 and February 7, 1997 and not explaining that the poor quality of work he complained about was not part of Ms. Wende's regular duties.

Thus, I credit Ms. Wende when she stated she was never told that there was anything wrong with her appearance and that the first time she heard that her clothes were too tight was at this hearing. Although Mr. Prado had checked on the evaluation that her appearance was unsatisfactory, nothing in any of the memos to the superintendent complained about her violating the dress code. The other comments about her attitude and lack of initiative are very vague and not specified at the hearing. For instance, Mr. Prado stated that Ms. Wende did not take any initiative. However, Ms. Wende's willingness to contribute to the office is demonstrated by the fact that she paid typing course and studied two times a week for three months even though her job duties had never included typing. Nor at any time was she ever written up, disciplined, giving any written warnings, for any thing for which she was told in her evaluation was unsatisfactory.

I also **FIND** Ms. Wende more credible when she stated that she did not receive the memos of February 5 and April 24, 1997 concerning her attendance and work performance until after the increment denial. Although Mr. Prado's June memo to Mr. Gattoni stated that he had reviewed these memos with Ms. Wende, neither earlier memo showed that she was sent a copy. Nor did the text of either memo appear to address an employee but rather appeared to be addressed to and for management.

Based on the facts that her records does not show a record of excessive absenteeism and the poor quality work that was criticized was work that she had very rarely been required to do, I **CONCLUDE** that the determination not to give Ms. Wende an increment in 1997-98 was patently arbitrary and capricious. I **CONCLUDE** that the determination of the Board to deny her increment in 1996-97 was not for good cause and must not be upheld.

ORDER

Based on the foregoing, I **ORDER** that the decision of the Board denying an increment to Eileen Wende is hereby **REVERSED.** The Board is directed to reinstate the 1996-97 increment retroactive to the proper date.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Sept 8, 1999
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

9/14/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 20 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

Witnesses:

Petitioner:

Eileen Wende

Philip Steinberg

Board:

Peter Fischbach

Victor Continere

Jorge Prado

Exhibits:

Petitioner:

P-1 Continere to Gattoni, April 30, 1996

P-2 Letter - Garcia to Prado, April 22, 1997

P-3 Prado to Gattoni, April 22, 1997

P-4 Prado to Gattoni, April 22, 1997

P-5 Clerical evaluation, April 6, 1998

P-6 Certificate to Completion, Spring 1994

P-7 Collective Bargaining Agreement

P-8 Certificate of Completion, Spring 1995

P-9 Typing I Basic Certificate, January 1998

P-10 Fischbach to Wende, June 11, 1998

P-11 Wende to Fischbach, June 15, 1998

P-12 Fischbach to Wende, July 8, 1998

P-13 Record of absence - Wende

P-14 Board of Education to Wende, August 1997

P-15 Prado to Gattoni, April 22, 1997

P-16 Absence Form - Wende, March 24, 1997

P-17 BOE Dress Code - Professional, January 1, 1993

P-18 BOE Dress Code - Non-professional, September 21, 1995

P-19 Clerk's Tally of Wende 1996-97 absences

P-20 Undated handwritten memo - Prado to Gattoni

P-21 Dr. Hermann, March 7, 1997

P-22 Absentee Form BOE, March 24, 1997

P-23 Letter - Fischbach to Mullica, February 25, 1999

Exhibits:

Board:

R-1A Salary Guides for Support Staff

R-1B Salary Guides for Support Staff

R-2 Memo to Wende from Fischbach

R-3 Board Resolution to withhold employment and adjustment increments

R-4 Letter - Board Secretary to Wende, June 30, 1997

R-5 Memo - Wende to Duffy, June 27, 1997

R-6 Prado to Gattoni, June 24, 1997

R-7 Prado to Gattoni, March 20, 1997

R-8 Prado to Gattoni, February 5, 1997

R-9 Prado to Gattoni, April 24, 1997

R-9A Memo

R-9B Memo

R-10 Gattoni to Board

R-11 Clerical evaluation

R-12 Personal Improvement Plan, May 1, 1997

R-13 Clerical evaluation

R-14 Draft letter, April 1996

OAL DKT. NO. EDU 9838-97
AGENCY DKT. NO. 290-8/97

NORTH BERGEN FEDERATION OF TEACHERS, LOCAL 1060, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, AND EILEEN WENDE,	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in rendering the within decision.

Upon careful and independent review of the record in this matter, the Commissioner is compelled, for the reasons set forth below, to set aside the Initial Decision of the Administrative Law Judge (ALJ). The within matter concerns a tenured clerk whose increment was withheld by the Board for the 1997-98 school year upon the Board's determination that Petitioner Wende's absences were excessive and were negatively impacting the District, and because the Board found Petitioner Wende's job performance to be unsatisfactory. In this connection, although Wende, along with Petitioner North Bergen Federation of Teachers, her bargaining agent, initially asserted broad bases for their claim that

the Board's action was improper, the gravamen of the challenge at the OAL ultimately concerned the Board's discretionary authority pursuant to *N.J.S.A.* 18A:29-14.

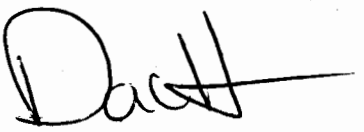
Within the context of a statute addressing compensation issues pertaining to "teaching staff members," *N.J.S.A.* 18A:29-1 *et seq.*, local boards are authorized by *N.J.S.A.* 18A:29-14 to withhold, for inefficiency or other good cause, the employment or adjustment increment, or both, of any "member" in any year. That "member" may appeal from such action to the Commissioner of Education. Prior decisional law has established that *N.J.S.A.* 18A:29-4.1, the statute permitting local boards to adopt salary policies for one, two or three years and schedules for all full-time "teaching staff members" concerns only those persons required to be licensed to hold their positions. (*See Bd. of Ed. of Tp. of Neptune v. Neptune Tp. Ed.*, 144 *N.J.* 16, 34 (1996).) This statute is to be read *in pari materia* with *N.J.S.A* 18A:29-14, the statute allowing school boards to withhold increments from members in a given school year because of inefficiency or other just cause; "they are part of a common statutory enactment and should be reconciled to the extent possible." *Probst v. Board of Educ. of the Borough of Haddonfield, Camden County*, 249 *N.J. Super.* 222, 228 (App. Div. 1991) (emphasis added).

Given the established case law in this area, and mindful of the amendments to *N.J.S.A.* 34:13A-1 *et seq.*, the New Jersey Employer-Employee Relations Act, which appear to provide for binding arbitration of disputes over withheld increments for noncertified employees within a bargaining unit, the Commissioner is not persuaded that he has the jurisdiction to hear and determine the within matter. However, since this threshold issue was not raised at the OAL and was not, therefore, briefed before the ALJ, the Commissioner finds it necessary to remand this matter for briefing and argument on the issue of jurisdiction, and for additional fact-finding,

as may be necessary upon the exploration of such jurisdictional issues, in order to resolve this matter.

Accordingly, the initial decision is set aside and this matter is remanded to the OAL consistent with the within parameters.*

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

October 28, 1999
Date of Mailing, October 28,1999

340-99

U.S.K., on behalf of minor child, J.W.Y.,	:	
PETITIONER,	:	
V.		
	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning aunt challenged Board's residency determination concerning her nephew, J.W.Y.

In light of credible testimony of petitioner, the ALJ concluded that petitioner satisfied the residency requirements pursuant to N.J.S.A. 18A:38-1b(1) in that petitioner was domiciled within the District; petitioner was supporting J.W.Y. *gratis*; the parents were presently not capable of supporting him due to family hardship; and J.W.Y. was not residing with petitioner solely for the purpose of receiving a free public education in the District. Thus, the ALJ concluded that petitioner was not liable for tuition to the Board during the period of time that J.W.Y. attended school in the District. ALJ ~~ordered~~ granted the petition allowing J.W.Y. to attend school in the District and dismissed the District's counterclaim for payment of tuition.

Commissioner concurred with the decision of the ALJ so long as there is no change in petitioner's circumstances that would alter J.W.Y.'s entitlement.

October 28, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3958-99

AGENCY DKT. NO. 66-4/99

U.S.K. ON BEHALF OF MINOR CHILD J.W.Y.,

Petitioner,

v.

BOARD OF EDUCATION FORT LEE,

BERGEN COUNTY,

Respondent.

Stephen M. Latimer, Esq., appearing for petitioner
(Loughlin & Latimer, attorneys)

Robert T. Tessaro, Esq., appearing for respondent

Record Closed: July 27, 1999 Decided: September 10, 1999

BEFORE **MARGARET M. HAYDEN**, ALJ:

STATEMENT OF THE CASE

Petitioner appeals the determination of the respondent Board of Education of Fort Lee that minor child, J.W.Y., was not entitled to a free public education in the Fort Lee School District (District). Petitioner claimed that the minor child was entitled to a

free public education pursuant to *N.J.S.A.* 18A:38-1(b)1 as he was living in the home of the person domiciled within the District and was supported by that person. Respondent claimed that the minor child does not meet the requirements of the statute and filed a counterclaim for payment of tuition.

On or about March 22, 1999, the District informed petitioner that the Board of Education had reviewed the evidence submitted on behalf of J.W.Y. to support the application to attend school in the District and rejected that application. On or about April 7, 1999, the petitioner filed a petition and request for a hearing. On April 28, 1999, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) for a hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The OAL held a hearing on July 27, 1999.

FACTUAL DISCUSSION

Having had an opportunity to observe the witnesses and consider the documentary evidence, I **FIND** the following **FACTS** in this case.

Dr. Gerard DiGiovanni, the assistant superintendent for the District, testified that after the application was filed by petitioner it was reviewed by a subcommittee of the Board. The denial was recommended because the answer to one question was not filled out, the father had signed the affidavit but did not give his address, and the affidavit itself did not state any economic hardship. No one in the office reviewed the application with the applicant or inquired as to any inconsistencies or any blank spaces. The Board had noticed a conflict in the information provided because the mother said that she would not be claiming the son as a dependent for taxes and the petitioner said that the mother would be. No one asked petitioner or the mother about this conflict.

Petitioner U.S.K. testified that she lived in Fort Lee with her husband and her two children. Since March 1999, J.W.Y., the son of petitioner's sister and hence her nephew, resided there with her. Formerly J.W.Y., who is eight years old, had been residing in Los Angeles, California for approximately four to five years with his mother and father.

Petitioner's nephew came to live in Fort Lee because petitioner's sister was in the process of a bitter separation and divorce. About a year before J.W.Y. came to live with petitioner, her sister had found out that her husband had become involved with another woman. The pupil's father had begun to living with his new girlfriend and rarely stayed in the family home. The mother was not employed at the time that the husband essentially left her although the separation did not become final until sometime in April 1999 when the mother left the family residence. The father was providing no support to his son and his wife and the extended family was helping them with food. Since April 1999, the mother had begun to work in a restaurant, first as a waitress and then as a cook. She made very little of money and worked very long hours. Initially, the mother sent the son to Fort Lee to her sister with the hopes of moving there soon herself. Since beginning training as a cook, the mother does not plan to move to Fort Lee until she has enough skills to have a job.

When petitioner and her family took in her nephew they knew that it was for indefinite period of time. Only petitioner and her husband had been providing support for J.W.Y. Her sister sends no money nor does the father. J.W.Y. has had no contact whatsoever with his father since coming to New Jersey.

Petitioner has no first hand knowledge of the family difficulties but heard about them from the sister. Petitioner knew before her nephew came to New Jersey that his father had become violent against the mother. In addition to hearing this fact from her sister, once a few months before J.W.Y. came to New Jersey, a neighbor of the mother in Los Angeles called petitioner and told petitioner that the sister's husband was

abusing the sister at that very moment and asked the petitioner whether to call the police. The petitioner instead called the husband at the family home and got him to cease his violence and leave the premises. Additionally, when petitioner's nephew came out to live with the family he often expressed hatred for his father because the fact that he had seen his father beat his mother. He had also told petitioner that he does not want to go back to Los Angeles because of the situation. The nephew also told her that his father had a new girlfriend. The petitioner feels that the child seems to be very shocked by the situation because his father's affair was with his best friend's mother.

The petitioner took the nephew to live with her family because the mother pleaded with the sister to take the child for his own well-being. The mother told petitioner that she desperately wanted the child out of the situation because he was becoming unstabled due to the unfortunate circumstances in the home. Even after the separation, the mother did not feel that she could provide him the stability and nurturing he needed, nor could she support him financially.

ISSUE

The issue to be determined is does the petitioner meet the entitlement to a free public education pursuant to *N.J.S.A.* 18A-38.1(b)1. If not, what is the amount of tuition owed to date?

DISCUSSION AND CONCLUSION OF LAW

The applicable statute, *N.J.S.A.* 18A:38-1(b)1, reads in pertinent part:

> Any person who is kept in the home of another person domiciled within the school district and is supported by such other person *gratis* as if he were such other person's own child, upon filing by such other person with the secretary of the board

> of education of the District, if so required by the board, a sworn statement that he is domiciled in the District and is supporting the child *gratis* and will assume all personal obligation for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parents or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economical hardship and that the child is not residing with the resident of the District solely for the purposes of receiving a free public education in the District. The statement shall be accompanied by documentation to support the validity of the sworn statement, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child. If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child.

Thus, the proofs in this matter must show that: 1) petitioner is domiciled within the District; 2) petitioner is supporting J.W.Y. *gratis*; 3) J.W.Y.'s parents are not capable of supporting or caring for him due to family or economic hardship; and 4) J.W.Y. is not residing with petitioner solely for the purpose of receiving a free public education in the District.

Where the facts are contested, the trier of fact must weigh the credibility of the witnesses in order to make factual findings concerning the disputed facts. Credibility is the value that a fact finder gives to a witness's testimony, requiring an overall assessment of the witness's story in light of its rationality, internal consistency, and manner in which it hangs together with other evidence. *Carbo v. United States*, 314 *F.*2d 718 (9th Cir. 1963). Credible testimony must proceed from the mouth of a credible witness and must be such as common experience, knowledge, and common observation can accept as probable under the circumstances. *State v. Taylor*, 38 *N.J. Super.* 6, 24 (App. Div. 1955). A fact finder is expected to base credibility decisions on

common sense, which is also referred to as intuition or experience. *Barnes v. United States*, 412 *U.S.* 837, 93 *S. Ct.* 2357, 37 *L. Ed.* 2d 380 (1973).

I **FIND** petitioner to be a very credible witness and thus, I **FIND** her testimony believable. Based on her testimony, I **FIND** that petitioner is domiciled within the District and that she is supporting J.W.Y. *gratis.*

The District argued that the testimony concerning hardship as well as the purposes of residing in the District is based solely on hearsay without any residuum of competent evidence and hence that petitioner has not borne her burden of proof in this matter. In administrative proceedings, hearsay is admissible subject to the residuum rule. *N.J.A.C.* 1:1-15.5(b). Under residuum rule some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearances of arbitrariness. *Id.* While this tribunal does not need to a determine if the father was having an affair, the mother's psychological state about what she thinks is happening as told to her sister is relevant and it is not inadmissible hearsay. See *Spragg v. Shore Care*, 293 *N.J. Super.* 33, 56 (App. Div. 1996). The testimony of the petitioner that the parent's neighbor in Los Angeles called petitioner during an incident of domestic violence concerning whether to call the police is admissible as an exception to the hearsay rule as it was an observation of an event made while the declarant was perceiving the event without opportunity to deliberate or fabricate. See *N.J.R.E.* 803(c)(1). Moreover, the minor child's statements that he hated his father because he had seen his father beat his mother and that he did not want to go back to Los Angeles were admissible to show the state of mind of the child.

I **FIND** that the credible facts show that the petitioner took the child into her home to stay for an extended period of time for purposes of supporting and caring for the child during the crisis in his mother's life. I **FIND** that the situation described by the petitioner of acrimony, violence and abandonment in the home as well as financial

hardship would make it very difficult for the mother to properly provide care and stability for the child. I **FIND** that there is sufficient legally competent evidence to support each ultimate fact here.

The District's argument that the petitioner must prove that it would be impossible for the mother to raise the child is a misreading of the law. It is important to note that hardship under *N.J.S.A.* 18A:38-1(b)1 need not be merely financial. Indeed, family discord of a much milder degree has been found to constitute hardship entitling the student to public education under the statute. *R.H. v. Ocean Co. Bd. Of Ed.,* 96 *N.J.A.R.* 2d (EDU) 628. It follows that the circumstances in this case rise to at least the same level of family hardship as did the circumstances in *R.H.* and thus meets the standard of the statute. "To hold otherwise harms a party the Legislature never meant to penalize . . . and overlooks the substantial State interest in ensuring the education of all its children . . . ." *Gundersen v. Bd. Of Ed. of the City of Brigantine, Atlantic Co.,* 95 *N.J.A.R.* 2d (EDU) 39, 42. In finding compelling circumstances that rise to the level of family hardship in a child's reaction to serious marital and parental conflict, the Commissioner, overruling the ALJ, quoted his previous decision with approval:

> In interpreting a statute, the Commissioner must look to the fundamental purpose for which the legislation was enacted, and where a literal reading will not accord with that purpose, the spirit of the law will control over its letter . . . . Moreover, the meaning of a statute is to be gathered from the mischief sought to be eliminated as well as the proposed remedy . . . .
>
> The amendments to *N.J.S.A.* 18A:38-1 . . . were intended to ease the burden on local boards of education attempting to remove illegally enrolled students, specifically those living with a parent or guardian who claims to be, but is not, domiciled within the district, and those living with a person other than the parent or guardian in order to obtain the benefit of a free public education in a district other than that of their entitlement by parental domicile . . . .
>
> The intent of the "affidavit student" law is not now, and never has been, to deny an education to a child whose living

> arrangements may not be as contemplated by the statutory scheme. . . .

R.H. v. Ocean Co. Bd. of Ed. at 632, citing *Gundersen, supra*.

I **FIND** that the competent evidence amply demonstrates that petitioner took her nephew into her home to provide him the care that his mother was unable to give him during this family hardship and to prevent him from having to see more physical violence. I **FIND** that there is no evidence that the petitioner took the nephew into her home for the sole purpose of attending school in the District.

Based on the above, I **CONCLUDE** that petitioners satisfied the residency requirements pursuant to *N.J.S.A.* 18A:38-1(b)1 in that the petitioners are domiciled within the District, the petitioners are supporting J.W.Y. *gratis*, the parents are presently not capable of supporting him due to family hardship, and J.W.Y. is not residing with petitioner solely for the purpose of receiving a free public education in the District. Consistent with the above, I **CONCLUDE** that petitioners are not liable for tuition to the Board during the period of time that J.W.Y. attended school in the District.

ORDER

I **ORDER** that the petitioner's petition to allow J.W.Y. to attend school in the District is hereby **GRANTED**. I **ORDER** that the District's counterclaim for payment of tuition is hereby **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Sept 10, 1999
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

9/14/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 20 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

Exhibits:

P-1 Certificate of U.O.Y. (mother)

R-1 thru 7 Application to Board

R-8 Letter - Board to petitioner

OAL DKT. NO. EDU 3958-99
AGENCY DKT. NO. 66-4/99

U.S.K., on behalf of minor child, J.W.Y.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his independent and careful review, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that, under the circumstances existing in this matter, petitioner satisfies the criteria set forth in *N.J.S.A.* 18A:38-1b(1) and, as such, minor child, J.W.Y., is entitled to a free public education in the Fort Lee School District.

Accordingly, the recommended decision of the OAL is affirmed for the reasons stated therein. The Board is ordered to permit J.W.Y.'s attendance in its school system free of charge so long as there is no change in petitioner's circumstances that would alter his entitlement. The Board's counterclaim for tuition is hereby dismissed.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

October 28,1999
Date of Mailing, October 28,1999

342-99

IN THE MATTER OF THE TENURE	:	
HEARING OF BRUCE VAN DYKE,	:	COMMISSIONER OF EDUCATION
LENAPE REGIONAL HIGH SCHOOL	:	DECISION
DISTRICT, BURLINGTON COUNTY.	:	

October 28, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11524-97
AGENCY DKT. NO. 443-11/97

BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,
Petitioner,
v.
BRUCE VAN DYKE,
Respondent.

Louis L. Chodoff, Esq., for petitioner (Archer & Greiner, attorneys)

Robert N. Agre, Esq., for respondent (Rubin & Agre, attorneys)

Record Closed: September 20, 1999 Decided: September 21, 1999

BEFORE **ANTHONY T. BRUNO**, ALJ:

This matter was transmitted to the Office of Administrative Law on December 26, 1997 for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 21, 1999
DATE

Anthony T. Bruno
ANTHONY T. BRUNO, ALJ

Receipt Acknowledged:

9/23/99
DATE

Debbie Antanaitis/bgp
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 24 1999
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

tmp

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
1999 SEP 20 A 6:47

ARCHER & GREINER,
A Professional Corporation
One Centennial Square
Haddonfield, New Jersey 08033
(609) 795-2121
Attorneys for Petitioner, Board of Education of the Lenape Regional High School District, Burlington County

BY:

_____

DEPARTMENT OF EDUCATION
OFFICE OF ADMINISTRATIVE LAW

BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY	:	**BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY**
Petitioner	:	**OAL DOCKET NO:**
v.	:	
BRUCE VANDYKE	:	
Respondent	:	

SETTLEMENT AGREEMENT

This Agreement made this day of , 1999, by and between Petitioner, Board of Education of the Lenape Regional High School District, Burlington County ("Lenape Board"), and Respondent,

Background

WHEREAS, on October 8, 1997, Daniel F. Hicks, Ph.D., Superintendent of the Lenape Regional High School District (" Lenape District") filed tenure charges with the Lenape Board against Bruce VanDyke , alleging that Bruce VanDyke engaged in various acts of conduct unbecoming a teacher within the meaning of N.J.S.A. 18A:6-10 et. seq.

WHEREAS, on October 23, 1997, Bruce VanDyke submitted his opposition to these tenure charges with the Lenape Board; and

WHEREAS, at a closed session at a special meeting held on October 28, 1997, the Lenape Board duly certified these tenure charges; and

WHEREAS, on November 6, 1997, the Lenape Board filed these tenure charges with the Commissioner of Education ("Commissioner"); and

WHEREAS, Bruce VanDyke acknowledges that he has entered into this settlement willingly and voluntarily, and with a full and complete understanding of his rights;

WHEREAS, Bruce VanDyke acknowledges that he was expressly advised of the Commissioner's duty, pursuant to N.J.A.C. 6:11-3.6, to refer tenure determinations to the New Jersey State Board of Examiners for possible revocation of his teaching certificate, and having been so advised, still wishes to settle this matter on the terms set forth below;

WHEREAS, the Lenape Board acknowledges that it has agreed to settle this matter because, as a result of such settlement, Bruce VanDyke is removed from his position as teacher within the Lenape Regional High School District, and the Lenape Board has conserved a significant amount of public funds in so doing;

WHEREAS, the Lenape Board acknowledges and understood that, as a result of the settlement, Bruce VanDyke will be removed from his position as teacher within the Lenape Regional High School District, i.e., the maximum penalty which could have been imposed under N.J.S.A. 18A:6-16, even after a full hearing;

WHEREAS, the Lenape Board acknowledges and understands that the Commissioner still has the authority to refer the matter to the New Jersey State Board of Examiners if he felt the matter warranted such referral; and

WHEREAS, the parties have agreed to settle this matter on the terms forth below:

1. Bruce VanDyke shall resign from the Lenape District immediately, effective upon execution of this Agreement. Bruce VanDyke further agrees not to seek reinstatement and/or reemployment in any capacity with the Lenape District.

2. In response to reference requests and/or requests for information concerning Bruce VanDyke's separation from employment with the Lenape District, the Lenape Board agrees that Bruce VanDyke's date of hire, the effective date of his resignation from the Lenape District, and that he resigned during the pendency of tenure charges that were filed against him will be disclosed. Any further information will be supplied by Bruce VanDyke.

3. The parties acknowledge that this Settlement Agreement is being entered into as a means of terminating the above-captioned matter, and is not an admission, and shall not be construed to be an admission on the part of Bruce VanDyke of any liability.

4. Bruce VanDyke will pay the Lenape District $6,500.00 in restitution as follows:

   A. the sum of $3,000.00 payable upon execution of this agreement; and

   B. the sum of $3,500.00 payable during the course of his participation in the Pre-Trial Intervention ("PTI") Program, at times designated by the PTI office.

5. On or before September 1, 1999, Respondent agrees to submit to the Lenape Board a letter of resignation; the form and content of which is acceptable to the Lenape Board and its counsel.

6. This Settlement Agreement is further contingent upon approval by the Lenape Board, the Burlington County Superintendent of Schools and the Commissioner, should such approval be necessary and/or required by law.

7. If this Settlement Agreement is not so approved by the Lenape Board, the Burlington County Superintendent of Schools and the Commissioner, should such approval be necessary and/or required by law, the parties agree and acknowledge that: (1) this Agreement is void; (2) the hearing in this matter shall be scheduled as provided for by law, (3) Judge Bruno's Order that Bruce VanDyke is not entitled to salary and/or benefits until the hearing, shall remain in full force and effect until otherwise ordered, and (4) the parties retain all rights as otherwise provided for by law.

3C

8. Upon execution of this Agreement and upon receipt of the approvals and the restitution as set forth herein, all matters between Bruce VanDyke and the Lenape Board are deemed concluded.

ATTEST:

By: _____

BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT

By: _____
DATE
President

_____
DATE

ATTEST:

By: _____
Attorney at Law
in the State of
New Jersey

607863-1

OAL DKT. NO. EDU 11524-97
AGENCY DKT. NO. 443-11/97

IN THE MATTER OF THE TENURE	:	
HEARING OF BRUCE VAN DYKE,	:	COMMISSIONER OF EDUCATION
LENAPE REGIONAL HIGH SCHOOL	:	DECISION
DISTRICT, BURLINGTON COUNTY.	:	

The record, settlement agreement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters. He adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

In so approving, however, the Commissioner emphasizes that while the Board is not specifically required to provide publicly the reasons for respondent's separation from the District, it must make such information available upon request, in accordance with Executive Order No. 11 (1974).[1] Term number two of the within agreement, therefore, shall not be read to in any way contradict Executive Order No. 11.

[1] Executive Order No. 11 (1974) states, in pertinent part, that the following information must be public:
a. An individual's name, title, position, salary, payroll record, length of service in the instrumentality of government and in the government, *date of separation from government service and the reason therefor*; and the amount and type of pension he is receiving;
b. Data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but in no event shall detailed medical or psychological information be released***. (emphasis added)

The matter is hereby dismissed, subject to compliance with the terms of the settlement.[2] A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

October 28, 1999
Date of Mailing, October 28, 1999

343-99

SHIRLEY WRIGHT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

October 28, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10739-97

AGENCY DKT. NO. 412-10/97

SHIRLEY WRIGHT,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT

OF THE CITY OF NEWARK, ESSEX COUNTY,

Respondent.

Charles I. Auffant, Esq., for petitioner

Cherie L. Maxwell, Esq., for respondent (Sills, Cummis, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: September 23, 1999 Decided: September 23, 1999

BEFORE **EDITH KLINGER**, ALJ:

On December 15, 1997, this matter was transmitted to the Office of Administrative Law for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13. A hearing scheduled for November 24, 1998 was adjourned and rescheduled to November 30, 1998.

On November 30, 1998, the parties resolved this matter. On September 23, 1999, the parties submitted the attached Stipulation of Settlement indicating the terms of agreement which are incorporated herein by reference.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced on the record and by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of *N.J.A.C.* 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

September 23, 1999
DATE

Edith Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged:

Sept. 28, 1999
DATE

D. N. Antenaitis/jc
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 30 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

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CHARLES I. AUFFANT
Attorney at Law
661 Franklin Avenue
Nutley, New Jersey 07110
973-661-4545
Attorney for Petitioner

SHIRLEY WRIGHT, Petitioner, vs. NEWARK PUBLIC SCHOOLS, Respondent,	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDOR-10739-97N AGENCY REFERENCE NO. 412-10/97 *CIVIL ACTION* STIPULATION OF SETTLEMENT

The above captioned parties agree to settle this matter on the following terms and conditions:

1. Petitioner Shirley Wright will resign her permanent teaching position with the Newark Public Schools by letter of resignation dated on or about June 30, 1998 or such other date as agreed to by the parties. . Said letter will be held in escrow by the Petitioners attorney until final approval of this stipulation by the Newark Public Schools.

2. The Newark Public Schools will pay Petitioner her entire withheld increment for the 1997-1998 academic year.

3. Petitioner will apply for disability retirement with the Teachers Pension and Annuity Fund. Respondent, Newark Public Schools will assist Petitioner, if required, in obtaining, executing and delivering any and all documents within Respondent's possession, custody or control required by the Pension Board.

4. Upon payment of the entire withheld increment in this matter, Petitioner will withdraw the above referenced action and release her letter of resignation to the Newark Public Schools.

I have read foregoing, understand same and agree to be bound by the terms and conditions contained therein.

Dated: 11/30/98

Shirley Wright

Shirley Wright

Dated: 11/30/98

Charles A [illegible]

~~Notary Public~~

Dated: 12/15/98

Newark Public Schools

(Please Print Name)

Title

Dated:

Attest

.2b

OAL DKT. NO. EDU 10739-07
AGENCY DKT. NO. 412-10/97

SHIRLEY WRIGHT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

October 28, 1999
Date of Mailing, October 28, 1999

D.B. AND J.B,. on behalf of minor child, A.B., PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF LOWER CAMDEN COUNTY REGIONAL SCHOOL DISTRICT NUMBER ONE, CAMDEN COUNTY, RESPONDENT.	:	DECISION

SYNOPSIS

Petitioning parents challenged the Board's decision denying their son, A.B., participation in the District's gifted and talented program.

Based on the testimony and evidence presented, the ALJ found that the Board complied with the Department of Education's policy to make provisions for identifying pupils with gifted and talented abilities; that said policy is set forth in writing; that the selection procedure clearly establishes the requirements for entry into the program; that these requirements have a rational basis in that they are designed to identify those students who will attain success in the program; and that these requirements were correctly applied to A.B. Thus, the ALJ concluded that the Board's denial of selection of A.B. to the gifted and talented program was proper. Petition was dismissed.

Commissioner adopted findings and determination in Initial Decision as his own.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 391-98

AGENCY DKT. NO. 547-12/98

D.B. AND J.B. ON BEHALF OF A MINOR CHILD, A.B.,

Petitioners,

v.

BOARD OF EDUCATION OF LOWER CAMDEN COUNTY REGIONAL SCHOOL DISTRICT NUMBER ONE, CAMDEN COUNTY,

Respondent.

D.B. and **J.B.,** petitioners, *pro se*

Barry Chatzinoff, Esq., for respondent (Weinberg, McCormick, Chatzinoff and Paul, attorneys)

Record Closed: August 5, 1999 Decided: September 15, 1999

BEFORE **JOSEPH F. MARTONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, D.B. and J.B., challenge the decision of respondent Board of Education of the Lower Camden County Regional High School District Number One (LCCR) denying the participation of their son, A.B., in the school district's Academically Gifted and Talented

Enrichment Class at Overbrook Junior High School. Petitioners' petition was filed on December 9, 1998. Respondent's answer was filed on January 7, 1999, and the matter was transmitted to the Office of Administrative Law (OAL) on February 1, 1999, for hearing as a contested case. The matter was scheduled for hearing on August 4 and 5, 1999. On those dates, a hearing was held and concluded and the record closed on August 5, 1999.

FACTUAL DISCUSSION

Most of the essential facts in this matter are not disputed. It should be recognized that the following is not intended to be a verbatim recitation of the testimony, but is intended to summarize that portion of the testimony found to be relevant to the issues in this matter.

A.B. is 13 years of age and attends Overbrook Junior High School where he has successfully completed seventh grade. A.B.'s mother, J.B., testified that A.B. did not develop language skills like other children and that by the time he was three he had suffered from colic, chronic ear infections, a hernia operation, and tubes being inserted into his ears. At age three, A.B. was evaluated by the Berlin Township Schools child study team (CST) and was classified as preschool handicapped. He attended a full-time preschool program in Pine Hill. He was provided with maximum assistance for language skills, fine motor skills and speech. At age 5, A.B. was reevaluated and reclassified as perceptually impaired because of his language-based difficulties which included difficulties with short term memory, sequential organization, below normal socialization, and fine and visual motor skills. He attended a half-day regular program and half-day in a language-based, multi-sensory class. He also received speech therapy.

A.B. attended regular first and second grade classes, receiving help with language skills as well as speech and handwriting therapy. These skills were reinforced at home with speech practice, handwriting and reading.

J.B. testified that A.B. was reevaluated at the end of the school year in 1994 and was declassified because of his high I.Q., his high achievement test scores and his ability to perform at grade level. J.B. indicated that the parents were not informed of the ramifications of this declassification.

J.B. testified that from the beginning of third grade through sixth grade, A.B. was placed in the Berlin Township Schools gifted and talented program on the advice of the CST, as a result of his very superior I.Q. In these school years, he had difficulty with handwriting and had writing problems. He was given tutoring and also received speech therapy until sixth grade. However, Berlin Township identified A.B. as gifted and treated him in this way, resulting in an increase in his self-esteem. He graduated from the Berlin Township Elementary School with an A average and received a special academic award. He was a candidate for the gifted and talented program at Overbrook Junior High School for seventh grade and passed the first requirement for selection by scoring a 120 on the Riverside Cognitive Test. However, he was denied entry into the Overbrook gifted and talented program in August 1998.

J.B. provided a letter from Richard Selznick, Ph.D. of The Children's Regional Hospital at Cooper Hospital/University Medical Center, dated July 12, 1999 (P-2). This letter indicated that the parents had consulted with Dr. Selznick on June 28, 1999, regarding A.B.'s status as a gifted and talented youngster. It reflected that there appers to be some question as to A.B.'s status, as some assessments have found him to be gifted while others have not. Dr. Selznick offered to evaluate A.B. independently by giving him certain tests in order to give a fairly good indication of A.B.'s eligibility for a gifted and talented program.

J.B. also identified a psychological assessment performed by Steven A. Levick, School Psychologist, in February 1999 (P-3), in which Mr. Levick describes A.B. in the Summary as in the average range of cognitive functioning. J.B. disputed this conclusion because the testing of A.B. reported by Mr. Levick reflected a high average range bordering on superior.

J.B. testified as to what she felt was the bias of the LCCR CST in evaluating A.B. She cited the example that Mr. Levick was scheduled to test A.B. at the end of January 1999. The parents requested that this testing be rescheduled because it was to be held the day after the Super Bowl in 1999. She indicated that A.B. is very interested in football and that they promised him the opportunity to see the Super Bowl game which usually ends late Sunday night. However, Mr. Levick declined this request and tested A.B. on the day after the Super Bowl because he said

there was no other available time in his schedule. In addition, A.B. is best tested in the morning, but Mr. Levick gave him tests in the afternoon.

J.B. testified that in the Learning Assessment of January 1999 (P-4), A.B. has a "well developed fund of knowledge" and a reading comprehension level at grade 11.3, and A.B. is well above grade level in everything except spelling, indicating that he is not just an average child. She indicated that A.B. shows "dual exceptionality" in that he is both gifted and learning disabled. When A.B. received assistance with language skills, speech and handwriting therapy in the 1991-92, 1992-93 and 1993-94 school years under §504, he progressed on his California Achievement Test scores and his Iowa test scores; however, after this assistance ceased, he has been steadily declining in these test scores (P-5). When he was screened for reading and writing using the Woodcock Reading Mastery Test in July 1999, it showed that A.B. is not writing at his level and commensurate with his high vocabulary.

When A.B. was not accepted into the Overbrook gifted and talented enrichment class, the parents appealed the decision to the Board of Education and a hearing was scheduled to consider this issue (P-14). A meeting was also scheduled by the Guidance Director to determine A.B.'s eligibility for §504 accommodations for administration of standardized tests for the following 1998-99 school year (P-15). An evaluation of A.B. was made on September 30, 1999, and it was determined that A.B. does not have a handicap so as to qualify him for §504 accommodations (P-16). J.B. testified that she received this letter on October 3, 1998, indicating that a §504 evaluation had taken place. She had been promised that she would be notified and included in such a meeting, but the parents were not included in this meeting or any discussion.

On October 13, 1998, J.B. filed a complaint with the Office of Civil Rights, and in December 1998, the School District was required to conduct a full §504 evaluation with parental participation. As a result, a CST meeting took place on February 12, 1999. On that date the parent attended a classification eligibility determination. A.B. was again rejected as disabled. The parents then took their son for further evaluations to the Learning Enrichment and Assessment Program (LEAP).

On cross-examination, J.B. testified that A.B. is a good student and his grades are all As and Bs. He is introverted and has very few friends. He was assessed for emotional difficulties and went to counseling while he was at the Berlin Township Schools. However, he is not being provided with counseling by LCCR. He gets along well with his teachers and there are no disciplinary problems. He is in some honors classes. His attendance is good and he missed approximately ten days during the past school year. J.B. testified that A.B. is bored in school at the present time. He does not do any homework in order to attain his A and B grades.

J.B. testified that it was after A.B. was declassified that he was placed in the gifted and talented program in the Berlin Township School. He performed at the level of the class and got good grades. A.B.'s disability is language-based. Her son is getting a lot of A's and B's but she spends a great deal of time with him helping him with his studies. He is bored in his Study Skills, English and Science classes. He is not challenged in any of his classes and he is also bored at home.

A.B.'s father, D.B. testified that both he and his wife asked for copies of all relevant information, including copies of A.B.'s 1998-99 application for admission to the Overbrook gifted and talented enrichment class and for the teachers' evaluations of A.B. However, they were denied access to this information. It has not yet been provided.

A.B.'s parents called Ruth Marino as a witness in this matter. Dr. Marino testified that she has a Ph.D. degree and is a certified school psychologist. She testified to her educational background, and her experience. She is an Adjunct Professor at Holy Family College in Philadelphia, and she helped formulate the Educational Testing Service licensure examination for a national certification. She testified as an unpaid witness as a favor to the parents. She is employed as a school psychologist at Berlin Township and is certified both in Pennsylvania and New Jersey.

A.B. was first evaluated in August 1989. Dr. Marino's first evaluation of A.B. as a member of the Berlin Township CST was in 1991 (P-19) and her second evaluation was in 1994. A.B. was diagnosed with Apraxia in 1989. This involves difficulties with motor coordination, speech and language and fine motor skills. Dr. Marino testified that when A.B. was tested his

verbal score was in the bright average range of 110-120, but his performance score was in the average range of ability. Her report (P-19) indicates that there is a large, though nonsignificant difference between the verbal and performance I.Q. scores. She indicated that there was a great deal of motor involvement. As a result, A.B. was provided with speech and language therapy and occupational therapy dealing with his deficits in speech and language and in motor coordination. He also had a great deal of trouble converting his thoughts into written language. Eventually, in 1994 A.B. was declassified because he was competing in average classes. He has a learning disability but was able to compete in average classes.

Dr. Marino testified that when A.B. was declassified his teachers did not recommend him for the gifted and talented program. However, in his regular classes he was not challenged although he had a low tolerance for frustration. She explained that anxiety interfered with his learning and he had a low tolerance for frustration and was too anxious. His scores varied more than the standard deviation. However, it was concluded that A.B. was capable of performing better than his I.Q. showed. She concluded that A.B. has a physical disability which interferes with his performance. He has difficulty with his writing and language skills. The Berlin Township CST recommended that A.B. be included in the gifted and talented program if his I.Q. is above 130.

Dr. Marino testified that it sounds as if A.B. still has the disability in speech and language and motor coordination. He is gifted with a subtle learning disability. She feels that having him in the Overbrook gifted and talented program would help him by giving him mental challenges. It would get him to think and to solve problems. It would help him get past his frustrations. His potential is higher than he demonstrates. His inclusion in the gifted and talented program would enhance his strengths.

On cross-examination Dr. Marino indicated that she has had no discussions with anyone at the LCCR School District. She does not know anything about the Overbrook Junior High School gifted and talented program. She admitted that if A.B. entered and failed the Overbrook program it would be detrimental to him. She indicated that A.B., has a physical disability although she admitted that she could not find any statement in her psychological report of May 1991 (P-19) stating this. She admitted that the Berlin Township CST declassified A.B. and she was a member

of that CST. However, Dr. Marino explained that it was the learning evaluation which resulted in A.B.'s declassification. She also stated that the CST of which she was a member never recommended a §504 determination. She indicated that A.B. has trouble with keyboarding, but that a low A or high B average is not a problem. However, she feels that he belongs in top courses. She admitted that the 130 I.Q. test result may be an anomaly since it is not consistent with test scores either prior or subsequent to that date. She also admitted that she has not tested A.B. since 1994.

Roseanne Simonelli Vivolo testified that she has been employed by LCCR as a Learning Disability Teacher/Consultant (LDT/C) since August 1992. She testified to her educational background and experience. One of her functions is the identification of children with learning disabilities. She indicated that she is not familiar with §504 evaluations.

Ms. Vivolo testified that she sat in on a meeting on September 21, 1998, involving a §504 evaluation. She was present for the sole purpose of interpreting the learning assessment scores and determinations. A.B.'s mother wanted A.B. in the gifted and talented program and had some documents supporting her position. Ms. Vivolo explained that there must be a severe discrepancy between a child's cognitive ability and his achievement in order to support a determination that there is a disability. In a 1996 Iowa test A.B. attained an average to high average range in cognitive ability and as a result it was found that there was no learning disability as it is known in the educational field. Ms. Vivolo identified A.B.'s report cards (R-2) which reveal A or B level grades in his classes and she indicated that this is consistent with the assessment. As a result there is no indication of the existence of a learning disability.

On cross-examination, Ms. Vivolo indicated that there are some learning disabled students in the gifted and talented program. However, these students must pass the same criteria as nondisabled students in order to get into the program. She indicated that in situations where there is a severe discrepancy of 22 points or more between cognitive functioning and academic testing, it is concluded that a child is learning disabled. She indicated that the Iowa test is not used as a criteria and that the WIOT test is used. However, A.B.'s 1994 Iowa scores are consistent with his grades.

Wallace F. Hussong, testified for respondent. He holds New Jersey teaching certificates as a grade K-8 teacher and as a grade 7-12 Biology teacher. He has been employed by respondent LCCR since 1973 and is in charge of the District's seventh and eight grade gifted and talented program. This position was part-time from 1979 and has been full-time since 1985. He testified as to his educational background and experience. He teaches two or three gifted and talented seventh grade classes and two or three eight grade classes. He is also directly involved in determining who is chosen for this class. He is also involved in the gifted and talented curriculum. He indicated that the LCCR gifted and talented program is much different than the Berlin Township sixth grade gifted and talented program. The Berlin Township program is a pull out program, whereas the LCCR program is an academic enrichment class consisting of one period per day in addition to the regular curriculum. It is a graded course which involves a great deal of writing, an extensive amount of math including discrete mathematics, as well as projects involving cameras, videos and television. The class proceeds at a very rapid pace.

Mr. Hussong testified to the selection process for the gifted and talented enrichment class. The assessment of eligibility takes 5 to 6 months. Students are chosen based on testing and academic performance and it is designed so as to comply with the guideline of including three to five percent of the school population. Mr. Hussong testified that he is the only gifted and talented teacher. They attempt to keep the classes at no more than 12 students per class, although, he has had up to 16 in a particular class. However, he indicated that where there are no more than 12 students in a class they interact better. In November or December of their sixth grade year, the students are given the Riverside Cognitive Abilities Test – Level D (CogAT). These tests are computer scored and if students achieve a 120 in one of three areas, they become candidates for the program. Out of 500 original candidates, the selection pool is reduced to approximatly 100. A list is generated and parent questionnaires and teacher evaluation forms are issued. He requests two or three teacher evaluations per student. He then waits for the achievement test scores. He then makes up a spread sheet, and the cut off for the year is based on a particular number. The "Baldwin Matrix" score, which has been in use since 1979, is used to determine eligibility for the gifted and talented enrichment class. He identified A.B.'s sixth grade gifted and talented identification score sheet (R-3). He testified that A.B. received a total of 16 points based on the Baldwin Matrix score. The CogAT is broken into a verbal I.Q., quantitative I.Q., and a nonverbal

I.Q. and point values are assigned to the ranges achieved by a student. The California Achievement Test scores are also used and point values are assigned to various ranges of scores. There are also scores given based on teacher evaluations and parent questionnaires.

Mr. Hussong testified that the teacher evaluations used to determine A.B.'s score are no longer in existence. After the determination is made to accept or not to accept the student, these evaluations are discarded because of space limitations. He testified that he was completely unaware of the pendency of this proceeding until recently, otherwise he would have retained A.B.'s teacher evaluations. Mr. Hussong testified that he personally reviewed the teacher evaluations of A.B. and he placed the score on the score sheet (R-3). The teachers are asked to grade students from one to four in a number of areas and he recalls that A.B. was evaluated by three different teachers. He also identified a parent questionnaire (R-7) and he indicated that he does not see the highest possible score of 32 very often, but in this case the parents gave A.B. the highest score. Everything is then placed on a computer spread sheet (R-4). In the case of the 1998-99 gifted and talented class, the last student selected had a score of 23 and anything below that was not accepted. He indicated that 33 students intervened between A.B. and the last student accepted into the class and A.B. was not close to qualifying.

Mr. Hussong also indicated that he would be very concerned if A.B. is entered into the Overbrook gifted and talented enrichment class because he might be easily frustrated. The extensive writing, the pace of the class, and the keyboarding skills which are required would be a problem for A.B. He is not sure that A.B. would function very well in the class.

On cross-examination, Mr. Hussong testified that he had the teacher evaluation questionnaires in his possession on August 31, 1998. He indicated that students in the gifted and talented program are required to both read and write at the eleventh or twelfth grade level. He indicated that if A.B. truly has a 130 I.Q. he feels that he would be able to function in the gifted and talented program.

Mr. Hussong admitted that he has never met A.B. There are no gifted learning disabled students in the class at present. He testified that he has had 18 hours of graduate credits and attends annual work shops in the gifted and talented program but there is no special certification

or training required for teaching such a class. There have never been any exceptions made to the requirements for entry into the gifted and talented program. Some of the students that have been accepted into the program have opted not to enter the class. A score of 21 is a minimum and if students scores less than 21 they are not permitted to enter the class. There have been no substitution of tests for entry into the program in accordance with the policy of the Board of Education. He testified that the Wechsler Intelligence Scale returns only one score where the CogAT scores give three separate scores in verbal, math and overall. He has found over the years that the CogAT test scores are good indicators whether a student will succeed in the gifted and talented class. He feels that this is a more valid measure because it measures those areas that are needed in order to succeed in the class. He also testified that the criteria for entry into the program is exactly the same from year to year. Once students are admitted into the seventh grade gifted and talented class, they are back in for the eighth grade. The same admission criteria applied for the 1999-2000 school year class.

A.B. again applied for entry into the gifted and talented program for the 1999-2000 school year and he attained a score of 21 points. However, the cut off for his group was 23. Mr. Hussong repeated that a learning disabled child must meet the same criteria as a non-disabled student for entry into the class. Students that enter the school who have been in another school's gifted and talented program are not admitted, but they are tested for the next year. He testified that I.Q. test scores fluctuate, but the CogAT scores do not change significantly from year to year. I.Q. scores are never used as a measure for entry into the program. He felt that A.B.'s 130 I.Q. score is from four years prior and there should be a more current score.

Finally, Mr. Hussong indicated that in determining admission to the gifted and talented enrichment class, A.B. is compared with the rest of the students in his group, and the score of 23 is the cut off for the group.

Steven A. Levick testified that he is employed by respondent as a school psychologist and a behavioral specialist. He has been so employed since September 1989. He testified as to his educational background and experience. He holds a national certificate as a school psychologist and is a certified school psychologist in New Jersey. He participates in CST evaluations and has participated in several hundred of them. He evaluated A.B. and was involved in constructing an

independent CST in performing this evaluation. He was the psychologist assigned to this evaluation. He testified that the CST was constructed to perform an independent evaluation in order to determine if A.B. is eligible for special education services. He indicated that the team followed the guidelines and requirements for such an evaluation to the letter.

Mr. Levick testified that he administered two tests, the Wechsler Intelligence Scale for Children-Third Edition and the Kauffman Brief Intelligence Test. In the Wechsler, A.B.'s verbal score was 123, his performance score was 106 and his full scale score was 116. This places him in the high average range of cognitive functioning. Mr. Levick indicated that his psychological assessment of February 1999, (P-3) contains an error in the summary where it indicated that A.B.'s cognitive testing places him the average range of cognitive functioning. It should state that A.B. is in the high average range. The Kauffman Brief Intelligence Test resulted in a composite score of 109, which is in the same range as A.B.'s Wechsler scores. The Iowa and CogAT test scores achieved by A.B. were cross-checked and Mr. Levick indicated that he felt he got a good sampling of A.B.'s abilities. He detected no apparent anxiety or apprehension and A.B. seemed eager to take the tests. He attempted to determine A.B.'s true potential. He concluded that there are no severe discrepancies in A.B.'s cognitive functioning and his performance. There must be a severe discrepancy in order to support a finding of a learning disability, but A.B. does not have the required 22 point spread. As a result, he felt that there is no specified learning disability. He also indicated that no one in the school district felt that A.B. rose to the level of a §504 qualification.

On cross-examination, Mr. Levick testified that there was no significant drop from the Wechsler and the Kauffman Brief Intelligence Test. A.B. was not anxious and was very relaxed when he took these tests. He does not recall if he administered these tests in the afternoon. He indicated that there are no anomalies in his report and that A.B. is in the average to high average range of intelligence.

The final witness to testify was Dr. Dennis Grimmett, Assistant Superintendent of respondent. He testified to his educational background and work experience. He has been with the LCCR Board of Education for 21 years and is the only Assistant Superintendent. The Guidance Department falls under his aegis, and the §504 coordinator reports to him.

Dr. Grimmett testified that a §504 determination was made in this matter on September 21, 1998. The parents were offered a CST evaluation or a §504 determination at that time. He explained that a §504 determination requires a finding that a student is substantially limited or impaired in a major life function. The team considered A.B.'s test scores and teacher assessments and concluded that A.B. was not limited or impaired in a major life function. He also agrees with the decision and the policy of the Board of Education with respect to the standards adopted for entry into the LCCR Gifted and Talented Enrichment Class. There is merit is setting standards and sticking by them.

On cross-examination, Dr. Grimmett was questioned why the parents are not involved in the §504 determination process, and he indicated that he is not aware of any district that allows parental involvement in that determination. He admitted that he has never met A.B., although he has knowledge of A.B. through his test scores. He indicated that it is common practice not to have a LTD/C present at a §504 meeting. However, Ms. Vivolo was present in order to interpret the learning assessment scores and determinations. The guidance counselor is present at a §504 and the parents still have input as to the options. He testified that dual exceptionality is not a widely adhered to realm and he personally does not adhere to it.

LEGAL DISCUSSION AND ANALYSIS

There is no law or regulation which prescribes the substantive content of a gifted and talented program or imposes any particular regimen for such a program on the local school district. *See, Kanter v. Mountain Lakes Board of Education, 95 N.J.A.R.* 2d (EDU) 454, 456.

N.J.S.A. 18A:7A-10 authorizes the Commissioner with the approval of the State board to develop and administer a uniform Statewide system for evaluating the performance of each school in order to determine pupil status and needs, ensure pupil progress and assess the degree to which the thoroughness and efficiency standards established pursuant to *N.J.S.A.* 18A:7F-4 are being achieved. It should be noted that the Public School Education Act of 1975 provided at *N.J.S.A.* 18A:7A-5(d) (now repealed) that a major element of a thorough and efficient education is "a breadth of program offerings designed to develop the individual talents and abilities of pupils."

Pursuant to the foregoing authority, regulations found at *N.J.A.C.* 6:8-2.5(a)4 provide as follows:

> (a) The curriculum and instruction element shall be rated acceptable upon demonstration of performance in the following four indicators:
>
> * * *
>
> 4. Gifted and talented programs and services:
>
> i. The district shall make provisions for identifying pupils with gifted and talented abilities and for providing them with an educational program and services.
>
> ii. The documentation/activities for Group 1 school districts shall be:
>
> (1) The written identification process; and
> (2) A sample lesson plan.
>
> iii. The documentation/activities for Group 2 school district shall be:
>
> (1) The written identification process:
> (2) Lesson plans;
> (3) Classroom observations; and
> (4) Staff interviews.

In the *Kanter* case cited above, Judge Springer refers to a prior decision of the Commissioner, *Humcke v. Tinton Falls Bd. of Educ.*, 1981 *S.L.D.* 165 (Comm'r Dec. 12, 1980), wherein the Commissioner, quoting approvingly from an internal Department of Education memorandum, set forth that,

> . . . While some schools may wish to provide the gifted and talented with a program, it would be unrealistic to expect schools to offer separate programs for each and every exceptionally gifted and talented pupil. However, it is realistic to expect schools to provide opportunities for these pupils.
>
> *Humcke*, at 170.

The current regulations appear to continue the prior policy of the Department of Education which imposes the burden on each school district to make provisions for identifying pupils with gifted and talented abilities and providing them with an educational program and

services while at the same time not establishing specific requirements for such programs. Thus, if a local school district has adopted policies and procedures which have the effect of making provisions for identifying pupils with gifted and talented abilities and providing them with an educational program and services, it has conformed with the requirements of State law and regulations.

In the present matter, respondent has applied clear requirements for selection into its Gifted and Talented Enrichment Class. The procedure is set forth in writing (P-21) and makes it clear that the Riverside Cognitive Abilities Test – Level D will be administered and scored for selection of students both to be entered into the selection pool and as a part of the overall selection process. Those students with a composite CogAT score of 120 or above are entered into the selection pool and a "Baldwin-Matrix" is started for each student. Results of the sixth grade achievement tests total reading and total mathematics scores are also entered into the Baldwin-Matrix as are the results of teacher evaluations and parent questionnaires. Any student who attains a weighted score above thirty points on the Baldwin-Matrix is automatically included in the class and any student who attains a weighted score below twenty-one points will not be considered for selection. The class is intended to comprise three to five percent of the incoming seventh grade enrollment and the cut off score is adjusted each year in order to conform to this percentage.

The testimony of Mr. Wallace Hussong is the effect that these procedures and requirements were fully complied with in the selection of 1998-99 participants in the LCCR gifted and talented program. He described in detail the procedures used and I **FIND** that these procedures conformed with the requirements of respondent's Gifted and Talented Selection Procedure (P-21).

In particular, Mr. Hussong identified A.B.'s sixth grade gifted and talented identification score sheet (R-3) and he showed how the point values which were assigned to A.B.'s test scores, were consistent with the final overall score of sixteen achieved by A.B. Unfortunately, the teacher evaluations are no longer available, but Mr. Hussong testified from personal knowledge that he reviewed these teacher evaluations and he personally placed a score on A.B.'s score sheet.

Mr. Hussong testified that the LCCR gifted and talented enrichment classes are taught at a rapid pace and involve a great deal of reading, writing and special projects. Students who are learning disabled must comply with the same criteria as non-disabled students. Implicit in Mr. Hussong's testimony is that the reason for this is that students with learning disabilities may not be able to maintain the rapid pace of the class and may become frustrated and suffer more harm than benefit from being permitted to enter based on lower standards. Mr. Hussong also testified based on his twenty years experience in the LCCR gifted and talented program that the achievement test scores utilized by the School District in selecting students for the class are good indicators whether a student will succeed in the class. He felt that these were more valid measures because they measure those areas that are needed in order to succeed in the class.

In the present matter, in order for the parents challenge to the exclusion of their child from the school district's gifted and talented program to succeed, they must show that the actions of the school district were arbitrary, capricious and unreasonable or that the school district has failed to comply with the requirements of the Department of Education with respect to this program.

A.B. is a good student who is getting A's and B's in his classes, including some honors classes. He gets along well with his teachers, his attendance is good and there are no disciplinary problems. His mother indicated that he is bored in school and does not do any homework in order to attain his A and B grades, although she also testified that she spends a great deal of time helping him with his studies.

The parent's expert, Dr. Marino, opined that A.B. is gifted with a potential higher than he demonstrates but with a subtle learning disability in speech and language and motor coordination. She feels that having him in the Overbrook gifted and talented program would help him by giving him mental challenges and enhancing his strengths, by getting him to think and to solve problems, and it would help him get past his frustrations. However, Mr. Hussong, the school district's gifted and talented program teacher explained that the Overbrook program is a graded academic enrichment course consisting of one period per day in addition to the regular curriculum. It involves a great deal of writing, an extensive amount of math including discrete mathematics, as well as special projects. Mr. Hussong expressed concern that if A.B. is entered into the

Overbrook gifted and talented program he might be easily frustrated by the extensive writing, the rapid pace of the class, and the keyboarding skills which are required. He is not sure that A.B. would function very well in the class.

Most of the standard achievement tests given to A.B. show that he is in the average to high average range of intelligence. It is in the area of A.B.'s weaknesses in speech and language and motor coordination that the program requires prospective participants to be most able. Therefore, it appears clear based on the testimony of Mr. Hussong, that the Overbrook gifted and talented program is not designed to enhance the self esteem of students if they are otherwise unable to do the work to keep up with the class.

I know that the parents will be distressed and disappointed with my decision in this matter. They have gone to great lengths to obtain for their son the best possible education, and they are to be commended for their efforts. However, based on the testimony and evidence presented in this matter, I **FIND** that the respondent, LCCR has complied with the policy of the Department of Education to make provisions for identifying pupils with gifted and talented abilities. I **FIND** that respondent has further complied with this policy by providing to such children a gifted and talented educational program and services. I **FIND** that respondent has adopted policies and procedures which have the effect of making provisions for identifying pupils with gifted and talented abilities and providing them with an educational program and services. Therefore, I **FIND** that the school district has fully conformed with requirements of State law and regulations in this regard.

With respect to the question whether the school district was arbitrary, capricious and unreasonable in denying petitioner's child, A.B., enrollment in the LCCR gifted and talented program, I make the following findings. I **FIND** that the procedure for selection to the gifted and talented program is set forth in writing (P-21). I **FIND** that the selection procedure clearly establishes the requirements for entry into the program. Based on the testimony of Wallace Hussong, who is, in effect, the Gift and Talented Program coordinator, I **FIND** that these procedures have a rational basis in that they are designed to identify those students who will attain success in the Gifted and Talented Program. I **FIND** that these requirements were correctly

applied to A.B. and I **CONCLUDE** that respondent's denial of selection of A.B. to the Gifted and Talented Program was proper.

DECISION AND ORDER

Based upon the foregoing, it is hereby **ORDERED** that the decision of respondent, Board of Education denying participation of A.B. in the Lower Camden County Regional High School District Number One gifted and talented program is hereby **AFFIRMED,** and petitioner's appeal is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 15, 1999
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

Sept. 17, 1999
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 21 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

APPENDIX

LIST OF WITNESSES

For petitioners:

J.B.

D.B.

Ruth Marino

For respondent:

Roseanne S. Vivolo

Wallace F. Hussong

Steven A. Levick

Dennis Grimmitt

EXHIBITS

For petitioner:

P-2 Letter of Richard Selznick, Ph.D., dated July 12, 1999

P-3 Psychological Assessment of A.B., dated February 1999

P-4 Learning Assessment of A.B., dated January 1999

P-5 Graph of A.B.'s C.A.T. and Iowa scores together with test reports

P-6 1994 Psychological Evaluation of A.B.

P-7 Social Assessment of A.B., dated January 1999

P-8 Woodcock Reading Mastery Test Report, dated August 1999

P-9 Learning Enrichment and Assessment Program (LEAP) Schedule and paid invoice

P-12 August 1998 letter of respondent to parents regarding gifted program selection

P-13 Letter of Robert Neidig, Principal of Berlin Township School District - undated (March 1998)

P-14 Letter of Michael Schreiner, Superintendent of Schools dated September 1, 1998

P-15 Letter of Francine McGrath, Guidance Director, to J.B., dated September 11, 1998

P-16 Letter of R.H. Hamilton, Principal, to parents, dated October 2, 1998

P-17 Letter of parents to Board of Education, dated September 14, 1998

P-18 Portion of parent questionnaire prepared by parents and submitted to respondent

P-19 Psychological report of A.B., dated May 1991

P-20 Study Skills Class Vocabulary Flash Cards

P-21 Gifted and Talented Selection Procedure

For respondent:

R-1 ERIC Digest article entitled "Gifted but Learning Disabled: A Puzzling Paradox"

R-2 A.B. report cards for grade seven

R-3 Sixth grade gifted and talented identification score sheet for A.B.

R-4 Cognitive Abilities Test report for A.B.

R-5 Iowa Test of Basic Skills report for A.B.

R-6 Teacher Nomination Form for Gifted and Talented/Enrichment Program (blank)

R-7 Parent Questionnaire for Gifted and Talented Program (blank)

R-8 Spread sheet ranking applicants for Gifted and Talented Program

OAL DKT. NO. EDU 391-98
AGENCY DKT. NO. 547-12/98

D.B. AND J.B,. on behalf of minor child, A.B., PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF LOWER CAMDEN COUNTY REGIONAL SCHOOL DISTRICT NUMBER ONE, CAMDEN COUNTY, RESPONDENT.	:	DECISION

The record and Initial Decision issued by the Office of Administrative Law have been reviewed. Petitioners' exceptions, filed on September 29, 1999, were timely filed pursuant to *N.J.A.C.* 1:1-18.4. However, respondent's reply exceptions, delivered to the Commissioner on October 12, 1999, were not timely filed pursuant to *N.J.A.C.* 1:1-18.4(d).

Upon review of the record and petitioner's exceptions, the Commissioner is in agreement with the findings and conclusions of the Administrative Law Judge (ALJ) and adopts the recommendation of the ALJ to dismiss the petition for the reasons well expressed in the Initial Decision.

Accordingly, the Petition of Appeal is hereby dismissed.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

October 28, 1999
Date of Mailing, October 28,1999

344-99

D.C.G., on behalf of minor child, P.C.G.; AND P.C.G.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

October 28, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NOS. EDU 4433-99 and
EDU 4558-99

AGENCY DKT. NOS. 104-5/99 and
103-5/99

D.C.G. ON BEHALF OF MINOR CHILD, P.C.G. AND P.C.G.,

Petitioner,

v.

BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,

Respondent.

Denis C. Germano, Esq., on behalf of petitioner (Hulse & Germano, attorneys)

John P. Comego, II, Esq., on behalf of respondent (Archer & Greiner, attorneys)

Record Closed: September 21, 1999 Decided: September 28, 1999

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of petitioner's contention that the Board of Education employed examination procedures that did not comport with *N.J.S.A.* 18A:40A-12. Prior to hearing the

parties filed a Stipulation of Dismissal with Prejudice, which is annexed. I **CONCLUDE** that the matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that this matter be **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9/28/99
DATE

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

Sept. 30, 1999
DATE

D. N. Antanaitis/fe
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 1 1999
DATE

Barbara A Harmon
OFFICE OF ADMINISTRATIVE LAW

/caa

FILED
STATE OF N.J.
OFFICE OF ADMIN. LAW

SEP 21 9 47 AM '99

ARCHER & GREINER
A Professional Corporation
One Centennial Square
Haddonfield, New Jersey 08033
(609) 795-2121
Attorneys for Respondents

BY: ARTHUR F. RISDEN, ESQUIRE
JOHN B. COMEGNO II, ESQUIRE

DENIS GERMANO, parent and guardian of P.C.G.; and P.C.G.; Petitioners, vs. LENAPE REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION; DANIEL F. HICKS, Superintendent; and CHARLES A. FLEISCHMAN, Principal; Respondents.	:	OFFICE OF ADMINISTRATIVE LAW Transmitting Agency: Department of Education OAL Docket Nos. EDUOS 4433-99S EDUOS 4558-99S **STIPULATION OF DISMISSAL WITH PREJUDICE**

AS the Petitioners, Denis Germano and P.C.G., seek to withdraw their claims against Respondents, Lenape Regional High School District Board of Education, Daniel F. Hicks, and Charles Fleischman; it is hereby stipulated that these actions are dismissed, with prejudice, and without fees or costs to any party.

HULSE & GERMANO
Attorneys for Petitioners

BY: Denis C. Germano
DENIS C. GERMANO

Dated: 9/16/99

ARCHER & GREINER, P.C.
Attorneys for Respondents

BY: J.B. Comegno II
JOHN B. COMEGNO II

Dated: 8/27/99

OAL DKT. NOS. EDU 4433-99 AND EDU 4558-99 (CONSOLIDATED)
AGENCY DKT. NOS. 104-5/99 AND 103-5/99

D.C.G., on behalf of minor child, P.C.G.; AND P.C.G.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and Initial Decision withdrawing this consolidated matter, based on a Stipulation of Dismissal With Prejudice executed by the parties, transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2, have been reviewed. Upon review, the Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before him and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

October 28,1999
Date of Mailing, October 28, 1999

345-99

TISHA ROMEO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

October 28,1999

OAL DKT. NO. 7356-99
AGENCY DKT. NO. 179-7/99

TISHA ROMEO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-14.4, along with a copy of a notification sent to petitioner on October 5, 1999 providing her ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by petitioner, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

*This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

October 28,1999
Date of Mailing, October 28, 1999

346-99

S.B. AND M.B., on behalf of minor child, A.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HOPEWELL VALLEY REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

October 28, 1999

OAL DKT. NO. EDU 395-99
AGENCY DKT. NO. 18-2/99

S.B. AND M.B., on behalf of minor child, A.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HOPEWELL VALLEY REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties on September 10, 1999 providing them ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by the parties, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

*This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

October 28, 1999
Date of Mailing, October 28, 1999

347-99E

C.J. AND M.J., on behalf of minor child, C.M.J.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

October 29, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INTERLOCUTORY ORDER
DENYING EMERGENT RELIEF
OAL DKT. NO. EDU 08614-99S
AGENCY DKT. NO. 309-10/99

C.J. AND M.J. ON BEHALF OF MINOR CHILD C.M.J.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,

Respondent.

BEFORE **JEFF S. MASIN**, ALJ:

This matter was opened to the Office of Administrative Law ("OAL") on an application for emergent relief first filed with the Commissioner of Education. C.J. and M.J., the parents of a 16-year-old female, C.M.J., requested emergency relief permitting their daughter to attend Toms River High School or Brick Memorial High School or alternatively to be continued on home instruction which she has been receiving since spring 1999. The petitioners' representations, contained in a letter of October 6, 1999, filed with the Department of Controversies and Disputes and also in the statements of C.J. at the hearing, reflect that their daughter was raped by a fellow student at Lakewood High School in March of 1999. The petitioners' daughter was at that time in tenth grade. She is now in eleventh grade and is sixteen years old. Shortly after the incident the accused student returned to the high school to attend classes. It is unclear as to the state of charges pending against that student, except that the father represents his understanding that there

are some juvenile charges which are still pending. The board's counsel indicated that the board is unaware of the status of any possible charges.

According to Mr. J., the sexual assault occurred on a Thursday. His daughter was out of school on Friday and returned to school on Monday, when she was confronted by fellow students. It was after this confrontation that she revealed the sexual assault to her parents. Since that time she has not attended school and the board has been providing home instruction. The girl has received anonymous phone calls on a number of occasions and in one call a female indicated that there was an intention that Ms. J. be harmed if she returned to school. According to her father, Ms. J. is intent on not returning to Lakewood High School and would drop out of school rather than return if her return were mandated.

At the hearing, board counsel was queried as to the board's intentions. He advised that the board has not yet begun any process to seek to have the parents of this minor student return her to attendance at the high school. The board has however determined that she should return to the school and counsel represented that the board would shortly be instituting appropriate municipal court proceedings if she did not return on her own. It is anticipated by counsel that the process of obtaining the necessary municipal court determination would probably take 30 to 60 days. Counsel also indicated that until such time as the board had obtained the appropriate judicial determination instructing the parents to return the child to Lakewood High School, the board would continue to provide home instruction.

Upon consideration of the information provided by the parties, and considering the standards for emergent relief, this administrative law judge first observes that it is unclear that there is in fact any emergency at this time. The board has now agreed to provide home instruction as it has been doing since last spring and to do so until such time as it has obtained the appropriate order directing that the parents return their minor child to the high school, which event is apparently a month or two in the future. In addition, the parties discussed the need to have a plenary resolution of the J.s' application for schooling in another high school resolved as quickly as possible. Even if emergent relief were granted in this case, the appropriately narrow relief which would be given would only involve either an order that the child be allowed to attend

another high school pending a plenary determination or that home instruction continue pending a plenary determination. A decision on an emergency basis, without the benefit of testimony and other appropriate evidence, could not involve any determination as to the appropriate school setting for this child in the long term. She has approximately one and three-quarters years of high school remaining. Thus it was agreed that scheduling a plenary hearing within a short time was most appropriate and could lead to a resolution of the petitioner's application for relief against the board within the time frame of the board's processing of proceedings seeking to have the child returned to Lakewood High School. Counsel for the board has agreed to consider the appropriateness of filing a petition with the Commissioner seeking an order that the child return to school at Lakewood, while also taking into account the possibility that the more appropriate and perhaps preferred path would be through the municipal court process.

Based on all of the above comments, and a consideration of the standards for emergent relief, I **FIND** that the limited information provided by the parent as to the possibility of threats and danger to their child should she return to Lakewood High School is insufficient to suggest by itself that there is a reasonable likelihood of success on the merits. At the same time, there are issues to be considered with respect to the appropriateness of the educational setting for this child given her experience and the potential discomfort and emotional stress upon her in returning to the school even in the absence of any serious threat of bodily harm. These issues need to be explored in the context of a full hearing, but the evidence such as it is, which consisted almost entirely of hearsay and which did not include any testimony, affidavits or certifications by the child, who is sixteen years old and presumably capable of providing evidence, falls short of establishing a reasonable likelihood of success on the merits. At the same time, since the board has agreed to the continuation of home instruction pending a plenary hearing, it appears that, without the necessity of granting emergent relief, the situation which will exist pending the outcome of the plenary hearing mirrors the narrow relief that would be likely even if emergent relief were granted. It seems more likely that the appropriate temporary relief would be to continue home instruction rather than to undertake transfer of the student to an out of district high school for what might be a limited period of time should the plenary hearing result in a determination that the petitioners have failed to establish that an order assigning the child to an out of district high school on a long term basis is appropriate. For the reasons expressed, and the

Board's representation of its intentions regarding continued home instruction, the application for emergent relief is **DENIED**. Based upon Mr. J.'s indicating that he wishes the matter to proceed to plenary hearing on the merits of his application, the case will be scheduled for plenary hearing.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

October 20, 1999
DATE

JEFF S. MASIN, ALJ

mjm

OAL DKT. NO. EDU 08614-99S
AGENCY DKT. NO. 309-10/99

C.J. AND M.J., on behalf of minor child, C.M.J.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

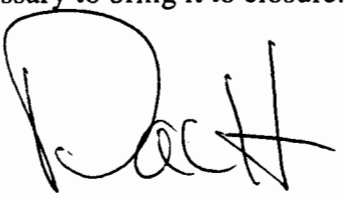
The record of this emergent matter, which included an audiotape of the hearing conducted at the Office of Administrative Law (OAL) on October 19, 1999, and the Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner concurs with the ALJ, for the reasons well stated in his Initial Decision, that the within application for emergent relief must be denied as petitioners have not satisfied the standards necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). In so finding, the Commissioner is mindful, as was the ALJ, that the evidence advanced in this matter did not include any testimony, affidavits, or even a certification by the minor child, rendering it, at this point, merely speculative and, therefore, insufficient to establish a reasonable likelihood of success on the merits. Additionally, the Commissioner fully concurs with the ALJ that the nature of the relief requested by petitioners is not amenable to determination in an emergent proceeding but, rather,

is more appropriately fashioned subsequent to a hearing on the merits which, due to the circumstances of this matter, should be conducted on a expedited basis.

Accordingly, the Order of the ALJ denying emergent relief is affirmed. This matter shall proceed to an expedited hearing on the merits in the event that petitioners desire to pursue their claim or to such proceedings as are necessary to bring it to closure.[1] [2]

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

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[1]It is noted that a letter to the parties from the ALJ, dated October 20, 1999, accompanied the return of this emergent application to the Commissioner. Such letter appended a facsimile from petitioners and their child, addressed to the ALJ, dated October 19, 1999, transmitted to the OAL on October 20, 1999, which stated "[t]his letter is to inform you that my wife, my daughter [C.J.] and myself have come to the conclusion that any further action on our part against the Lakewood schoolboard would just be futile and therefore we have decided that [C.J.] should drop out of Lakewood High School. We have also decided that [C.J.] would be better off continuing her education outside of the Lakewood education system."

[2]This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*

October 29,1999
Date of Mailing, October 29, 1999

349-99

EDU #9986-99
C's # 349-99EL
SB # 53-99

R.E. AND L.E., on behalf of minor child, E.E.	
PETITIONERS-APPELLANTS	STATE BOARD OF EDUCATION
V.	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF MADISON, MORRIS COUNTY,	
RESPONDENT-RESPONDENT	

Decided by the Commissioner of Education, November 3, 1999

For the Petitioners-Appellants, Bernard Weiss, Esq.

For the Respondent-Respondent, Rand, Algeier, Tosti & Woodruff (Ellen S. Bass, Esq., of Counsel)

On November 3, 1999, the Commissioner of Education granted the Madison Board's motion to dismiss "the outstanding issues in this matter, in that they are not justiciable before me." Commissioner's Decision, slip op at 1. He therefore dismissed the petition, in which the petitioners had challenged their son's suspension from school, along with the petitioners' request for emergent relief.

On December 3, 1999, the petitioners filed a notice of appeal with the State Board of Education.

Pursuant to N.J.A.C. 6:2-1.11(a), the petitioners' brief in support of their appeal was due on December 23, 1999, 20 days after they filed their notice of appeal. The

FEB. 2, 2000

petitioners, however, failed to file a brief by that date. By letter dated December 28, 1999, the Director of the State Board Appeals Office notified the petitioners of their failure to file a brief and informed them that this matter was being referred to the Legal Committee of the State Board for consideration of their failure to perfect the appeal.

The petitioners have still failed to file a brief in support of their appeal, six weeks after the deadline for such filing. Nor have they offered any explanation for their failure to file or requested an extension of time for such filing. As a result, we dismiss the appeal in this matter for failure to perfect. N.J.A.C. 6:2-1.12(a). See Paszamant v. Board of Education of the Borough of Highland Park, decided by the State Board, April 1, 1992, aff'd, Docket #A-4812-91-3 (App. Div. 1993).

February 2, 2000

Date of mailing _____

350-99

FLORENCE ADLER, PETITIONER, V. BOARD OF EDUCATION OF THE TOWNSHIP OF SHAMONG, BURLINGTON COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

Petitioner, tenured teaching staff member holding instructional certification with endorsement as music teacher (K-12), claimed tenure and seniority rights to positions awarded by the Board to other individuals.

ALJ concluded that petitioner did not have the necessary seniority to oust Ms. Tavani from the full-time music teacher position. ALJ noted since the key issue in regard to seniority is not formal appointment but actual service in the particular position for which one is certified (*Lichtman*), Ms. Tavani, who was certified as a music teacher, was entitled to seniority because of her performance of the duties of a music teacher in 1967-68 and 1968-69 school years, when the administrative principal asked her to teach music for classes other than her own. In regard to the computer course position, the ALJ noted that case law has established the principle that in most instances no specific instructional endorsement is required to teach a computer course. Citing *Lewis and Skawinski*, the ALJ concluded that based upon current law, tenured petitioner was entitled to one of the computer teacher positions for the 1997-98 and 1998-99 school years over nontenured teachers and was, therefore, entitled to the difference in salary between what she earned and what she would have earned had she been properly assigned.

Commissioner adopted findings and determination in Initial Decision as his own and directed the Board to compensate petitioner for lost wages and emoluments, including the additional pension credit commensurate with her salary loss. Commissioner clarified that Ms. Tavani had superior seniority as a teacher of music by virtue of her music instruction during the 1967-68 and 1968-69 school years not because he found that Ms. Tavani "brought to her task as teacher of music for these other students some element of educational background which others not so certified cannot be presumed to have," but because the record supported the conclusion that Ms. Tavani was asked to teach the additional classes since the administrative principal was aware of her dual certification.

November 3,1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 06257-97S
AGENCY DKT. NO. 226-6/97

FLORENCE ADLER,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF SHAMONG, BURLINGTON COUNTY,
Respondent.

Kathleen A. Naprstek, Esq., for petitioner (Zazzali, Zazzali, Fagella, and Nowak, attorneys)

John T. Barbour, Esq., for respondent

Record Closed: July 14, 1999 Decided: September 21, 1999

BEFORE **JEFF S. MASIN**, ALJ:

Florence Adler filed a Petition of Appeal with the Commissioner of Education ("Commissioner") on June 25, 1997, asserting that the respondent Board of Education of the Township of Shamong ("Board") had violated her rights as a tenured employee and had violated her rights of seniority in connection with the Board's alleged retention of non-tenured teachers in full-time positions which the petitioner asserts are properly positions to which she has tenure and seniority rights superior to those holding said positions. The Board filed an answer to the petition on July 16, 1997. The Commissioner transferred the matter as a contested case to the Office of Administrative Law ("OAL") on July 25, 1997. An amended answer to the petition was filed on August 13, 1997. A prehearing conference was conducted on September 24, 1997. At that time the parties indicated that notice of the pending contested case needed to be supplied to other

employees of the District who might be affected by the outcome of the dispute. A further conference was held on November, 19, 1997. As a result of her direct interest in the outcome of the case, another member of the staff of the respondent, Florence Tavani, was granted intervenor status. She filed a motion for summary decision which was denied on September 15, 1998. Thereafter, the case was scheduled for hearing in January 1999, but was adjourned due to the need to determine if there were yet other employees who might be affected by the case. A hearing was scheduled for May 24, 25 and 26, 1999. On May 14, 1999, counsel for intervenor Tavani advised that his client was retiring effective July 1, 1999, and desired to withdraw from the case. A letter of May 21, 1999, confirmed this information and Ms. Tavani was permitted to withdraw. The hearing was held on May 24 and concluded on that date. Counsel then filed briefs and reply briefs and the record closed on July 14, 1999. However, because the judge was involved in a number of expedited and emergent hearings and had other decisions which were required to be completed, he requested an extension of the 45-day decision period and the Director and Chief Administrative Law Judge and the Commissioner granted an extension of the time for the decision to be filed.

In her petition Ms. Adler contends that she holds an instructional certificate with an endorsement as a music teacher (K-12) and that, after having commenced her employment with the respondent as a part-time music teacher in November 1983, and working as part-time music teacher through the end of the 1986-87 school year, she became a full-time music teacher on September 1, 1987, and remained so, acquiring tenure which she asserts extended to all assignments which she is authorized to fill by virtue of her certification. Thereafter, on May 8, 1997, she was informed that her full-time position as a music teacher was to be abolished upon the respondent's recommendation and that a part-time music teacher position was to be created in place of the full-time position. The Board then voted on May 20, 1997, to abolish the full-time position and create the part-time position and to appoint the petitioner to that part-time position. Despite this action, the petitioner alleges that effective September 1, 1997, the respondent has retained non-tenured teachers in full-time positions which require or to which the petitioner's instructional certification is appropriate. Ms. Adler claims that by virtue of her tenure she is entitled to fill such full-time positions and the Board's retention of non-tenured persons in these full-time positions is in violation of her tenure rights under *N.J.S.A.* 18A:25-5, *N.J.S.A.* 18A:28-9 *et seq.*, and *N.J.S.A.* 18A:6-10.

In addition to her tenure claims, Ms. Adler also claims in her petition that as a consequence of her service with the respondent, she has acquired seniority under her instructional certificate and that this seniority extends to the positions created by the Board. As such, she asserts that the Board's retention and assignment of less senior personnel violates her seniority rights under *N.J.S.A.* 18A:28-9 *et seq.* and *N.J.A.C.* 6:3-5.1 *et seq.*

The parties have entered into a stipulation of facts, which is incorporated herein. In addition to stipulating to much of the factual information which Adler asserted in her petition, the parties have also stipulated regarding Florence Tavani's employment history with the Board, which commenced on September 1, 1967, when she was employed as a full-time elementary school teacher, and the employment history of Ron Heil and Alan Taylor, two other employees of the District who commenced employment on September 1, 1997; Heil as an elementary school Computers/Technology teacher and Taylor as an elementary school teacher.

STIPULATION OF FACTS

1. Petitioner Florence Adler ("Adler") holds a certificate issued by the New Jersey Department of Education State Board of Examiners in April of 1981 which states that Adler is authorized to serve in the public schools of New Jersey as a teacher of music (K-12), which was (sic) A copy of that certificate is attached as Exhibit J-1.

2A. Petitioner was hired by the Shamong Board of Education for the remainder of the 1983-84 school year as an hourly employee in the position of "part-time teacher of music" as per the minutes of the Board's November 8, 1983 meeting, a copy of which is attached as Exhibit J-11.

2B. Petitioner commence employment with respondent Board of Education of Shamong Township ("Shamong Township") on or about November 9, 1983 as a part-time music teacher. She served as a part-time music teacher with respondent through the end of the 1986-87 school year and was assigned to teach music at Indian Mills School (grades K-8).

3. Effective September 1, 1987, and continuing through the 1996-97 school year, Petitioner was employed by Respondent as a full-time music teacher. She was initially assigned to teach music at Indian Mills School (grades K-8) and was

reassigned in September 1992 to teach music at Indian Mills Memorial School (grades 4-8).

4. Petitioner obtained tenure pursuant to N.J.S.A. 18A:28-5 in her employment position as a teacher in Respondent's school district.

5. By letter dated May 8, 1997, Petitioner was informed by Respondent that a recommendation would be made to abolish her position as full-time music teacher and to create a part-time music teacher position in its place.

6. On or about May 13, 1997, at a regular meeting of the Board, Respondent voted to abolish Petitioner's position as full-time music teacher, to create a part-time music teacher position, and to appoint Petitioner to that part-time position.

7. During the 1997-98 school year and the 1998-99 school year, Petitioner was assigned to the position of part-time music teacher.

8. For the 1996-97 school year, Petitioner was paid according to Step 10 (BA + 15) on the salary guide, receiving a salary of $39,547.00.

9. For the 1997-98 school year, Petitioner was paid according to Step 11 (BA + 30) on the salary guide. As a part-time employee she received a salary of $20,948.00, which was one-half the full-time salary of $41,896.00. See Exhibit J-2.

10. For the 1998-99 school year, Petitioner was paid according to Step 12 (BA +30) on the salary guide. As a part-time employee she received a salary of $21,604.00, which was one-half the full-time salary of $43,208.00. See Exhibit J-3.

11. Intervenor Florence Tavani ("Tavani") holds a certificate which was issued by the New Jersey Department of Education State Board of Examiners on June 25, 1965 which states that Tavani is authorized to serve in the public schools of New Jersey as a teacher of music (K-12) and as an elementary school teacher (K-8). A copy of that certificate is attached as Exhibit J-4.

12A. Tavani commenced employment with respondent Board of Education of Shamong Township ("Shamong Township") on or about September 1, 1967 as a full-time elementary school teacher. See Exhibit J-6.

12B. Tavani was rehired by the Board of Education for the 1968-69 school year as per the minutes of the Board's April 9, 1968 meeting. See Exhibit J-7.

12C. Tavani was rehired by the Board of Education for the 1969-70 school year as per the minutes of the Board's April 23, 1969 meeting. See Exhibit J-8.

12D. Tavani was rehired by the Board of Education for the 1970-71 school year as per the minutes of the Board's March 10, 1970 meeting. See Exhibit J-9. Tavani attained tenure with the commencement of her employment in September 1970.

12E. Tavani was rehired by the Board of Education for the 1971-72 school year as per the minutes of the Board's April 13, 1971 meeting. See Exhibit J-10.

13. Tavani has submitted a letter of resignation indicating her intention to resign from her position with Respondent in order to retire effective July 1, 1999.

14. Petitioner has been advised that she will be employed on a full-time basis for the 1999-2000 school year. See Exhibit J-5.

15. Ron Heil ("Heil") holds an instructional certificate with an endorsement as an elementary school teacher (K-8), which was issued by the New Jersey Department of Education State Board of Examiners in October of 1996. See Exhibit J-12.

16. Heil commenced employment with respondent Board of Education of Shamong Township ("Shamong Township") on or about September 1, 1997 as a full-time elementary school teacher and has continued in that capacity through the current time.

17. During the 1997-98 and 1998-99 school years, Heil was assigned to teach the elementary school Computers/Technology course to grades 4 through 8 at Indian Mills Memorial School. See Exhibit J-14.

18. Alan Taylor ("Taylor") holds an instructional certificate with an endorsement as an elementary school teacher (K-8), which was issued by the New Jersey Department of Education State Board of Examiners in October of 1995. See Exhibit J-13.

19. Taylor commenced employment with respondent Board of Education of Shamong Township ("Shamong Township")

on or about September 1, 1997 as a full-time elementary school teacher and has continued in that capacity through the current time.

20. During the 1997-98 and 1998-99 school years, Taylor was assigned to teach the elementary school Computers/Technology course to grades K through 3 at Indian Mills School. See Exhibit J-14.

The Board asserts that Florence Tavani has greater seniority under her Teacher of Music endorsement than does Florence Adler. It also asserts that it has no other positions in the district for which Adler was qualified and to which she could be assigned. The stipulation provides that Adler holds a certificate which states that she is authorized to teach music in grades K-12 and has been so certified since April 1981. She was first hired by the Board on November 8, 1983, to complete the 1983-84 school year as an hourly employee to teach music part-time, and later became a full-time music teacher in the Indian Mills School for K-8 and later in 1992 was assigned to grades 4-8 as a full-time music teacher at the Indian Mills Memorial School. The stipulation further provides that Ms. Tavani holds a certificate which authorizes her to serve as a teacher of music K-12 and as an elementary school teacher. Tavani has been so certified since June 25, 1965.

Florence Tavani testified that in 1967 she taught music to classes which the principal of the then only school in the Shamong District asked her to cover. A third grade teacher had very little free time and Principal Andelora requested Tavani to teach music to this teacher's class while the teacher ate her lunch. Tavani did so, every day of the 1967-68 school year. Tavani was herself assigned at that time to two first grade classes as an elementary school teacher. In 1968-69 she taught music to Mrs. Marshall's fourth grade class, while also assigned as an elementary school teacher to two first grade classes. Once again, she claims that she taught music to Marshall's class every day of the school year. During that year the principal was Mr. Ben Fogletto. She considered that she performed this teaching of music under her endorsement as a music teacher grades K-12. After 1968-69 she only taught music to her own classes.

The witness explained that in 1967-68 the school district was so small that Mr. Andelora was given blanket permission by the Board to move teachers around in assignments as he believed

warranted. There was no superintendent of schools at that time, no business administrator or teacher's union. The principal sat in on negotiations with the teachers.

Karen Morgan, a kindergarten teacher in Shamong since 1968, and Anna Marshall, who retired in 1983 after working in the District since 1967, each testified. Ms. Morgan taught first grade in a room next door to Ms. Tavani's. She held an elementary, K-8 certification. In 1968-69 she was aware that Tavani was working in a third grade classroom teaching music during the third grade teachers lunch break. She and Tavani talked about what each was doing during lunch periods and they had to cover for each other. Morgan had a music background and Principal Fogletto knew it so he asked her to form a chorus of 6th to 8th graders which met after school. Ms. Marshall explained that Tavani taught Marshall's class music each day for the whole school year so that Marshall could go to lunch. Tavani would bring her guitar. Marshall never sat in on the class while Tavani taught. This arrangement stopped after the 1968-69 term.

Roger Ward Wagner retired from the principalship of Indian Mills Memorial School in 1996. Mr. Wagner explained that Memorial was built in 1991, before that time Indian Mills School was a K-8 school. After Memorial was built, Mills School became K-3 and Memorial was grades 4 through 8. Before he became the principal of Indian Mills School in 1978, Wagner taught at the school beginning in 1968, when he was a 6th grade teacher and then a 6th, 7th and 8th grade teacher. The school was very small, only about 120-130 students and one class for each grade. There were no special teachers for music, art, or physical education. Instead, each teacher taught these subjects to his or her own class, unless teachers switched for "special projects." The same situation existed in the 1969-70 school year. "Special project" teachers were not employed at the school until the early 1970's, with a music teacher or a physical education teacher first hired in about 1973-74.

Wagner knew Ms. Tavani, who taught either 1st or 2nd grade at that time. Ms. Morgan also taught one of these grades. Wagner did not recall any specific authorization being issued for teachers to teach "specially," however, the procedures then in place were "less formal" than now. As Wagner recalled, Tavani taught in an older building, he taught on the other side of a breezeway. No teachers had free time. They each taught art, music and physical education and had lunch duty. There was no reason why the administration at that time would have discussed

other teachers' assignments with him, and he had no opportunity to observe what went on in Tavani's classroom. Wagner did not dispute that Tavani did teach music to classes other than her own at times. He had not seen either Morgan or Marshall's statements.

In addition to the testimony regarding Ms. Tavani's music instruction in the late 1960's, additional testimony was presented regarding a computer course and its content, this in regard to the Board's assertion that it had no position available for Adler after she was "riffed" despite her tenure and seniority status. She testified that she is currently a music teacher in Shamong. In 1996-97, the school year during which she filed the petition in this case, she has not taught computers, although she has monitored students using them and has worked with them. Special area teachers monitored the computer room and there was a computer teacher at the time. She took no technology or computer courses in college, from which she graduated in 1981. She has not taken any computer courses since college, other than attending one workshop for computers which lasted a day and a keyboard (musical) technology course which involved computer usage. She has a computer at home, but does not know which operating systems it has.

Ronald C. Heil, a computer teacher for Shamong is a certified K-8 elementary school teacher. He has taught in the district for two years, teaching a computer technology course full-time for fourth to sixth graders. The course is initially exploratory and touches upon the keyboard, slide shows, the internet, CD Rom and other applications. In the fifth grade course the approach is in greater depth, including databases and hyperstudio. In sixth grade the course is entirely hyperstudio, involving a multimedia presentation on a particular topic. The course curriculum was entered in evidence.

Heil works with teachers and suggests to them things which they can have their students work on with the computers.

Dr. Joseph H. Webb, the Superintendent of Schools for Shamong, testified that he discussed the County Technology Plan with County Superintendent Douglass Groff to determine what certification a teacher needed in order to teach a computer course. He was told that a teacher needed only an elementary education certificate. The County Superintendent only referred to the Administrative Code regarding this issue.

Webb was "generally" familiar with the content of the curriculum for the computer course and believed that it was geared to the core curriculum.

Eileen Maria Senior, Director for Curriculum, Instruction and Planning for the District, has been a teacher, administrator and principal in the District for twenty-two years before assuming her present position, which she has held for one year. She is familiar with the course curriculum for the computer course. It involves the core curriculum content and is integrated therewith in all content areas. The "expert" teacher of technology is expected to and in fact does work with the regular classroom teachers to integrate and infuse technology into the core curriculum.

DISCUSSION

Tenure is acquired by serving the requisite period of time established in *N.J.S.A.* 18A:28-5 under the authority of an instructional certificate and the tenure extends to all endorsements held on that certificate. *Capodilupo v. West Orange Board of Education*, 218 *N.J. Super.* 512 (App. Div. 1987), *cert. denied,* 109 *N.J.* 514 (1987). Where a teacher has acquired tenure and is then subject to a reduction in force ("RIF"), the teacher retains certain rights, such that the Board must reduce positions only in accordance with seniority, and all tenured staff who suffer loss due to a RIF must be recalled to fill positions for which they are qualified and which may become vacant in order of seniority. *N.J.S.A.* 18A:28-10. If a tenured teacher is subject to a RIF, if another position is available, a tenured teacher has a right to that position over a non-tenured teacher or any individual with less seniority, so long as the tenured teacher has the appropriate certification for the position. *Bednar v. Westwood Board of Education*, 221 *N.J. Super.* 239 (App. Div. 1988). *N.J.A.C.* 6:3-5.1(i).

In this case, the primary issue in regard to Ms. Adler's rights relates to Ms. Tavani's service as a music teacher and the date at which she first began to acquire seniority in that capacity. Ms. Adler started as a full-time music teacher in September 1987, and therefore she had more than ten years of seniority. Ms. Tavani became a teacher in the District long before Adler first began her part-time employment in 1983-84. Tavani started with the District in 1965. The key question is what if any significance her activities in 1967-68 and 1968-69 have to do with her

acquisition of seniority as a music teacher. Adler disputes that Tavani acquired any seniority from that time, and contends that since Tavani only became a full-time music teacher in the District about five years ago Adler has a clear seniority advantage over her and was therefore entitled to the position filled by Tavani.

The evidence presented by the Board from Ms. Tavani, Ms. Marshall and Ms. Morgan is convincing to the effect that in the 1967-68 and 1968-69 school years Tavani was asked by the school principal at Indian Mills School, who was then the highest level employee of the Board, to undertake music instruction for the students in classrooms other than her own, in order to assist in providing lunch breaks for other teachers in what was apparently a very busy schedule in this small school. There is no evidence of any formal Board appointment to the position of teacher of music at that time, indeed, the evidence is clear that the Board did not begin to hire teachers for specific art, music and physical education roles until much later. Instead, Tavani's assignment to teach music to other classes was all accomplished informally in accordance with the formal authority granted by the Board to the administrative principal to "shift the teaching staff around in order to fulfill educational needs." Ms. Adler's witness Mr. Wagner did not present any evidence to refute the testimony of the three women.

In considering whether Tavani's actual performance of music education in these years is deserving of the accumulation of seniority, it is noted that as a teacher of elementary students in Shamong in the late 1960's any teacher, including Tavani, Morgan or Marshall, was apparently expected to teach their students music, art and physical education as a regular part of their duty as an elementary school teacher. As such, the administrative principal could presumably have asked that Morgan or Marshall teach music to students in other classrooms while the teachers in those rooms were at lunch, and this despite the fact that perhaps Morgan or Marshall did not have the music certification which Tavani possessed. While the Board could not have hired a teacher to serve specifically as a music teacher who did not possess the proper certification as a teacher of music, it could hire a certified elementary school teacher to teach all of the subjects taught in an elementary classroom, including music, and in fact that is what the Shamong Board did. The question then is whether when the administrative principal asked Tavani to act as a music teacher for classes other than her own, her service in that capacity should be viewed any differently than

the music instruction she provided to her own class of students, for which it is not claimed that her service while teaching music caused her to acquire any seniority rights.

Since the key issue in regard to seniority is not formal appointment but actual service in the particular position for which one is certified, *Lichtman v. Ridgewood Board of Education*, 93 *N.J.* 362, 369 (1983), Ms. Tavani is entitled to seniority as of the performance of the duties of a music teacher in 1967-68. While she served as a regular elementary education classroom teacher that year for the students in her own classroom, she worked concurrently as a music teacher for other students for whom she did not fulfill, indeed was neither assigned nor asked to fulfill, the role of a regular classroom teacher. While others may have fulfilled a similar function while not certified as a music teacher, Tavani held the proper certification, and as such, the assumption must be that she brought to her task as teacher of music for these other students some element of educational background which others not so certified cannot be presumed to have. Since Tavani's sole designated function for the students in Marshall and Morgan's classes was music teacher, she should receive the benefit of her specialized service and therefore gain seniority from 1967-68. This being the case, she had seniority over Ms. Adler, as the seniority first acquired in 1967-68 continued to accrue over the following continuous years of service whether she taught music under her certification in those ensuing years or not. I **CONCLUDE** therefore that Ms Adler did not have the necessary seniority to oust Ms. Tavani from the full-time music teacher position after Adler was riffed.

In regard to the computer course, case law has established the principle that in most instances no specific instructional endorsement is required to teach a computer course. *Taxman v. Piscataway Board of Education*, 93 *N.J.A.R.* 2d (EDU) 189; *Lewis and Skawinski v. State-Operated School District of Paterson, Passaic County,* EDU 9743-94 & EDU 9745-94, Final Decision by Commissioner of Education, March 24, 1997, *affirmed* by State Board, October 1, 1997. While in *Morgan v. Board of Education of the Township of Wayne*, 1991 *S.L.D.* 2578, the State Board did find that there could be exceptions to that general rule, such as where the courses involved older students (in *Morgan* junior high school students) and the curriculum dealt with data base and spreadsheets in a business context, the evidence here is that the course involved is more in line with the course of study considered by the Commissioner in *Lewis and Skawinski*, *Supra.*, where the Commissioner found that the computer instruction was "viewed as a

mechanism to learn the various content subjects, and the instruction is wholly driven by the lesson plans of the classroom elementary teachers." *Id.* at 15-16. While there is a specific "Computer Curriculum" in Shamong, approved in October 1995, it appears to be largely an adjunct to the instruction in core curriculum, and indeed one of its stated goals is to "provide problem-solving learning experiences and computer assisted instruction to reinforce skills in the content areas through technology." This curriculum is not so similar in nature to the business oriented course work in *Morgan* as to suggest that the exception to the general rule identified there should apply here. While it is possible and perhaps even appropriate that the Commissioner and the State Board rethink the appropriate qualifications necessary for teaching computer courses in light of the ever expanding technological advances and the central place which computers are assuming in society, until they determine to do so, I must **CONCLUDE** that based upon current law Ms. Adler has seniority such that she was entitled to one of the computer teacher positions for the 1997-98 and 1998-99 school years and is therefore entitled to the difference in salary between what she earned and what she would have earned had she been properly assigned.

Ms. Adler's counsel shall advise counsel for the Board of the specific amount of money which is due to her client under this ruling and shall present a certification to that effect to counsel and to the Commissioner within ten days.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 21, 1999
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

9/23/99
DATE

Debbie Antanaitis /mr
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 24 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

JOINT EXHIBITS:

Stipulation of Facts (1 - 20) with attached exhibits J-1 Certificate for Teacher of Music for Florence C. Lowder issued 04/81; J-2 letter to Florence Adler from Suzanne C. Rath dated 1/14/98 regarding salary approval with attached Schedule A; J-3 letter to Florence Adler from Suzanne C. Rath dated 5/13/98 regarding salary approval with attached Schedule A; J-4 Certificate for teacher of music and elementary school teacher for Florence Tavani issued 6/25/65; J-5 letter to Florence Adler from Suzanne C. Rath dated 5/11/99 regarding salary approval with attached Schedule A; J-6 notation on a page regarding board approval of Florence Tivani (sic) as a teacher for the school year 1967-68 signed by T. Gruning; J-7 page from minutes of a 4/9/68 meeting of the Shamong Township BOE; J-8 page from minutes of a 4/23/69 meeting of the Shamong Township BOE signed by Elwood C. Griscom; J-9 page from minutes of a 3/10/70 meeting of the Shamong Township BOE; J-10 two pages from minutes of a 4/13/71 meeting of the Shamong Township BOE; J-11 page from 11/8/83 Executive Session of the Shamong Township BOE.

J-12 Certificate for elementary school teacher for Ronald C. Heil issued 10/96

J-13 Certificate for elementary school teacher for Alan J. Taylor issued 10/95

J-14 Computer Curriculum for Indian Mills School, Indian Mills Memorial School, Shamong Township Board of Education, Grades K-8, published Summer 1995

FOR THE PETITIONER:

None

FOR THE RESPONDENT:

None

OAL DKT. NO. EDU 06257-97S
AGENCY DKT. NO. 226-6/97

FLORENCE ADLER, PETITIONER, V. BOARD OF EDUCATION OF THE TOWNSHIP OF SHAMONG, BURLINGTON COUNTY, RESPONDENT.	: : : : :	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Both petitioner's and the Board's exceptions were submitted in accordance with *N.J.A.C.* 1:1-18.4, as was petitioner's reply.

Although petitioner indicates that she concurs with the Administrative Law Judge's (ALJ) conclusion that she was entitled, by virtue of her tenure and seniority rights, to one of the full-time computer teaching positions for the 1997-98 and 1998-99 school years, she nevertheless contends that the ALJ misinterpreted the law in his analysis of her claim to the full-time teaching position held by Ms. Tavani. That is, petitioner maintains that Tavani did not legally begin to accrue seniority as a music teacher until she was assigned by the Board in September of 1992 to serve under her music teacher endorsement to her instructional certificate. (Petitioner's Post-hearing Brief at p. 10) Petitioner underscores that the testimony confirmed that, during the early years of Ms. Tavani's employment, the Board did not employ teachers for special subjects, such as music, art and physical education. Rather, these subjects were taught by the elementary teachers under their elementary endorsements of their certificates, in accordance

with *N.J.A.C.* 6:11-6.1(b), and Ms. Tavani merely volunteered to accommodate her colleagues and/or the principal by providing music instruction to elementary classes other than her own. (*Id.*) As petitioner observes, there is nothing in the record to demonstrate that Ms. Tavani was assigned by the Board to serve under her music endorsement. To the contrary, the record shows that Ms. Tavani was employed as a "teacher," not as a "music teacher." As she argued before the ALJ, petitioner finds it significant that the Board failed to appoint Ms. Tavani as music teacher.

Additionally, although petitioner concurs with the ALJ's conclusion that she is entitled to back pay equal to the difference in salary between what she earned in her part-time position during the aforementioned school years and what she should have earned if she had been properly placed in a full-time position, petitioner contends that she is also entitled to have the Board make necessary payments to the Division of Pensions to provide her with the additional pension credit which she should have had for that full-time service at the higher salary. (Petitioner's Exceptions at p. 2)

The Board excepts to that portion of the Initial Decision where the ALJ concludes that petitioner was entitled to hold one of the elementary computer teaching positions, maintaining that petitioner was not qualified to teach such courses. (Board's Exceptions at p. 2) Here, the Board renews its argument as raised before the ALJ that:

> The curriculum for the district's elementary school Computers/Technology course is in evidence as J-14. Respondent's witnesses, Ron Heil an [e]lementary [t]eacher who teach[es] the Computers/Technology course and Eileen Senior, Director of Curriculum, both testified without contradiction as to the extensive integration of the full elementary school core curriculum content into the district's elementary school Computers/Technology course. The course curriculum, J-14, could not be more explicit in establishing that this course *** is not merely "computers" but has all aspects of the elementary core

> curriculum subjects fully integrated therein. (Board's Exceptions at p. 3)

The Board reasons, therefore, that an elementary teaching endorsement was a necessary credential for teaching the Computers/Technology course in its District. (*Id.* at p. 5) In support of its position, it cites to the State Board of Education's caution that, pursuant to *Morgan v. Board of Education of the Township of Wayne*, 1991 *S.L.D.* 2578, it has "*rejected the broad general principle that the duties attending a course involving computers can never be of such character as to require possession of a particular instructional endorsement****." *Lewis and Skawinski* State Board decision, *supra*, Slip Opinion at p. 5) (emphasis in text) (Board's Exceptions at pp. 8-9) Moreover, the Board finds the circumstances in *Lewis and Skawinski* to be distinguishable, in that matter "there was not a showing of the extensive intertwining of the core curriculum standards and the district's elementary academic curriculum into the district's computer curriculum ***." (*Id.* at p. 9)

In reply to the Board's exceptions, petitioner argues:

> Although respondent obviously feels that some special skills should be needed to teach a general computer course and although respondent and others may desire a change in the current state of the law, the fact remains that until such time as the State Board of Education enacts such changes, and possibly creates a specific computer endorsement to the instructional certificate, any holder of an instructional certificate is qualified to teach basic computer courses. (Petitioner's Reply at p. 2)

Additionally, as per the directive of the ALJ in his Initial Decision, petitioner certifies that her gross salary loss for the 1997-98 and 1998-99 school years was $42,552. (Certification of Florence Adler, September 30, 1999)

Upon careful and independent review of the record in this matter, the Commissioner determines to affirm the Initial Decision, with clarification. Initially, the

Commissioner notes that he is compelled to concur with the ALJ's conclusion that Ms. Tavani had superior seniority as a teacher of music by virtue of her music instruction during the 1967-68 and 1968-69 school years, not because he finds that Ms. Tavani "brought to her task as teacher of music for these other students some element of educational background which others not so certified cannot be presumed to have," (Initial Decision at p. 11), but, rather, because the record supports the conclusion that Ms. Tavani was asked to teach the additional classes *because* the administrative principal was aware of her dual certification. Ms. Tavani claims, without dispute or rebuttal by the Board, that:

> In September, 1967, I was hired to teach at Indian Mills School. *Since the Principal was aware of my dual certification in both Elementary Education and Music Education*, I was assigned to teach a first grade and also, a third and fourth grade music period. This assignment continued throughout the years from 1967 to 1969. (Statement by Florence Tavani, November 5, 1997, Supplemental Certification of Kathleen A. Naprstek, at Exhibit B, *emphasis supplied*)[1]

Although petitioner maintains that Ms. Tavani's assignment could have no legal effect in that she was never formally appointed by the Board of Education, the Commissioner concurs with the ALJ that, under the particular circumstances operative in this matter, where the administrative principal was the chief school administrator,[2] and where he was granted complete authority to effectuate assignments of teachers,[3] the Commissioner finds petitioner's position to be unpersuasive.

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[1] Petitioner's Post-hearing Brief so affirms in its summary of the testimony: "This comports with Ms. Tavani's testimony at [the] hearing, in which she indicated that because she also held a teacher of music certification, the principal of Indian Mills School asked her to teach music to the 3rd grade students during the 1967-68 school year while the 3rd grade teacher took a lunch break. She stated that she performed a similar task for the 4th grade class during the 1968-69 school year.***" (Petitioner's Post-hearing Brief at p. 5)

[2] Board's Post-hearing Brief at p. 2

[3] Exhibit J-6, Board minutes from the meeting where the Board approved the application of Ms. Tavani and her consequent hiring as a teacher state: "Mr. Andalaro reported of the need to shift the teaching staff around in order to fulfill educational needs. The board unanimously agreed that he should take such action as he feels is necessary."

Additionally, the Commissioner concurs with the ALJ that, based on a review of the record and, in particular, the summary of testimony offered by Mr. Heil and the curriculum for the Computers/Technology course, the actual skills taught by the computer teachers are primarily technical in nature, notwithstanding that these skills are carefully integrated throughout the elementary subject areas, with the cooperation of the classroom teachers.[4] As such, the Commissioner does not agree with the Board that an elementary endorsement was required to teach the courses in question.

Accordingly, the Initial Decision of the ALJ is affirmed, with clarification. The Board is directed to compensate petitioner for lost wages in the amount of $42,552, and emoluments, including the additional pension credit commensurate with her salary loss.[5]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[4] It is noted that Mr. Heil testified that "The course is initially exploratory and touches upon the keyboard, slide shows, the internet, CD Rom and other applications. In the fifth grade course the approach is in greater depth, including databases and hyperstudio. In sixth grade the course is entirely hyperstudio, involving a multimedia presentation on a particular topic. ***" (Initial Decision at p. 8) The ALJ further noted that "[Mr.] Heil works with teachers and suggests to them things which they can have their students work on with the computers." (*Id.*)

[5] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

November 3, 1999
Date of Mailing, November 3, 1999

350-99

EDU #6257-97S
C # 350-99
SB # 52-99

FLORENCE ADLER,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SHAMONG, BURLINGTON COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, November 3, 1999

For the Petitioner-Respondent, Zazzali, Zazzali, Fagella & Nowak
(Kathleen A. Naprstek, Esq., of Counsel)

For the Respondent-Appellant, John T. Barbour, Esq., of Counsel

Petitioner Florence Adler was a music teacher employed by the Board of Education of the Township of Shamong (hereinafter "Board") whose full-time position was reduced to part-time effective in the 1997-98 school year. By petition filed in June 1997, the petitioner challenged her reduction to part-time status, alleging that the Board had retained non-tenured and less senior teachers in full-time positions for which she was qualified.[1] Petitioner, who had achieved tenure as a result of her employment and who possessed certification only as a teacher of music, asserted claims to two

[1] We note that the petitioner served as a music teacher on a part-time basis during the 1997-98 and 1998-99 school years. On July 1, 1999, a staff retirement resulted in a vacancy for a full-time music teacher. The petitioner was advised that she would be employed in that assignment for the 1999-2000 school year.

July 5, 2000

positions–one as a music teacher and the other as a teacher of Computers/Technology to elementary school classes. The music position was held by Florence Tavani. The Computers/Technology assignments were filled by two non-tenured teachers who possessed elementary certification.

The Administrative Law Judge ("ALJ") found that Tavani, an elementary teacher who also possessed a music endorsement, had acquired seniority as a music teacher by virtue of her assignment to teach music in 1967-68 and 1968-69 while the regular classroom teacher took her lunch break. As a result, Tavani had accrued more seniority as a music teacher than the petitioner, who had not begun her employment in the district until 1983. The ALJ therefore rejected the petitioner's claim to that position. However, the ALJ found that the petitioner had been entitled to retention as a Computers/Technology teacher over the non-tenured teachers serving in that assignment, concluding that such assignment required only instructional certification rather than elementary certification.

The Commissioner adopted the ALJ's determination with the clarification that Ms. Tavani's superior seniority as a music teacher resulted from the fact that she was asked to teach the additional classes because the principal was aware that she possessed certification as both an elementary teacher and a music teacher. Agreeing with the ALJ that an elementary endorsement was not required to teach the Computers/Technology courses, the Commissioner directed the Board to compensate the petitioner for lost salary and emoluments.

The Board appealed the Commissioner's decision, arguing that elementary certification is required to teach the Computers/Technology course because that course integrates the core curriculum content standards.

Ms. Adler did not appeal the Commissioner's determination that Ms. Tavani had more seniority as a music teacher.

After careful review of the record in this case, we reverse the Commissioner's determination that an elementary endorsement is not required to teach the Computers/Technology courses at issue. In this respect, we stress that the State Board of Education is the ultimate administrative decision-maker and fact-finder in school matters. In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989), certif. den., 121 N.J. 615 (1990); Dore v. Bedminister Tp. Bd. of Ed., 185 N.J. Super. 447, 452 (App. Div. 1982).

In South River Education Association et al. v. Board of Education of the Borough of South River, decided by the State Board November 4, 1987, aff'd by the Appellate Division, Docket #A-1695-87T8, April 16, 1990, the State Board considered the question of whether a district board could impose additional qualifications beyond those set forth in the certification regulations so as to permit it to hire an individual with nine credits in computer classes to teach a computer literacy course rather then select one of the certified elementary teachers on its preferred eligibility list. In deciding that question in the negative, the State Board found that, in the absence of a separate endorsement authorizing the holder to teach computer literacy, elementary certification was the appropriate certification. South River, supra, State Board's decision, slip op. at 8, n.3. Stressing that the State Board was the ultimate decision-maker in controversies arising

under the school laws and that the State Board's expertise was entitled to deference, the Appellate Division affirmed our determination that elementary certification was appropriate. Id., Appellate Division's decision, slip op. at 4-6.

Similarly, examination of the "Computer Curriculum" developed by the district's Computer Curriculum Committee (hereinafter "curriculum guide") settles that elementary certification was appropriate in the case now before us. Exhibit J-4, in evidence. The curriculum guide was intended to be functional in both the computer lab and the classroom, and it was intended to be expanded upon by the use of "individual teaching techniques and resources." Id. The curriculum guide was designed to be a "comprehensive guide of content standards, learning environments, related curriculum areas, and assessments for teachers to use in the computer lab as well as in classrooms from kindergarten to eighth grade." Id. The guide therefore focused on providing problem-solving learning experiences and employing computer assisted instruction, as well as the fundamental characteristics of technological systems.

Related curriculum areas are keyed to each computer content standard, and resource strategies are geared to the substantive curriculum areas such as language arts and social studies. The bibliography also reflects the district's intent to use the computer course as a vehicle for teaching the core curriculum standards. Given the character of the computer course designed by the district, elementary certification was appropriate for this assignment. In so concluding, we stress that the fact that there is no specific endorsement for computer courses does not mean that any instructional certification will qualify an individual to teach such courses in all cases. Rather, individuals must possess certification that is appropriate to the assignment and, as here,

that certification must be determined by careful reference to the particular curriculum that the district has adopted in a given case.

Thus, for the reasons set forth herein, we conclude that the petitioner was not qualified to teach Computers/Technology by virtue of her music certification, and we reverse the decision of the Commissioner on that issue.

Attorney exceptions are noted.[2]

Arnold G. Hyndman abstained.

July 5, 2000

Date of mailing JUL 07 2000

[2] We note that our Legal Committee granted the Board's request for leave to file exceptions to the Committee's report in this matter beyond the ten day period established by N.J.A.C. 6A:4-1.17, and that we have therefore considered the exceptions filed by the Board on June 7, 2000 in determining this case.

351-99R

IN THE MATTER OF THE TENURE HEARING OF ROBERT BARNES DRISCOLL, BOARD OF EDUCATION OF CAPE MAY COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, CAPE MAY COUNTY. : COMMISSIONER OF EDUCATION

DECISION

ROBERT BARNES DRISCOLL,

PETITIONER,

v.

BOARD OF EDUCATION OF THE CAPE MAY COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, CAPE MAY COUNTY,

RESPONDENT.

November 10,1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8613-97 AND
EDU 10241-97 CONSOLIDATED
AGENCY DKT. 319-9/97 AND 402-10/97

ROBERT BARNES DRISCOLL,

Petitioner,

v.

THE BOARD OF EDUCATION OF THE CAPE MAY COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT,

Respondent.

AND

IN THE MATTER OF THE TENURE HEARING OF ROBERT BARNES DRISCOLL, BOARD OF EDUCATION OF THE CAPE MAY COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, CAPE MAY COUNTY.

Ned Rogovoy, Esq., for petitioner/respondent (Waltman, Reilly & Rogovoy, attorneys)

James Waldron, Esq., for respondent/petitioner

Record Closed: September 29, 1999 Decided: September 30, 1999

BEFORE **LILLARD E. LAW,** ALJ:

These matters were transmitted to the Office of Administrative Law on October 17, 1997 and November 26, 1997, respectively, for a hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14-F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of the settlement.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

30 September 1999
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

Oct. 4, 1999
DATE

D.A. Antanaitis /jc
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 5 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

lmh

FILED

SEP 29 11 07 AM '99

STATE OF NEW JERSEY
OFFICE OF
ADMINISTRATIVE LAW

SETTLEMENT AGREEMENT

THIS AGREEMENT made this 10th day of March, 1999, by and between:

THE BOARD OF EDUCATION OF THE
CAPE MAY COUNTY TECHNICAL SCHOOL DISTRICT
188 Crest Haven Road
Cape May Court House, NJ 08210
hereinafter referred to as **"DISTRICT"**

and

ROBERT BARNES DRISCOLL, a/k/a ROBERT B. DRISCOLL
c/o Ned P. Rogovoy, Esquire
WALTMAN, REILLY & ROGOVOY
23 North High Street
P.O. Box 520
Millville, NJ 08332
hereinafter referred to as **"DRISCOLL"**

W I T N E S S E T H:

RECITALS

(A) **DRISCOLL** is a tenured teacher employed by the **DISTRICT**. **DRISCOLL** was suspended, without pay, by the **BOARD OF EDUCATION** on July 16, 1997 as a result of his Indictment by the Cape May County Grand Jury on June 3, 1997. **DRISCOLL** challenged that action by the **DISTRICT** and filed a Petition of Appeal with the Commissioner of Education.

(B) Subsequently, on September 24, 1997, the Superintendent filed Certified Tenure Charges with the Secretary of the Board of Education seeking **DRISCOLL'S** removal for unbecoming conduct as a tenured teacher. Those tenure charges were, as required by law, submitted to the Commissioner of Education.

(C) The Commissioner has elected to refer **DRISCOLL'S** Petition of Appeal, as well as the Certified Tenure Charges, to the Office of Administrative Law for a plenary hearing. Both matters were consolidated by Order dated December 17, 1997. Both matters remain open and unadjudicated as of the date hereof.

(D) The **DISTRICT** and **DRISCOLL** have agreed to a Statement of Procedural History and a Stipulation of Facts, a copy of whi is annexed hereto as Exhibit "A" and incorporated herein by reference as if set forth at length and the same is made a part hereof.

(E) The Statement of Procedural History and the Stipulation of Facts has been, or is about to be, filed with the Office of Administrative Law and will ultimately be submitted by the Office of Administrative Law to the Commissioner of Education of the State of New Jersey.

(F) **DRISCOLL** contends that he is fit, capable and a suitable candidate to resume his tenured teaching duties within the

DISTRICT. The **DISTRICT** contends that because of his Indictment on one (1) charge and Waiver of Indictment and agreement to be charged under a Prosecutor's Accusation with respect to a second charge and his ultimate plea of guilty thereto, establishes unbecoming conduct on the part of a tenured teacher, which is sufficient in nature and context to justify **DRISCOLL'S** dismissal from his position as a tenured teacher.

(G) Both parties acknowledge that **DRISCOLL'S** Indictment and Prosecutor's Accusation charged the violation of a fourth (4th) degree crime. **DRISCOLL'S** ultimate plea of guilty and conviction to a charge does not operate as a matter of law to require a forfeiture of his teaching position. Rather, such conviction requires a plenary hearing before an Administrative Law Judge at the conclusion of which, the Administrative Law Judge issues an initial finding, which is thereupon submitted to the Commissioner of Education, who may affirm, modify or reverse the initial decision of the Administrative Law Judge.

(H) While the facts giving rise to the Indictment and Prosecutor's Accusation, which resulted in **DRISCOLL'S** suspension without pay, are not in dispute, the affect of that conduct and whether or not it constitutes unbecoming conduct, justifying **DRISCOLL'S** removal from his tenured position, is very much in dispute and the subject of considerable controversy between the parties.

(I) In recognition of the expense, delay and uncerta outcome of any litigation, and in further recognition of the serious issues in dispute, the parties have agreed to enter into this Settlement Agreement for the purpose of resolving all issues in dispute and for the purpose of terminating the litigation. In doing so, the parties acknowledge that this Settlement Agreement, together with the Statement of Procedural History and Stipulation of Facts, must be submitted to the Administrative Law Judge for initial review and approval and the Administrative Law Judge must thereafter submit the Settlement Agreement and other documents to the Commissioner of Education for final review and approval. It is further acknowledged that the terms of this settlement cannot be implemented until such time as the terms of the settlement are reviewed and approved by the Commissioner of Education.

NOW, THEREFORE, in consideration of the recitals set forth above and the mutual promises hereinafter set forth and for other good and valuable consideration, and subject to the approval of the Commissioner of Education, the parties mutually agree as follows:

1. **FINDINGS AND DETERMINATIONS:** The Procedural History and Stipulation of Facts attached hereto as Exhibit "A" is incorporated herein by reference and made a part hereof.

2. **TERMS:** The litigation referred to herein is hereby

agreed to be settled upon the following terms and conditions:

(A) **DRISCOLL** shall immediately submit a letter of resignation from his position with the **CAPE MAY COUNTY TECHNICAL SCHOOL DISTRICT**.

(B) **DRISCOLL** will continue to be relieved of all duties in accordance with the terms of this settlement.

(C) The **DISTRICT** will pay the following sums to **DRISCOLL**:

(1) Full salary and benefits retroactive to his date of suspension without pay, but subject to all normal and customary withholding deductions, including deductions for Federal and State taxes, Social Security and pension. That payment will include payments through the end of the 1997-1998 school year. Said payment, less the deductions, will be made in a lump sum as hereinafter provided.

(2) **DRISCOLL** will receive full salary and benefits for the 1998-1999 school year. Payment will be made in a lump sum covering the period September, 1998 to the date when the Commissioner of Education grants approval and the lump sum payment shall be made as hereinafter

provided.

(3) The lump sum payments referred to in (1) and (2) above, less all normal and customary payroll and pension deductions, shall be made to **DRISCOLL** in a lump sum to be payable within THIRTY (30) DAYS of the Commissioner's final decision approving the within settlement.

(4) Commencing on the date of the Commissioner's decision granting approval to the settlement between the parties, **DRISCOLL** will be paid the normal salary for his position, plus benefits, less normal and customary payroll deductions, in accordance with the usual and customary pay periods in effect at the **CAPE MAY COUNTY TECHNICAL SCHOOL DISTRICT**. These payments, together with all retroactive payments to the date of **DRISCOLL'S** suspension without pay, shall cumulatively continue for so long as is required for **DRISCOLL** to accrue TWENTY (20) YEARS of service credit with the Teacher's Pension and Annuity Fund (TPAF) of which **DRISCOLL** is a member. The TWENTY (20) YEAR period shall commence with **DRISCOLL'S** initial employment with the **CAPE MAY COUNTY TECHNICAL SCHOOL DISTRICT**, formerly known as the **CAPE MAY COUNTY VOCATIONAL SCHOOL DISTRICT**. Once

DRISCOLL has obtained TWENTY (20) YEARS of service credit with TPAF, the payments from the **CAPE MAY COUNTY TECHNICAL SCHOOL DISTRICT** to **DRISCOLL** shall cease and terminate. It is the intention of the parties through this settlement that **DRISCOLL** will become eligible to receive a pension through TPAF for TWENTY (20) YEARS of continuous employment with the **CAPE MAY COUNTY TECHNICAL SCHOOL DISTRICT**. The parties contemplate that, in no event, shall the payments extend beyond THREE (3) YEARS from the date of **DRISCOLL'S** suspension on July 16, 1997.

(5) During such time as **DRISCOLL** is receiving payments from the **CAPE MAY COUNTY TECHNICAL SCHOOL DISTRICT**, he shall have no obligation to perform any duties for or on behalf of the **CAPE MAY COUNTY TECHNICAL SCHOOL DISTRICT** and is completely free to seek and hold any other employment of his choice. Income from such outside employment shall not effect the payments to be made to **DRISCOLL** by the **CAPE MAY COUNTY TECHNICAL SCHOOL DISTRICT** as outlined herein.

(6) The term "benefits" as used herein shall mean salary, group health and hospitalization

insurance, including group life insurance a pension contribution by employer, but shall exclude any reimbursement for any courses which teachers are entitled to receive as specified by the Collective Bargaining Agreement between the **DISTRICT** and the teachers.

(D) **DRISCOLL** agrees that he will not, at any future time, attend any school activity or event, nor will he have any involvement, direct or indirect, with any school function or activity, whether the same is conducted on the school property or campus or at any other location.

(E) The **DISTRICT** shall have no obligation to p **DRISCOLL** all or any portion of his counsel fees. In lieu of payment of counsel fees incurred by **DRISCOLL**, the **CAPE MAY COUNTY TECHNICAL SCHOOL DISTRICT** will waive its entitlement to a credit for wages earned by **DRISCOLL** during the period of his suspension.

(F) In addition to other payments specified above, **DRISCOLL** shall also be entitled to be reimbursed for all health and medical insurance expenses which he has incurred since his suspension and pursuant to the COBRA regulations. It is estimated that the amount due from the **DISTRICT** to **DRISCOLL** is **Five Thousand Seven Hundred Thirty Eight Dollars and Fifty Six Cents ($5,738.56)**, as more particularly identified in a statement attached hereto as

Exhibit "B". Prior to making such reimbursement, the **DISTRICT** shall receive reasonable proof that such expenses were actually incurred and paid by **DRISCOLL**. Once verified, said amount shall be payable in a lump sum in such manner and at such time as other lump sum payments specified in this Agreement are made.

(G) The pending appeals before the Commissioner of Education and the Office of Administrative Law shall be dismissed, with prejudice, subject to the approval of the Commissioner of Education.

(H) **DISTRICT** and **DRISCOLL** acknowledge that the controversy between them is an "Employee Personnel Matter" which ordinarily is privileged and not subject to public disclosure without the consent and approval of the employee. The parties further acknowledge that the confidentiality normally associated with such matters has, by necessity, been eroded by reason of **DRISCOLL'S** Indictment and the resulting litigation between the parties pending in the Office of Administrative Law, all of which is a matter of public record. Notwithstanding, however, the parties agree that this matter shall, to the extent permitted by law, remain confidential. Specifically, the **DISTRICT** agrees not to release any information to the public or press except to the extent required by law.

3. **ENTIRE AGREEMENT:** The within Agreement constitutes

the entire and only Agreement between the parties. No amendment of this Agreement shall be effective unless in writing, signed by the parties and executed with the same formality as this Agreement.

4. **CONTINGENCY:** This Settlement Agreement is expressly contingent upon the approval of the Commissioner of Education of the State of New Jersey. The parties acknowledge that counsel for the parties and **DRISCOLL** appeared before the Office of Administrative Law, Administrative Law Judge Lillard Law, on February 4, 1999, at which time the aforesaid terms of settlement were made a part of the record, subject to and conditioned upon express approval and ratification thereof by the **BOARD OF EDUCATION OF THE CAPE MAY COUNTY TECHNICAL SCHOOL DISTRICT** and further subject to the express approval of the Commissioner of Education as herein above indicated.

5. **CONTROLLING LAW:** This Agreement shall be construed in accordance with the law of the State of New Jersey.

6. **ENFORCEMENT:** Upon approval of the within terms by the Commissioner of Education, the terms of the within settlement shall be specifically enforceable by a Court of competent jurisdiction. In the event that it becomes necessary to resort to a Court of competent jurisdiction for the enforcement of all or a portion of this Settlement Agreement, the prevailing party shall be entitled to recover from the other party all reasonable attorney's

fees, expert fees and litigation costs.

IN WITNESS WHEREOF, the parties have caused these presents to be signed the day and year first above indicated.

DATED: March 10, 1999

BOARD OF EDUCATION OF THE CAPE MAY COUNTY TECHNICAL SCHOOL DISTRICT

BY: Carlo Melini
CARLO MELINI, President,
Board of Education

WILBUR J. KISTLER, Superintendent
Cape May County Technical
School District

ATTEST:

Abramo L Vallese
ABRAMO VALLESE, Board Secretary/
Business Administrator
Cape May County Technical
School District

DATED: ~~March~~ April 1, 1999

Robert B Driscoll
ROBERT BARNES DRISCOLL, a/k/a/
Robert B. Driscoll

WITNESS:

Ned P Rogovoy
NED P. ROGOVOY, ESQUIRE
Witness to Signature of
Robert B. Driscoll Only

APPROVED AS TO FORM AND LEGALITY:

James A Waldron
JAMES A. WALDRON, ESQUIRE
Attorney for Board of Education of
the Cape May County Technical
School District

APPROVAL OF THE COMMISSIONER OF EDUCATION

I have reviewed the foregoing Agreement, together with the Procedural History and Stipulation of Facts. I do hereby approve the foregoing Settlement Agreement and I do further authorize its implementation.

DATED: _____, 1999

_____
COMMISSIONER OF EDUCATION
STATE OF NEW JERSEY

VO-TECH#1
B:A-DRISCOLL.SET
JAW/cac
3/1/99
Draft#2

FILED

SEP 29 11 47 AM '99

STATE OF NEW JERSEY

JAMES A. WALDRON, ESQUIRE
Attorney At Law
P.O. Box 803
Cape May Court House, NJ 08210
(609) 368-9008
Attorney for Cape May County Technical School District

BEFORE THE COMMISSIONER
OF EDUCATION OF NEW JERSEY

PROCEDURAL HISTORY AND STIPULATION OF FACTS

ROBERT BARNES DRISCOLL,	:	
Petitioner,	:	
vs.	:	OAL DOCKET NO. EDU 8613-97 AGENCY DOCKET NO. 319-9/97
BOARD OF EDUCATION OF THE CAPE MAY COUNTY VOCATIONAL TECHNICAL CENTER, CAPE MAY COUNTY,	:	
Respondent.	:	

AND

IN THE MATTER OF THE TENURE HEARING OF ROBERT BARNES DRISCOLL	:	OAL DOCKET NO. EDU 10241-97 AGENCY DOCKET NO. 402-10/97

MATTERS CONSOLIDATED BY ORDER DATED 12/18/97

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PROCEDURAL HISTORY

In these consolidated matters, Robert Barnes Driscoll will be referred to as "Driscoll" and the Cape May County Technical School District will be referred to as "District".

1. On March 28, 1997, a Criminal Complaint was filed against Driscoll in the Upper Township Municipal Court, Cape May County, for criminal trespass (Peeping Tom). The victim/complainant in that matter was Robert Jones.

2. On May 1, 1997, a second Criminal Complaint was filed against Driscoll in the same Court for a series of events alleged to have occurred between January 1, 1997 through March 27, 199..

3. On or about April 3, 1997, the District became aware of the first charges and the District then placed Driscoll on a paid leave of absence until the end of the 1996-1997 school year. While Driscoll was relieved of his classroom assignments, he was given a special assignment by the Superintendent and his salary and benefits were continued without interruption.

4. On or about June 3, 1997, Driscoll was indicted on charges arising out of his arrest on March 28, 1997.

5. On July 16, 1997, the Board of Education voted to

3/n

suspend Driscoll, without pay, based upon his Indictment on June 3, 1997, under Indictment No. 97-06-00302-I; Docket No. 97000314.

6. On July 17, 1997, Driscoll waived Indictment on a second charge and requested to proceed by way of Prosecutor's Accusation for the charges allegedly occurring between January 1, 1997 and March 27, 1997 involving criminal trespass, a fourth degree crime, in violation of N.J.S.A. 2C:18-3c. The victims in the accusation were Robert and Susan Rimpato. The Prosecutor's Accusation No. 97-07-00441-A; Docket No. 97000441.

7. On or about September 8, 1997, Driscoll filed a Petition of Appeal with the Commissioner of Education seeking reinstatement of his salary on the grounds that even if convicted, the conviction would be for a fourth (4th) degree crime and would not operate as an automatic forfeiture of his teaching position. This matter was assigned OAL Docket No. EDU 8613-97, Agency Docket No. 319-9/97. This action is referred to as "Driscoll I".

8. On September 24, 1997, the District filed an Answer to Driscoll I.

9. Also on September 24, 1997, the Superintendent filed Certified Tenure Charges with the Secretary of the Board of Education, seeking Driscoll's removal from his tenured teaching position for conduct unbecoming a tenured teacher. Driscoll was

notified of the filing of said charges and was afforded an opportunity to provide any written response for consideration by the Board of Education. Driscoll did not file any such response.

10. On October 15, 1997, the Complaint by the Superintendent and the Certified Tenure Charges were considered by the Board of Education, at which time the Board found probable cause for the charges and further found that the charges merited Driscoll's termination. The Board suspended Driscoll again, without pay, and certified the charges to the Commissioner of Education, where they are now pending under OAL Docket No. EDU 10241-97 and Agency Docket No. 402-10/97. This matter is referred to as "Driscoll II".

11. On or about November 6, 1997, Driscoll, by and through his attorney, Ned P. Rogovoy, Esquire, filed an Answer to the tenure charges (Driscoll II).

12. By written Order of December 18, 1997, Administrative Law Judge Lillard E. Law consolidated Driscoll I and Driscoll II with the consent of both parties.

13. The matter was originally scheduled for trial on September 3, 4 and 11, 1998, but was adjourned with the consent of both parties in order to afford the District the opportunity to submit the psychological reports submitted by Driscoll to an

independent psychologist for review. The trial was then rescheduled for February 1, 2, 4 and 5, 1999.

14. On January 29, 1999, both parties notified the Administrative Law Judge that a settlement appeared imminent. The Court, at the request of Driscoll, excused the parties from attending on February 1, 2, and 4, 1999, but directed the parties to appear on February 5, 1999, at which time the parties placed on the record a Settlement Agreement intending the same to be ratified, confirmed and approved by the Board of Education at its meeting on February 17, 1999 and subject to the review and approval of the Commissioner of Education of New Jersey.

15. At a meeting of the Board of Education on February 17, 1999, the Board, in closed session, reviewed the Settlement Agreement and approved same. Thereupon the Board reconvened in open session and voted to authorize the appropriate officials of the District to sign the Settlement Agreement. The specific details were not made public pending review and approval by the Administrative Law Judge and, ultimately, by the Commissioner of Education.

STIPULATION OF FACTS

The parties hereby stipulate to the following facts:

1. Robert Barnes Driscoll was born on September 16, 1952 and is currently forty six (46) years of age. He is married and has two (2) children. During the pendency of this action (Driscoll I and Driscoll II), he has been divorced.

2. Driscoll began his employment with the District on September 1, 1980. He remained continuously employed from the date of hire until his suspension on July 16, 1997, as a result of his Indictment by the Cape May County Grand Jury.

3. The events set forth in the Procedural History are hereby incorporated herein by this reference.

4. Specifically, the Indictment which was filed on June 3, 1997 alleged that Driscoll committed the offense of criminal trespass as a "Peeping Tom". The allegation is that Driscoll looked in the window of his neighbors, Mr. and Mrs. Robert Jones. The unlawful event is alleged to have occurred on March 28, 1997. The Indictment alleged a violation of N.J.S.A. 2C:18-3c,

fourth degree crime. Driscoll made a written statement to the New Jersey State Police admitting his involvement in this occurrence.

5. Similarly, on July 17, 1997, Driscoll executed a Waiver of Indictment and agreed to stand trial on a Prosecutor's Accusation, which alleged a series of acts occurring between January 1, 1997 and March 27, 1997, in which Driscoll committed an act of criminal trespass by entering onto the property of Robert and Susan Rimpato, with the intent to peer into the windows and invade the privacy of Robert and Susan Rimpato, all in violation of N.J.S.A. 2C:18-3c, a fourth degree crime.

6. Following the filing of the Indictment and the Accusation, Driscoll sought to be admitted into the Pre-Trial Intervention Program. Driscoll's entry into that program was denied. Driscoll thereafter filed a Motion with the Superior Court of New Jersey seeking to overturn the decision denying him entry into the program and seeking from the Court an Order admitting him to the P.T.I. Program. The Motion was considered by the Honorable Carmen Alvarez, J.S.C., and Driscoll's Motion was denied.

7. A Pre-Trial Conference was scheduled for May 7, 1998 and was thereafter adjourned to June 18, 1998, at which time Driscoll entered a plea of guilty.

8. On July 17, 1998, Driscoll was sentenced to probation

with conditions. Among the conditions imposed were that Dris ll continue to undergo psychological treatment and counselling.

9. Driscoll is presently appealing through separate counsel the Court's denial of his entry into the Pre-Trial Intervention Program. That appeal is presently pending before the New Jersey Superior Court, Appellate Division.

10. On August 25, 1998, counsel for Driscoll, Mr. Rogovoy, supplied to the Board's attorney, Mr. Waldron, a Summary Report, dated November 20, 1997 from Philip Witt, PhD., a Diplomate in Forensic Psychology, together with a copy of Dr. Witt's Curriculum Vitae. The report was addressed to Mr. Rogovoy and referred to a psychological evaluation of Robert Driscoll perfor i by Dr. Witt on April 24, 1997. Dr. Witt offered the opinion that after extensive testing, risk assessment and interview, it was his opinion, expressed with a reasonable degree of professional certainty, that Driscoll presented no risk to his students and, therefore, would require no restrictions in this regard. Dr. Witt further observed that Driscoll had been a teacher without incident in the District for over seventeen (17) years and Dr. Witt observed nothing that would lead him (Witt) to believe that this would change.

11. At the request of Mr. Waldron, counsel for the Board, Mr. Rogovoy did, on September 17, 1998, submit the complete

psychological report prepared by Dr. Philip Witt on April 24, 1997. That psychological report acknowledged that Driscoll was presently under criminal charges for trespassing.

12. Dr. Witt opined that Driscoll was well within the limits of risk that are normally acceptable for out-patient psychotherapy. Dr. Witt also made specific recommendations, which were set forth in his report.

13. Also, on September 17, 1998, Mr. Rogovoy submitted a psychological report on Driscoll, dated June 23, 1997, and prepared by Kevin R. Dougherty, PhD., New Jersey Licensed Psychologist. Dr. Dougherty confirmed the diagnosis as stated by Dr. Witt and confirmed that he was providing individual psychotherapy treatments to Driscoll. Dr. Dougherty further confirmed in his report that Driscoll has had group therapy and psychiatric consultation and has regularly attended other sessions and meetings recommended by Dr. Witt and/or Dr. Dougherty. Dr. Dougherty further indicated that Driscoll was making progress toward four (4) of the five (5) treatment recommendations made by Dr. Witt. Driscoll had received a referral to address the remaining recommendation of Dr. Witt.

14. Dr. Dougherty also offered the opinion that Driscoll was low risk to the students who might come in contact with him.

15. The District, with the express consent and approval

of Driscoll and his attorney, Mr. Rogovoy, submitted the psychological report of Dr. Witt and the psychological report of Dr. Dougherty to an independent expert retained by the District, specifically, Timothy P. Foley, PhD., Director of Clinical and Forensic Services at the Joseph J. Peters Institute. Dr. Foley found that the tests administered by Dr. Witt were adequate and Dr. Foley did not recommend any further testing.

16. The District did request that Driscoll submit to an independent medical and/or psychological evaluation to be conducted by a psychiatrist or psychologist designated by the District. Driscoll refused that request, relying on the provisions of N.J.S.A. 18A:16-3, which provides him with the option of choosing, in this case the psychiatrist or psychologist, to conduct the examination. Driscoll, in reliance upon said Statute, chose not to submit to any further testing, but to rely on the evaluations prepared by Dr. Witt and Dr. Dougherty.

17. Driscoll contends that he is fit to resume his teaching duties and poses no threat to his students or any other students in the District. The Board rejects that contention, asserting that even if Driscoll's conduct is controllable, that, nonetheless, his Indictment and guilty plea to a charge of criminal trespass brought about as a result of his deviant psychological condition, conclusively amounts to conduct which is unbecoming of a tenured teacher and would merit his termination.

18. In light of the diametrically opposed positions of

the parties in this action, Driscoll and the District have entered into a Settlement Agreement, a copy of which is being submitted to the Administrative Law Judge contemporaneously with the Statement of Procedural History and the Stipulation of Facts.

19. The complete psychological reports of both Dr. Witt and Dr. Dougherty concerning Driscoll will be made available to the Commissioner upon his request should he deem it necessary.

DATED: June 18, 1999

WALTMAN, REILLY & ROGOVOY

BY: _____
NED P. ROGOVOY, ESQUIRE
Attorney for Robert Barnes Driscoll

LAW OFFICES OF JAMES A. WALDRON

BY: _____
JAMES A. WALDRON, ESQUIRE
Attorney for Cape May County Technical School District and the Board of Education of Said District

VO-TECH#1.
B:DRISCOLL.FACTS
JAW/cac
6/18/99
Draft#4

OAL DKT. NOS. EDU 8613-97 and EDU 10241-97 (CONSOLIDATED)
AGENCY DKT. NOS. 319-9/97 and 402-10/97

IN THE MATTER OF THE TENURE HEARING OF ROBERT BARNES DRISCOLL, BOARD OF EDUCATION OF CAPE MAY COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, CAPE MAY COUNTY.	:	COMMISSIONER OF EDUCATION
		DECISION
ROBERT BARNES DRISCOLL, PETITIONER, v. BOARD OF EDUCATION OF THE CAPE MAY COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, CAPE MAY COUNTY, RESPONDENT.	:	

The record, Settlement Agreement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, in this consolidated matter have been reviewed.

Upon careful and independent review of the record, the Commissioner cannot be satisfied that the proposed settlement meets the standards for review of settlements in tenure matters set forth in *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. It is well established that, having once taken up the burden of tenure charges, the Board may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges need no longer be pursued or why it is now in the public interest not to pursue them. *In the Matter of the Tenure Hearing of Kenneth Smith,*

School District of Orange, Essex County, decided by the Commissioner March 22, 1982, decision on remand June 16, 1983, *aff'd with modification* by the State Board of Education November 2, 1983, *aff'd* Superior Court January 30, 1986.

While the Commissioner does not preclude the possibility of settlement in this consolidated matter, he stresses that in order for him to meet his own obligation to the schools and children of New Jersey, he must be assured that any settlement is consistent with appropriate standards for setting aside tenure matters as expressed in *Cardonick, supra.* Neither the Initial Decision nor the Settlement Agreement sufficiently explains how the settlement in fact meets the Cardonick standards *in light of the specific tenure charges filed with the Commissioner against respondent.*

As emphasized by the Commissioner in *In the Matter of the Tenure Hearing of Corey Younger, State-operated School District of the City of Jersey City, Hudson County,* decided September 7, 1999 and *In the Matter of the Tenure Hearing of Elmena Jean, State-operated School District of the City of Newark, Essex County*, decided October 4, 1999, the mere fact that one of the terms of a proposed settlement in a tenure hearing matter calls for the teaching staff member's resignation does not in and of itself assure that the *Cardonick* standards have been met because concern for the public interest extends beyond the boundaries of the particular district certifying the tenure charges. This is particularly true in light of the fact that even after the Board in this matter approved the settlement terms in February 1999, it continues to reject respondent's contention that "he is fit to resume his teaching duties and poses no threat to his students or any other students in the District." See Procedural History and Stipulation of Facts, dated June 18, 1999, Number 17, at p. 10.

352-99L

State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

CHRISTINE TODD WHITMAN
Governor

DAVID C. HESPE
Commissioner

November 10, 1999

Alan S. Porwich, Esq.
Feintuch, Porwich and Feintuch
26 Journal Square, Suite 1003
Jersey City, NJ 07306

Charlotte Kitler, Esq.
General Counsel
State-Operated School District of Jersey City
346 Claremont Avenue
Jersey City, NJ 07305

Dear Counsel:

On July 16, 1999, petitioner was requested to submit to the Office of Controversies and Disputes within ten days, a letter brief or memorandum of law explicating why the matter entitled *Tracy Pettiford-Bugg v. State-Operated School District of the City of Jersey City*, Agency Dkt. No. 169-6/99, should not be dismissed as moot in view of respondent's affirmative defense that the relief petitioner seeks has already been granted, *i.e.*, restoration of the sick days for her absences from work on April 8, 1999 to April 16, 1999.

On August 5, 1999, by both regular and certified mail, petitioner was again requested to submit this information within ten days because, as of that date, we had not received any submissions by petitioner. Petitioner was also informed that if no submission was received within the specified time line, respondent's affirmative defense would be deemed admitted and the Petition of Appeal would be dismissed pursuant to the discretionary authority granted me by *N.J.A.C.* 6:24-1.9. Subsequently, petitioner requested that the matter be held in abeyance pending petitioner's verification of restoration of her sick days. This request was granted until September 24, 1999.

Given that petitioner has not as of this date submitted the aforementioned required information, the State-operated School District of Jersey City's affirmative defense that the matter is moot is deemed to be admitted by petitioner. Consequently, the Petition of Appeal is hereby dismissed in accordance with the authority granted me pursuant to *N.J.A.C.* 6:24-1.9.*

Sincerely,

David C. Hespe
Commissioner

DCH/DNA/MK

c: County Superintendent
Board Secretary

* This decision, as the Commissioner's final determination in this matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

353-99L

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRISTINE TODD WHITMAN
Governor

DAVID C. HESPE
Commissioner

November 10, 1999

Alan S. Porwich, Esq.
Feintuch, Porwich and Feintuch
26 Journal Square, Suite 1003
Jersey City, NJ 07306

Charlotte Kitler, Esq.
General Counsel
State-operated School District of Jersey City
346 Claremont Avenue
Jersey City, NJ 07305

Dear Counsel:

On August 9, 1999, petitioner was requested to submit to the Office of Controversies and Disputes within ten days, a letter brief or memorandum of law explicating why the matter entitled *Deborah Zdyb v. State-operated School District of the City of Jersey City*, Agency Dkt. No. 178-7/99, should not be dismissed as moot in view of respondent's affirmative defense that the relief petitioner seeks has already been granted, *i.e.*, restoration of the sick days for her absences from work on March 5, 1999 to March 26, 1999. On August 20, 1999, petitioner requested that the matter be held in abeyance pending petitioner's verification of restoration of her sick days. This request was granted until September 24, 1999.

No responsive papers had been received from petitioner as of October 12, 1999, consequently, petitioner was notified, by both regular and certified mail, to submit the required information within ten days. She was also informed that if no submission was received within the specified time line, respondent's affirmative defense would be deemed admitted and the Petition of Appeal would be dismissed pursuant to the discretionary authority granted me by *N.J.A.C.* 6:24-1.9.

In the absence of any submissions being received by petitioner as of October 12, 1999, petitioner was again notified by regular and certified mail that if a response to respondent's affirmative defense of mootness, or a request for withdrawal, was not received in ten days, the matter would be dismissed.

Given that petitioner has not as of this date submitted the aforementioned response, the State-Operated School District of Jersey City's affirmative defense that the matter is moot is deemed to be admitted by petitioners. Consequently, the Petition of Appeal is hereby dismissed in accordance with the authority granted me pursuant to *N.J.A.C.* 6:24-1.9.*

Sincerely,

David C. Hespe
Commissioner

DCH/DNA/MK
c: County Superintendent
Board Secretary

* This decision, as the Commissioner's final determination in this matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

354-99L

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRISTINE TODD WHITMAN
Governor

DAVID C. HESPE
Commissioner

November 10, 1999

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Berlin, New Jersey 08009

Emmett E. Primas, Jr., Esq.
20 Centre Street
Woodbury, NJ 08096

Dear Counsel:

Upon careful review of the Petition for Declaratory Judgment and Answer filed in the matter entitled *Dr. Michael E. Schreiner* v. *Board of Education of the Township of Berlin, et al.,* Agency Dkt. No. 312-10/99, I decline to consider the matter as one for declaratory judgment, pursuant to my authority under *N.J.A.C.* 6:24-2.1. However, this matter will be considered a contested case pursuant to *N.J.A.C.* 6:24-1.2, and is being transmitted to the Office of Administrative Law for further proceedings on that basis.

Sincerely,

David C. Hespe
Commissioner

DCH/DNA/MK
c: Board Secretaries
County Superintendent

ATTORNEY LIST

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Trenton, New Jersey 08618
Attorney for: **Michael E. Schreiner, Ed. D**

355-99

BOARD OF EDUCATION OF THE BOROUGH OF WEST PATERSON, PASSAIC COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
RAYMOND DE PALMA,	:	
RESPONDENT.	:	

November 17, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3502-98
AGENCY DKT. NO. 61-3/98

BOARD OF EDUCATION OF THE BOROUGH OF WEST PATERSON, PASSAIC COUNTY,
Petitioner,
v.
RAYMOND DEPALMA,
Respondent

Anthony P. Sciarrillo, Esq., for petitioner
(Lindabury, McCormick & Estabrook, attorneys)

George M. Holland, Esq. for respondent
(Williams, Caliri, Miller & Otley, attorneys)

Record Closed: August 12, 1999 Decided: October 6, 1999

BEFORE **IRENE JONES**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 9, 1999, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

Hearing dates were scheduled for February 16 & 17, 1999, but were adjourned because the parties had reached a settlement. A signed copy of the Stipulation of Dismissal was filed in this office on August 12, 1999 and is attached hereto.

I have reviewed the record and the terms of settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidence by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

10/6/99
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

10/8/99
DATE

Deborah Gattenella
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 12 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

WILLIAMS, CALIRI, MILLER & OTLEY
A Professional Corporation
1428 Route 23
Wayne, New Jersey 07474-0995
(973) 694-0800
Attorneys for Respondent/Counterclaimant
Raymond DePalma

WEST PATERSON BOARD OF EDUCATION, PASSAIC COUNTY,	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
Petitioner,	
v.	Agency Docket No. 61-3/98
RAYMOND DEPALMA,	STIPULATION OF DISMISSAL
Respondent.	

WHEREAS, Raymond DePalma (hereafter "DePalma") disputes the allegations contained in the above entitled Petition filed by the West Paterson Board of Education (hereafter "District"), and

WHEREAS, the District disputes the allegations contained in the counter-claim of DePalma; and

WHEREAS, the District and DePalma, though their respective counsel, have discussed the allegations and determined not to pursue those allegations; and

WHEREAS, the parties have amicably resolved all issues raised in this litigation and believe that it is consistent with public

policy and in their respective best interests mutually to dismiss their claims; and

WHEREAS, the parties acknowledge that each has had ample opportunity to seek independent legal counsel, financial or other advice regarding the dismissal of all claims herein; and that each is entering into this Dismissal freely and voluntarily; and

WHEREAS, the undersigned representatives of the parties hereby acknowledge that they have been duly authorized to sign this Dismissal and bind the parties to its terms,

IT IS HEREBY stipulated and agreed that the above entitled action be and it is hereby dismissed with prejudice and without costs against either party.

Dated: 8/5/99

WILLIAMS, CALIRI, MILLER
& OTLEY
Attorneys for Respondent
Raymond DePalma

By: _____
Robert H. Greenwood

Dated: 8/9/99

LINDABURY, McCORMICK
& ESTABROOK
Attorneys for Petitioner
West Paterson Board of
Education

By: _____
Anthony P. Sciarrillo

OAL DKT. NO. 3502-98
AGENCY DKT. NO. 61-3/98

BOARD OF EDUCATION OF THE BOROUGH OF WEST PATERSON, PASSAIC COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
RAYMOND DE PALMA,	:	
RESPONDENT.	:	

The record of this matter and an executed Stipulation of Dismissal have been reviewed. However, in that no settlement terms were included in the document signed by the parties so as to permit the Commissioner's review under *N.J.A.C.* 1:1-19.1, this matter shall, instead, be considered a withdrawal, pursuant to *N.J.A.C.* 1:1-19.2.

The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c approves the withdrawal. Consequently, this matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.*

IT IS SO ORDERED.

Douglas B. Fry

ASSISTANT COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

November 17, 1999
Date of Mailing, November 17,1999

356-99

TRICIA MEZZACAPPA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
THE SAMUEL DeWITT PROCTOR ACADEMY CHARTER SCHOOL, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner contended that her termination from employment as Business Manager/Board Secretary by respondent charter school was arbitrary, capricious and unreasonable. Petitioner sought compensation for the balance of salary due under her contract.

Based upon the evidence and an assessment of the witnesses, the ALJ found that the Board did not act arbitrarily or unreasonably when it decided that it was best to terminate this employee, who had left work without permission twice and, on occasion, was uncooperative and resistant to direction. The ALJ concluded that petitioner failed to establish that the Board acted in an arbitrary fashion.

Commissioner found that petitioner failed to establish that the Board's action terminating her from her position was in violation of her constitutional or statutory rights and, therefore, such action was not to be disturbed by the Commissioner. Petition was dismissed.

November 15, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 00792-99S
AGENCY DKT. NO. 27-2/99

TRICIA MEZZACAPPA,
Petitioner,
v.
THE SAMUEL DeWITT PROCTOR ACADEMY CHARTER SCHOOL,
Respondent.

Paul E. Griggs, Esq., for petitioner

Thomas W. Sumners, Jr., Esq. for respondent (Sumners, Council, George and Dortch, attorneys)

Record Closed: July 29, 1999 Decided: September 28, 1999

BEFORE **JEFF S. MASIN**, ALJ:

Tricia Mezzacappa was hired on or about September 21, 1998, by the respondent Samuel DeWitt Proctor Academy Charter School ("Proctor") to serve as its Business Manager/Board Secretary. Proctor is a small residential charter school located on the grounds of the Katzenbach School for the Deaf. Ms. Mezzacappa was terminated by the Board of Trustees ("Board") on November 11, 1998. She filed a Verified Petition with the Commissioner of Education ("Commissioner") on February 16, 1999, seeking to overturn the Board's action. The respondent filed an answer on February 19, 1999. The Commissioner declared the matter a contested case and transferred it on March 5, 1999, to the Office of Administrative Law ("OAL") pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A prehearing conference was held on April 26, 1999, and a prehearing order was issued on April 27, 1999. A hearing was conducted before this judge on June 29 and July 29, 1999. The record closed on July 29. Due to a

substantial number of hearings and decisions, the ALJ requested an extension of the time for filing the initial decision and an extension was granted by the Director of the OAL and the Commissioner.

Ms. Mezzacappa, who holds a B.S. in Accounting from Fordham University and now holds a Master of Arts from Rider University, has previously worked as a school auditor and then as a school business administrator. She testified that she responded to a newspaper advertisement for the position of Business Administrator/Board Secretary which the Board was seeking to fill. She was interviewed by Dr. David Neil Thomas, who is now retired, but who served as the interim Head of School for Proctor from some time in the summer of 1998 until early 1999. Dr. Thomas asked her about her prior experience and discussed "in depth" how the charter school differed from a regular public school. She was later interviewed by Thomas and a member of the Board. She queried them as to whether there were differences in standards and in law between the requirements pertaining to the charter school and a regular school. She was told that Proctor was going to operate "identical" as to core academic requirements and as to business practices.

Ms. Mezzacappa described several situations with which she was confronted which caused concern for her and which lead to confrontations with Dr. Thomas, ultimately leading to an event in early November 1998, which resulted in the Board terminating her. She explained the "GAAP," which stands for "Generally Accepted Accounting Principles," which is the legally required double entry bookkeeping method for public schools. She understood that the charter school was also required to use this method. She also understood that petty cash was to be managed in the same fashion as in a public school, and that other requirements regarding bidding, purchasing, audit requirements and standards also applied.

When Mezzacappa began working at Proctor on September 21, she found that the previous woman who had agreed to serve as a business administrator had taken the records to her home and had done very little work with them. Mezzacappa set up an office with a donated computer and after finally receiving these records about one week after she started, she began to try to "catch up" on the necessary record keeping, reconciliations, etc., working 60-70 hours a week to do so. She shared her concerns with Thomas about the work in extensive contacts each day. The school, which had been chartered in 1997, had never had a county approved budget and

had not been on the GAAP accounting system. Instead, the budget was set up on a Microsoft Excel sheet and had to be converted to the GAAP format. As she was told, her job was to handle whatever was needed, whether in regard to insurance, transportation, building and grounds, payroll, accounts payable, purchasing, etc. There was no written job description for her position. In essence, she "did what Dr. Thomas asked."

Ms. Mezzacappa explained that she questioned the procedure for paying bills. She found that the purchasing procedure "worked in reverse," by which she meant that Thomas would verbally authorize staff to purchase items and she then would receive requests for cash to reimburse for these purchases, without any vouchers indicating that the services were in fact rendered. In her experience and understanding, such requisitions were to be received and authorized by the Business Manager and the Superintendent or an authorized Board member. However, this system was not in place at Proctor. She questioned Dr. Thomas about this and he directed that she "cut the checks right away" for a number of items.

The school had a petty cash account which had started with about $50, which in her view was a reasonable amount for such an account. Normally, in administering such an account, receipts are given to her and she would reimburse for expenditures up to a set dollar amount. However, at Proctor no such policy was in place. She received a written directive to keep $2,000 in the petty cash account so that student activities could be paid for through the account. She believed that the proper procedure was to budget for these activities and that their costs should be handled as an expenditure. A petty cash account does not require that there be a voucher for each expense and approval for each as do other accounts in the budget. While she had problems with this directive, she did not verbalize her concerns to anyone at the time.

All of the school's employees were under contract and were salaried, except for the cook and the custodian. These persons should have submitted time sheets and she requested that they do so. Thomas okayed this request for the cook, but not for the custodian, who worked only at night and was not on the premises to submit the time sheets when Ms. Mezzacappa was there. Thomas himself was being paid on a daily rate as an independent contractor. He directed Mezzacappa to provide him with a check for $8,000 without any voucher, and she did so without

challenge, because she read his agreement with the Board and determined that the request, based upon the agreed upon daily rate, coincided with his contract.

Ms. Mezzacappa related the events of November 4, 1998, which led to her being suspended with pay for insubordination and ultimately terminated from employment. She had attended a School Boards convention in Atlantic City with permission. On Tuesday, November 4, she returned to work. At that time all of her time was being directed to the task of reconciling the accounts and finding an error therein. The State Department of Education had notified the school that it was to lose $100,000 for the next school year. She was told to figure out the way in which this happened. The school was funded about 50% by private donations and the loss of so much State money would have been detrimental to the existence of the school. She arrived at school at about 8:30 A.M. and Dr. Thomas followed her in. Thomas had spoken to her before she left for Atlantic City and told her that he was going to prepare a different budget structure to be reported to the Board at each meeting, which would supersede the GAAP budget, which was only to be used for payroll and accounts payable purposes. As they arrived on November 4, he handed her a budget which was separate from the GAAP Budget he had prepared. He told her that the GAAP document was not to be used or seen again, that this other budget would be the formal budget. He told her that her job was to put the numbers from the GAAP documents into this other budget, which was on a Microsoft document not similar to the GAAP or anything which she had previously seen. She resisted moving the numbers from the GAAP to the other budget, and was explaining the need to make the two budgets materially the same. While she said this, Dr. Thomas, who was to her left at her desk as she sat at the desk with her coat and keys, "lunged across" at her and slammed his hands on the desk in front of her. They were "face to face, very close, less than an inch away." He said, "This is what I intend to do and you had better be supportive of it." She moved to another area and he said that she would be replaced if she would not comply. She was upset and went to the ladies room and when she returned to her office to get her purse, she found the room locked and she unlocked it.

Ms. Mezzacappa spoke to Jocelyn Bines, a residential advisor regarding Thomas' conduct. According to Mezzacappa, Bines had previously complained about his behavior with her and with others and could commiserate with Mezzacappa, who herself had observed Thomas act unprofessionally in the work environment. He had told Mezzacappa that she was not to pay

the cook for two weeks following an outburst in the hall outside his office which resulted from a dispute over the behavior of the cook's child, who was a student at the school. Thomas had yelled at the cook, telling her that he was suspending her and would get a police officer to remove her if she did not take her daughter off the school premises. He had also badgered his secretary in Mezzacappa's presence.

According to the petitioner, she did not refuse to cooperate with Dr. Thomas or refuse to do as he wanted. However, after the incident in her office, she left the building and sat in her car and then went home and placed phone calls to members of the Board, who were mainly located in New York City. She first spoke to Juanita Joyner, who indicated not to worry, Mezzacappa was to stay home until further notice and Joyner would handle the situation. Other Board members were shocked to hear what Mezzacappa told them about Thomas.

On November 5, Mezzacappa was sent a letter written over the signature of Dr. Thomas, which indicated that he agreed with what he said was her assessment, supposedly expressed when she left the school the previous day, that, in what he quoted as her words, "This is not working out." Thomas requested that she submit her resignation, which he "would be pleased to accept" and if she did so, she would be paid through the end of the week. He added that "If you elect not to resign I will recommend your dismissal and suspend you effective yesterday." He asked her to advise how she wished to proceed. She did not submit a letter of resignation and on November 6, Thomas issued a letter which notified her of her suspension with pay, effective immediately and until the Board acted upon his recommendation to dismiss her. He identified the reason for his action as her "continued insubordinate behavior on several occasions," specifying October 21, regarding a matter regarding dental insurance issues, and the November 4 incident regarding the budget. He noted that following a discussion with her regarding the dental matter on October 21, she had been directed by him to check out a dental plan and she had told him that she "did not have to put up with this and proceeded to leave the premises. You did not report back to work any time that day and you called in sick on Thursday and Friday." He asserted that after her return to work she neither explained her insubordinate behavior or carried out his directive.

Thomas also detailed his version of the November 4 events, noting that after Mezzacappa left the school that day following his statement to her that if she left she would be docked that

day's pay, she "made no effort to contact us until Thursday afternoon" when she called the school but "refused to talk to me" when he asked his secretary to let him speak to her and "you refused to give us a telephone number where we could contact you (the telephone number you have on file has been disconnected). You hung up and I have not heard from you again."

Mezzacappa wrote to Thomas on November 7. In the letter she expressed her position that he had acted toward her in a manner which was unacceptable in the workplace, conduct which she testified that she would have reported in any event even if she had not been terminated because of the "way he came at me." In testimony, she explained that the discussion regarding the dental plan had arisen when a residential advisor had started an in-house dental plan "in jest." There was some mention of Delta Dental ("Delta"), a dental plan with which Mezzacappa had some familiarity from her previous experience as a business administrator. She explained that Delta required a minimum number of enrollees and 100% participation. While there may have been some other jesting comment about the fact that she was correct in her understanding of Delta's requirements, she recalled no "direction" to her to do something regarding a dental plan or any refusal to do so.

After she learned that she had been terminated, Ms. Mezzacappa stopped in at Proctor to hand in her keys and to ask for her job back. She had a mortgage commitment pending and needed the employment. She spoke with Dr. Thomas, who told her that the Board would rescind the termination in exchange for a letter of resignation. She denied that she admitted that she had made mistakes or apologized.

Mezzacappa complained that she did not have an opportunity to address the Board before they decided to terminate her. That decision was discussed at an open meeting for which she opted, but she did not attend. As for her not returning to work on the days following November 4 and prior to receiving the letter of termination from the Board, she had been told by Board members "not to worry" and assumed that things would be taken care of. In addition, she had been told that the Board was looking for Dr. Thomas' immediate replacement.

The witness denied that there were any conversations with Thomas prior to November 4 regarding his need for the alternative budget as a means of presenting to the Board a more simple

presentation of the budget than that offered by the GAAP. He had simply told her that he was going to prepare a separate budget. In her experience she had never before been asked to prepare a second set of records. She was confused about what she was being asked to do. She understood the GAAP to be the budget that was to be reported to the Board.

Ms. Mezzacappa recalled that she had been asked by Thomas to prepare a check for a David Brower, a technical coordinator for the Hopewell Valley Regional School District, when there was no voucher for the work he supposedly had performed. Thomas told her to cut the check and he would sign it, saying that it was an incentive to get Brower to come to Proctor to do some computer work.

Dr. Thomas, who is a graduate of West Point and holds a Masters and Ph.D. from Harvard, is now retired. He testified to his long service in education, including having served as a superintendent of schools in San Mateo and later in Santa Barbara, California, and as a deputy superintendent in Montgomery County, Maryland and in Loudon County, Virginia, before serving as superintendent in Hopewell Valley School District in New Jersey for five years before retiring. He was asked to help out the fledgling Proctor Academy in 1998. He determined that he needed a business manager for the school. The budget submitted for the school in August 1998 was $250,000 out of balance. He suggested methods to bring it into balance.

Thomas felt that the school's first Head Master had been "overwhelmed" and that it was important to have a second full-time person at the school. He had $40,000 to hire a business manager and after he advertised for applicants, he found that only Mezzacappa would work for that amount. He determined that she had an "excellent" knowledge of school business procedures and a very good background. He wanted her to assume full responsibility for the custodian, to call his house and make arrangements for his daily service and transportation. He wanted her to know the details of accounting rules, paperwork and communications with the state. She did not object to her job responsibilities when he hired her.

Within the first few weeks of her employment, two concerns arose. She had difficulty dealing with people. When the payroll checks were issued people would come in to the office to sign for the checks, and he wanted Mezzacappa, rather than either he or the secretary, to hand

these out. However, there were problems with this arrangement. He had arranged for Katzenbach School maintenance employees to strip and wax the floors in the dormitories. They performed the work and he wanted them to be paid for it. He told them that they would receive their pay as soon as he had a business manager. When they came to her for the pay, she "made out like it was a "federal case" and he was embarrassed that they were put off by her. As for Doug Brower, he was employed at Hopewell and Thomas knew him from there. He had asked Brower to undertake some computer-related work at Proctor for three days and Brower had agreed to come when he could. The Proctor Board was aware of this. He simply wanted to get Brower paid for his time. Dr. Thomas was himself serving in his interim capacity at a daily rate of $400. He had not been paid by the end of September. He and others were paying for necessary items out of their pockets and needed to get paid.

Ms. Mezzacappa was correct in saying that the custodian, whom he referred to as Manuel, should have turned in time sheets. Since she insisted that she would not pay him without a time sheet, Thomas said that he was going to get paid and since Manuel worked at night, Thomas told her to "go get him to give you time sheets" and asked her if she could stay one night to meet him. He does not know whether she ever met with Manual, but Manuel's wife did come into the office and "got into it with" Mezzacappa (apparently about her disinclination to issuing his pay), so much so that the wife refused to leave the office. In addition to this problem, he explained that the petitioner also had run-ins with the bank and the telephone company.

About two weeks after Mezzacappa started at Proctor, Dr. Thomas sat her down and told her that he had been playing telephone tag with the superintendent of the last district in which she had been employed prior to her hiring at Proctor. He informed her that the superintendent's secretary had referred his routine reference request to the superintendent himself, who had told Thomas that he had had to let her go in January 1998, because she was immature and could not get along with people. She seemed shocked to hear this, but to Thomas it was reflective of the problems emerging at Proctor. He counseled her that if there were situations involving request for payments which troubled her she should not get angry, but that he would play the "bad cop."

The other concern which arose was in regard to what Thomas described as Mezzacappa's "fairly circumscribed idea of what to do and how." He liked to give employees latitude, but in her

case he would tell her what was needed and she would do as she saw fit. She was very unwilling to take on what was not specifically the work of a business manager. He told her of his idea regarding a different budget structure, as it was not his practice to use the State mandated accounting system. The GAAP is a good system, however, each state has its own system for State Department of Education purposes, but that system is not usually good for anyone else to understand the budget. His method does require that two sets of books be kept, one for GAAP and one for his system. His system involved a very simplified three page budget, with sections for Residential, Instructional and Administration. He had told the Board that he would provide them with a balanced, understandable budget by December. The Board did not know if it could get through the school year and needed a budget which it could understand. He told her that he was going to use it and she told him that she was busy with other things. He kept talking to her about it, but she kept saying that she would put it together "later on." She voiced no objections to him about his plan and before she went to Atlantic City he spoke to her about it and, without pressing her, told her that he wanted to get started on the budget. While she was away he put the figures and format together on a spread sheet. He estimated some of the numbers and put in others that he knew, thinking that he was being helpful.

When Ms. Mezzacappa returned from Atlantic City, Dr. Thomas told her for the first time what he specifically wanted her to do, giving her his material and asking that she verify it from the records, but all she did was add up the numbers and correct his math. He then told her , "No, I want you to see if the expenditures are in line with GAAP documents, to cross walk the expenditures between both budgets, to make sure that they matched." She told him that she was busy, and asked if it was okay if she got to this later. On the morning of her second day back from Atlantic City he asked her when she was going to do this and she said "when she got around to it." He told her that she was going to do this now. He had promised Mariano Guzman, the Board treasurer and most important member of the Board, that he would work with Guzman on the budget and expected to meet with Guzman during the 2nd or 3rd week of November, and "time was closing down on" Thomas. He felt that the project would take her a couple of days. Thomas testified, "Here was this young lady resistant to direction," and that he leaned over her desk and said that he was "telling you to stop what you are doing and do this now." She responded that things were "just not working out." She had gotten up and he told her that if she left, she was not going to have a job. In view of her previous departure in October (mentioned in

his letter of November 5, see above and below) he told her not to do what she had done before. She did leave, did not show up for work the next two days and refused to speak to him on the telephone. He recommended her termination. She was given an opportunity to appear at the Board's meeting but did not attend. His recommendation to the Board was based upon her negative attitude toward working with people, her refusal to accept responsibility, her refusal to follow specific direction, which resulted in her putting off things and "letting them slide," and her having left the job twice for several days after ordered to do something.

After her termination, he spoke with the petitioner. She was "very apologetic," and said that she had "really screwed up. I don't know why I acted the way I did. Please take me back." She indicated that she had been under stress. He listened, but while he said that he would consider her request, he never recommended her reinstatement.

The witness denied that he ever told the petitioner to place $2,000 in the petty cash account for student activities, although there was some discussion of adding into the budget a $2,000 account against which to draw for incidental expenses and he did tell the petitioner to set up a budget for this. He believes that he had given her "more than responsible time" to get her tasks done. He was required to spend time getting her to do what he wanted her to do and this interfered with his ability to properly run the school.

There had been a problem with the telephone company which had been threatening to terminate service. He wanted Mezzacappa to get up to date with the phone bill. After she left they again threatened termination of service, but he had no actual details about her contacts or problems with the phone company or for that matter with the bank.

Dr. Thomas acknowledged his familiarity with the use of purchase orders in his days at Hopewell. He knew that the signature on an order warranted that there was money in the appropriated account. He agreed that in Hopewell he probably would not have paid a bill without a voucher. In the case of Proctor, he did tell Ms. Mezzacappa on "a couple of occasions" to pay bills without vouchers, such as in Brower's case, where he knew that Brower had done the work and wanted his name on the warrant list so that the Board would review it and approve it. This Board acted differently than any he had previously dealt with. They would obtain a consensus of

the Board to pay for things and would then approve them retroactively when they met, which was not regularly, perhaps every two months. He would send a voucher list to Treasurer Guzman. Thomas was "just trying to get it to run properly." He acknowledged that payment without a voucher was an improper procedure, that Mezzacappa was a licensed school business administrator and that it would be a "problem" to violate Title 18A, which applied to the school. He acknowledged that his attempt to make payments without vouchers and strict adherence to the normal procedure was a mistake on his part, and also noted that she "did not make an issue of this at the time." He did not want her to violate state regulations.

While there was no written job description, the petitioner knew from the interview what was expected. When there were problems he did not issue a letter to her telling her that she had to "clean up her act." In fact, when the incident regarding the dental plan occurred, she just walked off the job. That situation occurred when Joanne Bobb had called a dental company regarding a plan and had given Thomas some information about it. He gave this to Mezzacappa, who told him in response, "I don't have time to do that and they don't need it." He told her that it was important. She said that she would have to work on it as she did on the medical program and she did not want to do that. He wanted her to call and later asked her again. She would not. He then ordered her to call and she "jumped up and said, 'I don't have to take this,'" and left. She did not call in the next day and the phone number she had provided was incorrect. She remained out of work from Wednesday afternoon until Monday and reported that she had been sick on Thursday and Friday. He did not challenge her about whether she was actually sick, although he does not think that she actually was. After she left he called the company himself and learned that Proctor was too small for it to qualify. He denied that Mezzacappa ever told him that. After the November incident, she had now pulled the same disappearing act twice, and considering these "two outlandish incidents," he felt that it was time to terminate her. He denied that he had any physical confrontation with her on the 4th of November or that he was within an inch of her face. He simply told her to "do it now" and did not jump out of his chair.

Mariano Guzman is a trustee and serves as the treasurer for Proctor Academy. Mr. Guzman is the president of Children's Academies for Achievement, an organization which serves as a funding source for Proctor. Prior to Ms. Mezzacappa's termination, he met with Mezzacappa at the same time that he met with Dr. Thomas when he visited the school with a

prospective donor. He spoke with Mezzacappa for a few minutes and noted that she seemed to be "a little surprised" by the fact that the prospective donor was at the school. Guzman found her surprise at this surprising to him. He was concerned that she was perhaps not "seasoned enough" for the role which Thomas had selected her for. He raised this concern at a regular meeting of the Board, but relied upon Thomas's recommendation and voted to approve her hiring.

Several days before the Board determined to terminate the petitioner, Guzman received a telephone call from her at his New York office. He believed that this occurred on the day on which she left the school, which from the record was November 4. She was "quite upset" and he tried to calm her. She told him that she had left the school as a result of a situation which she had with Dr. Thomas, during which he had raised his voice. She was "very uncomfortable" and "just left." She described herself as "frightened" and said that having left, she was "frightened about having left." She said nothing about any physical intimidation. Guzman told her to stay home for the day and that he would contact Thomas. He did not tell her anything about staying out of work for the remaining days of that week, but on cross-examination he did testify that he told her that the school would be in touch with her. He also supplied Dr. Thomas with her telephone number, as Thomas told him that he did not have it.

After this call there were may additional calls to him at his office, which he did not take once he had spoken to Thomas. She then called him at home on the weekend. This time she was angry and suggested "through innuendo" that the Board was not fulfilling its fiduciary role. She talked about the "dual budget." Guzman testified that this issue had been discussed before, as the concern was how to present the budget to the Board in a summary manner understandable in lay terms. Guzman explained that the GAAP budget "doesn't work." He claimed that Ms. Mezzacappa was present at the meeting when this discussion occurred. All agreed that the "summary budget" should be prepared and he had urged Thomas to do so. When she made her comments during the weekend phone call, Guzman explained to her that he had been involved with education finance for 30 years and the last thing he would ever do was anything which was not legal. She also expressed her concern that Thomas might be trying to do things "not by the book." She had never made such accusations before to him or to other members of the Board and he was alarmed by this comment, which seemed to him to be "a little more vituperative" and an

expression of "anger." Following the call he contacted several Board members and Mr. Sumners, the Board's attorney.

Mr. Guzman related that after Ms. Mezzacappa received a *Rice* letter from the Board, she contacted him and was "really concerned" that the situation had reached that point. He told her that the Board needed to hear the matter through and she said that she would be at the meeting. He recalls that at the meeting someone mentioned that she might not appear. He heard nothing about any request to adjourn the hearing. After she was terminated, he received a copy of Mezzacappa's letter of November 13, 1998, and he and other members of the Board and Dr. Thomas spoke and the Board felt that it should uphold its previous decision to terminate her.

Ms. Mezzacappa testified on rebuttal. She related that on the morning of the scheduled Board meeting she spoke to Guzman and told him that she could not obtain legal counsel in time for the meeting. She also requested that the meeting be public. However, she was unable to attend the meeting. She did not ask for an adjournment. She believed that her present attorney, Mr. Griggs, did send a letter to the Board, but that it was sent after the hearing had been conducted. He also did not request any adjournment. She believed that it was a "shame for everyone that she was let go" and was surprised that she was terminated. Her letter sought to obtain another opportunity at the job.

DISCUSSION

The parties are in agreement that the appropriate standard to be applied in determining whether the Proctor Board acted within its legal rights in terminating Ms. Mezzacappa from her position is whether the Board acted arbitrarily and unreasonably. The decision therefore is not one which examines whether the Board's action was the "right" action to take, or whether some other measure short of termination might have been more appropriate to the circumstances, but instead whether the Board's action was founded upon a factual basis which could lead persons acting rationally and fairly to conclude that the conduct of Ms. Mezzacappa was such that a termination was necessary in order to achieve a legitimate purpose. Where the standard of review is arbitrariness, the proof in favor of overturning the decision must be clear.

According to Dr. Thomas, there were several motivations for his recommendation to the Board to terminate Ms. Mezzacappa. The most prominent appeared to be the two incidents in which she left work and then stayed out of work for days after leaving. In the first incident, the "dental plan" matter, she does not assert that her leaving work was the result of any physical intimidation. She left when she and Thomas had some dispute over checking out the possibility of a dental plan, and she then called in sick for two days thereafter. There is of course no evidence in the record from which to determine whether she was actually sick on those days or whether she simply decided to stay out due to the dispute with Thomas. In the second incident, she asserts a physical intimidation by her superior, and then claims that she remained out of work based upon instructions from Board members who told her to stay at home and they would work the problem out.

Based upon the evidence and an assessment of the witnesses, I am convinced that this second incident, which revolved around the "simple budget" issue, did erupt into a confrontation in Mezzacappa's office during which Dr. Thomas, exasperated with what he perceived as a disrespectful and uncooperative employee, assertively and strongly directed her to perform the job he wanted done without delay. I have no doubt he spoke loudly and did emphasize his demand by leaning over her desk, and while her description of his being an inch from her face may be an exaggeration, I **FIND** that he was quite close to her face as he spoke. His very way of describing the incident, "Here was this young lady resistant to direction" carries with it a picture of exasperation and frustration on the part of this extremely experienced administrator which supports these conclusions. Ms. Mezzacappa may well have felt uncomfortable with this, but she also was clearly resistant to his direction, did not feel that his plan to present a simplified format was proper, and his characterization of her as "resistant" is, in my view, not an exaggeration. His response to her lack of cooperation and her negative attitude may have been intense, but it is not unfair to say that her attitude helped to provoke it. Her decision to leave work that day was, under all the circumstances, not very surprising, although I **FIND** that she was not actually in any physical danger. However, her decision to leave the first time, after the "dental plan" discussion, was not so understandable, as there was no element there of physical intimidation, perceived or real, and she simply seems to have chosen to leave a situation not to her liking by going home. I have to question her alleged illness of the next two days, but admittedly that skepticism is based

not on any specific evidence, but upon an overall assessment of the manner in which she and Thomas interacted and her apparent inclination to leave rather than to hold her ground by remaining at work despite uncomfortable circumstances.

I **FIND** that there was most likely some misunderstanding and confusion on Mezzacappa's part regarding the instructions received from Guzman and others about whether she was to return to work on November 5 or stay out until contacted by the school, as even Guzman acknowledged on cross-examination that he told her.

Since Dr. Thomas did not know any of the details of either the bank or the telephone company matters these could not have played any part in the decision to terminate her, indeed there is no evidence that the Board knew anything about the details of these concerns as well.

When it considered her possible termination, the Board was aware that its employee had left work without permission on two occasions and had not returned the next work day either time. It had been informed by its interim head of school that she was not cooperative with him, was resistant to direction, had not taken responsibilities upon herself which Thomas had asked her to undertake. She was a new employee, on the job for less than two months, holding an important position in a small and apparently somewhat financially unstable enterprise. Under these circumstances, I cannot say that the Board acted arbitrarily or unreasonably when it decided that it was best to terminate this employee. While perhaps some form of action short of termination might have been sufficient, Ms. Mezzacappa's conduct did not bode well for her future as a helpful member of the operation. There is no basis in this record for second guessing the Board on this decision. There is no clear evidence that the Board acted arbitrarily and therefore, I **CONCLUDE** that the petitioner has failed to establish that the Board acted in an arbitrary fashion. Her petition seeking to overturn that decision must be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 28, 1999
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

Sept. 29, 1999
DATE

D. N. Contanzitis Jr.
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 30 1999
DATE

Barbara A Harnad
OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

JOINT EXHIBITS:

J-1 Letter dated 9/16/98 from Dr. David N. Thomas to Members of the Board

J-2 Agreement signed by Tricia Mezzacappa dated 9/16/98

J-3 Samuel DeWitt Proctor Academy Charter School, Regular Board Meeting, Agenda Item, dated 10/9/98

J-4 Letter dated 11/5/98 from Dr. David N. Thomas to Tricia Mezzacappa

J-5 Letter dated 11/6/98 from Dr. David N. Thomas to Tricia Mezzacappa

J-6 Letter dated 11/6/98 from Dr. David N. Thomas to Members of the Board

J-7 Letter dated 11/7/98 from Tricia Mezzacappa to Mr. Thomas, Samuel DeWitt Proctor Academy

J-8 Letter dated 11/12/98 from David N. Thomas to Tricia Mezzacappa

J-9 Stipulation of Facts, Stipulated Documents, dated 6/29/99

FOR THE PETITIONER:

FOR THE RESPONDENT:

R-1 Not in evidence (Dr. Thomas' notes for the November Board meeting)

R-2 Letter dated 11/13/98 from Tricia Mezzacappa to Mr. Thomas, Samuel DeWitt Proctor Academy

OAL DKT. NO. EDU 00792-99S
AGENCY DKT. NO. 27-2/99

TRICIA MEZZACAPPA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
THE SAMUEL DeWITT PROCTOR ACADEMY CHARTER SCHOOL, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon his independent and careful review of the record of this matter, the Commissioner finds that petitioner has failed to establish that the Board's action terminating her from her position was in violation of her constitutional or statutory rights and, therefore, such action may not be disturbed by the Commissioner.

Accordingly, the Initial Decision determination of the OAL recommending dismissal of the within Petition of Appeal is hereby affirmed.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

H.S., on behalf of her minor children,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parent challenged Board's residency determination that the S. family was not domiciled in the District during the 1998-99 school year and that the children were not entitled to a free public education there.

ALJ found that the domicile of the S. children between September 14, 1998 and October 31, 1998 was that of the parents, M.S. and H.S., and that all objective indicia were that the family was domiciled at Staten Island from March to October 1998 because they went there so that the father, M.S., could keep his job. The family, however, refused to remain there and moved back to Bayonne. Thus, the ALJ concluded that the S. family was not domiciled in Bayonne for purposes of *N.J.S.A.* 18A:38-1 between September 14 and October 31, 1998, and the Board was entitled to collect tuition from petitioner for that period of time.

Commissioner concurred with the ALJ and directed petitioner to reimburse the Board the amount of $4, 64.14, representing tuition costs for her three children from September 14, 1998 through October 31, 1998, that period when they were ineligible to attend school free of charge in the District.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1642-99

AGENCY DKT. NO. 487-10/98

H.S. AND M.S., ON BEHALF OF
THEIR MINOR CHILDREN,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY
OF BAYONNE, HUDSON COUNTY,

Respondent.

H.S. and **M.S.**, petitioners, *pro se*

Robert J. Merryman, Jr., Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: September 21, 1999 Decided: October 6, 1999

BEFORE **EDITH KLINGER**, ALJ:

On October 28, 1998, petitioner H.S. filed a Verified Petition with the Commissioner of Education seeking to enroll her three children, Albert S., Angela S. and Anthony S., tuition-free in the Bayonne public schools, pursuant to *N.J.S.A.*

18A:38-1(a), for the period between September 14, 1998, and the end of the 1998-99 school year. The Bayonne Board of Education (Board) alleged that the S. family was not domiciled in Bayonne during the 1998-99 school year and that the children were not entitled to a free public education there. Pursuant to *N.J.S.A.* 18A:38-1(b)(2), the Board attempted to remove the children from the Bayonne school system in October 1998. The children were allowed to remain in school pending the outcome of this appeal.

Respondent filed its answer on January 12, 1999, and on February 8, 1999, the Commissioner of Education transmitted the matter to the Office of Administrative Law for hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The case was assigned to the undersigned and scheduled for hearing on September 21, 1999. The hearing was held and the record closed on that date.

THE APPLICABLE LAW

This case arises under the provisions of *N.J.S.A.* 18A:38-1(b)(2), which states in relevant part:

> If the superintendent or administrative principal of a school district finds that the parent or guardian of a child who is attending the schools of the district is not domiciled within the district . . . , the superintendent or administrative principal may apply to the board of education for the removal of the child. The parent or guardian shall be entitled to a hearing before the board and if in the judgment of the board the parent or guardian is not domiciled within the district . . . , the board may order the transfer or removal of the child from school. The parent or guardian may contest the board's decision before the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection.

Pursuant to the same statute, the Board is authorized to assess and collect tuition from the parent or guardian for the period of ineligible attendance. The amount of the tuition is computed, on a per diem basis, as 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance. *N.J.S.A.* 18A:38-1(b)(2). It is undisputed that Bayonne's total annual cost per pupil is $8,203.16, or $45.57 per day. It is further undisputed that Bayonne does not allow a grace period for tuition while families are in the process of moving into the school district.

REVIEW OF EVIDENCE

M.S., the father of the three children, was employed as an assistant chemist with the New York City Police Department. He and his wife, H.S., and their children lived in Bayonne continuously until approximately March 1998.

One of the conditions of M.S.'s employment by New York City was that he be a resident of the city. On December 7, 1997, he received a letter from his employer notifying him that he would be dismissed from his job for violating this condition. He was, however, not dismissed, but given ninety days to relocate his family to New York.

They rented a townhouse in Staten Island for $900 a month and moved into it in March 1998. According to the testimony of M.S., they intended to remain there and adopt the Staten Island home as their domicile. The two younger children, Angela S. and Anthony S., were taken out of the Bayonne school system and enrolled in Staten Island schools, but the eldest, Albert S., remained in the Bayonne high school.

As part of M.S.'s job requirement, both he and his wife had to register their automobiles in New York and have New York license plates on them. He was forced to comply because he was issued a special parking permit by the New York City Police

Department and the permit had his license plate number on it. W-2 forms from M.S.'s employer show Staten Island as his address for the 1998 tax year.

H.S. was employed by an automobile dealer in Pine Brook, New Jersey, at all relevant times and, depending upon the date, gave her address as either West 29th Street in Bayonne or Avenue A in Bayonne. Albert S. was, at all relevant times, employed part time by a Burger King in Bayonne. He also gave his employer one or the other Bayonne address as his residence.

During and after the summer school recess, H.S. and the children refused to remain in Staten Island. On September 5, 1998, H.S. signed a lease for a one-bedroom apartment on West 29th Street in Bayonne. The lease shows that the premises were to be occupied by herself and the three children. The rent was $550 a month. She instituted utility service there on September 5, 1998, and telephone service on September 30, 1998. The utility bills from September 1998 through June 1999 are low, but the cost of heat for the apartment was included in the rent.

On September 14, 1998, the family applied to have the three children re-enrolled in the Bayonne public school system. After they began attendance, the district started to receive reports from neighbors that the S. children were being dropped off in Bayonne in the mornings and taken away in the evenings.

The district was already suspicious of the family because, it will be recalled, Albert S. was never withdrawn from the Bayonne high school when his family moved away in March 1998, even though his siblings were transferred to Staten Island schools. According to William Bodayle, an attendance officer, the district told him to investigate reports that Albert S. was being taken to Bayonne for the purpose of attending the high school and brought back to Staten Island in the evening. On March 19, 1998, Bodayle observed the S. residence in Staten Island at 6:20 a.m., but did not

see Albert S. there. On March 20, 1998, Albert S. transferred out of the Bayonne school system after information was provided to the superintendent of schools.

As a result of the reports and the prior history, on October 20 and 21, 1998, the Board sent Bodayle to observe the S. family's residence in Staten Island. On October 20, Bodayle and another attendance officer, Raymond Lynch, sat in a vehicle outside of the petitioners' residence from 6:15 a.m. According to Bodayle, M.S., H.S. and the three children left home at 6:45 a.m. They entered a vehicle registered to H.S. with New York license plate V712DZ. The family stopped to pick up two girls before driving across the Bayonne Bridge to Bayonne. Albert and Anthony S. were dropped off at the West 29th Street apartment, which is near the high school. The two passengers were left at a parochial school in Bayonne and, finally, M.S. left H.S. and Angela S., with the car, in the vicinity of the Robinson School in Bayonne, where Angela S. is a student. On October 21, the attendance officers again watched as the S. family left their Staten Island home, picked up the two girls and drove to Bayonne. The officers saw Albert and Anthony S. dropped off at West 29th Street. They then saw the two boys enter the high school without ever going to the West 29th Street apartment where they supposedly lived.

M.S. does not deny that the family lived in Staten Island for a period of time, but he insists that the period ended before October 1998. He testified that he tried to live in Staten Island by himself for a while after his family moved back to New Jersey, but he was not in good health and so he was forced to move to Bayonne with them. They continued to rent the Staten Island residence for a period of time because of M.S.'s employer and M.S. went back regularly to maintain the premises and pick up mail. There is no evidence, however, that the family continued to live in Staten Island after November 1, 1998. Bodayle testified that he observed the Staten Island residence on November 2, 3, 4 and 5, 1998, but never saw the children there again.

In March 1999, M.S. took an early retirement from his employment and the family gave up the Staten Island townhouse. The family moved to a larger apartment in Bayonne sometime after May 1999. The district does not dispute that the S. family is domiciled in Bayonne for purposes of the 1999-2000 school year.

M.S. produced several witnesses to testify to the family's Bayonne domicile during the 1998-99 school year. The first of these witnesses, Edward Boktor, knew the family since 1984 and knew that they moved to Staten Island in 1998. He also stated that he visited them in Bayonne on many occasions in 1998, but he could not give any dates nor could he identify the season of the year. Carolina Castellanos, the superintendent of the West 29th Street building in which the S. family had its apartment, believed that the whole family, parents and children, lived there. She stated that they were all present on May 23, 1999, when the building was evacuated because of a fire.

Father George Greiss, priest of the Coptic church in Bayonne attended by the S. family, testified that the family regularly attended services there and M.S. frequently volunteered to do work for the church. The sons walked across the Bayonne Bridge several times alone to attend church services and to be with their friends. This upset M.S. because he felt that it was unsafe. Father Greiss recalled visiting the family in Staten Island in 1998 but he could not remember when.

Loretta Kennedy, a family friend for over twenty years, recalled that the S. family moved to Staten Island sometime in 1998, but she did not remember exactly when. She recalled that the sons walked across the Bayonne Bridge several times by themselves during the summer of 1998 to visit her and their friends without their parents' knowledge. This upset M.S. very much when he found out. Kennedy testified that the S. family moved back to Bayonne in 1998, but she did not know the date.

Based upon the testimony, the documentary evidence and the demeanor of the witnesses, I make the following findings of fact:

1. The S. family moved to Staten Island in about March 1998 so that M.S. would not lose his job with the New York City Police Department. They intended to make the Staten Island home their domicile at the time of the move.

2. Although H.S. rented an apartment in Bayonne in September 1998, the family did not actually move back to Bayonne until about November 1, 1998, as evidenced by the observations of the attendance officers on October 20 and 21, 1998.

3. Given the underlying circumstance that M.S. was attempting to satisfy the requirements of his employer by living in New York, it is credible that he tried to relocate his family to New York in March 1998 and then tried to maintain a New York presence after his family moved back to Bayonne at the end of October 1998. For this reason, the facts that (a) M.S. and H.S. continued to register their vehicles in New York, and (b) M.S. frequently returned to Staten Island to obtain mail and check on the townhouse, are not dispositive of the issue of their domicile in Bayonne. These facts might have been a matter of concern for M.S.'s employer, but not the Board.

4. It is also not dispositive of domicile that the Bayonne apartment was too small for the family. From this fact, the district infers that the whole family did not live there. However, based upon the W-2 forms for M.S. and H.S. for 1998, the parents' combined net annual income was about $36,800. They were paying $1,450 ($900 + $550) a month for rent alone between March 1998 and the time that they gave up the Staten Island residence. This is almost half (47 percent) of their combined net salaries for this period. Albert S.'s net earned income was only $721.32 in 1998. The reason why they rented such a small apartment in Bayonne could easily be that they could not afford a larger one.

5. M.S. and H.S. sent their children to school in Bayonne between September 14 and October 31, 1998, while the family was still domiciled in Staten Island.

6. The children were in school on thirteen days in September and twenty-one days in October 1998, or a total of thirty-four days, while they were still ineligible.

DISCUSSION OF LAW AND CONCLUSIONS

N.J.S.A. 18A:38-1(a) provides that public schools shall be free to persons over five and under twenty years of age who are "domiciled in the school district."

> In a strict legal sense, the domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving.
>
> [*In re Unanue*, 255 *N.J. Super.* 362, 374 (Law Div. 1991), quoting *Kurilla v. Roth*, 132 *N.J.L.* 213, 215 (Sup. Ct. 1944).]

Thus, domicile is regarded as an individual's true and permanent home. *In re Jaffe*, 74 *N.J.* 86, 90-91 (1977).

There are three possible ways by which an individual may acquire a domicile: (1) by birth or place of origin; (2) through the choice of a person legally capable of choosing his or her domicile; or (3) by operation of law in the case of a person who lacks capacity to acquire a new domicile by choice. *In re Estate of Gillmore*, 101 *N.J. Super.* 77, 87 (App. Div.), *certif. denied*, 52 *N.J.* 175 (1968). Persons legally incapable of choosing domicile acquire domicile by operation of law. *Ibid.*

Since the instant case involves three children who lacked the capacity to choose their own domicile, domicile must obtain by operation of law. Under the common law,

the domicile of a child was said to follow that of the father "until the [child] is emancipated and chooses a place of residence of its own." *Mansfield Township v. State Bd. of Educ.*, 101 *N.J.L.* 474, 478 (Sup. Ct. 1925). I therefore **CONCLUDE** that the domicile of the S. children between September 14, 1998, and October 31, 1998, was that of M.S. and H.S.

The question of domicile is one of fact and must be determined on a case-by-case basis. *Lea v. Lea*, 18 *N.J.* 1, 7 (1955). Intent is the touchstone of domicile, and the manifestation of a person's intent converts residence from a mere place in which a person lives to a domicile. *State v. Benny*, 20 *N.J.* 238, 251 (1955). A person may have multiple residences, but may have only one domicile at a time; as such, the residence may coincide with domicile, but does not alone determine domicile. *Ibid.* Thus, "the concept of 'domicile' may have different content and shades of meaning depending upon the context in which is used." *Gillmore, supra*, 101 *N.J. Super.* at 86-87.

Nonetheless, "(e)very person has a domicile at all times, and no person has more than one domicile at any one time." *Id.* at 87 (citation omitted). Where a person has two homes in which he lives and between which he divides his time, it is still his intention which creates one or the other as his domicile. A very short period of residence in a given place may be sufficient to acquire domicile. Domicile is established by the "concurrence, even for a moment, of physical presence at a dwelling place with the intention of making it a permanent abode." *Lyon v. Glaser*, 60 *N.J.* 259, 264 (1972).

Where a person has more than one residence, the following factors are useful in determining his domicile:

> . . . the physical characteristics of each [place], the time spent and the things done in each place, the other persons found there, the person's mental attitude towards each

> place, and whether there is or is not an intention, when absent, to return.
>
> [*Mercadante v. City of Paterson*, 111 *N.J. Super.* 35, 39-40 (Ch. Div. 1970), *aff'd*, 58 *N.J.* 112 (1971).]
>
> [A] choice of domicile by a person, irrespective of his motive, will be honored by the court, *provided there are sufficient objective indicia*, by way of proofs, supporting the actual existence of that domicile.
>
> [*Unanue, supra*, 255 *N.J. Super.* at 376 (emphasis added).]

Here, all objective indicia are that the family was domiciled at Staten Island from March 1998 to the end of October 1998 because they went there with the intention to remain so that M.S. could keep his job. As it happened, his family refused to remain in Staten Island, so that, after the end of October 1998, M.S. was forced to return to Bayonne.

Based upon the above, I **CONCLUDE** that M.S. and H.S., and therefore their children, were not domiciled in Bayonne for purposes of *N.J.S.A.* 18A:38-1 between September 14 and October 31, 1998. I therefore **CONCLUDE** that the Board is entitled to collect tuition from respondents in accord with the provisions of the statute.

N.J.S.A. 18A:38-1(b)(2), as stated above, allows the assessment of tuition for each of the three S. children for each day on which they attended school in the district while ineligible. The daily tuition rate previously calculated is $45.57 for each of the three children, and this rate is applied for the thirty-four school days during the period in question. I **FIND** that the total tuition owed is $4,648.14 ($45.57 x 3 x 34) and I **CONCLUDE** that M.S. and H.S. are liable to the Board for this amount.

ORDER

Accordingly, it is **ORDERED** that petitioners pay to respondent $4,648.14 as tuition for their children's attendance in the Bayonne public schools from September 14, 1998, through October 31, 1998.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 6, 1999
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

10/8/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 12 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

md

APPENDIX

Witnesses

For Petitioners:

Edward Boktor
Carolina Castellanos
Father George Greiss
Loretta Kennedy
M.S.

For Respondent:

William Bodayle

Exhibits

For Petitioners:

P-1 Fire Incident Report
P-2 PSE&G Verification of Application, September 8, 1998
P-3 PSE&G bill, October 1998
P-4 PSE&G bill, November 1998
P-5 PSE&G bill, February 1999
P-6 PSE&G bill, March 1999
P-7 PSE&G bill, April 1999
P-8 PSE&G bill, May 1999
P-9 Letter, City of New York to M.S., December 8, 1997

For Respondent:

R-1 New York State Driver's Licenses and Registrations

R-2 Application for Lease, September 5, 1998

R-3 W-2 Forms, 1998

R-4 Petitioners' Answers to Respondent's Interrogatories

R-5 Registration Forms, September 14, 1998

R-6 Investigation Report, Bodayle, October 22, 1998

OAL DKT. NO. EDU 1642-99
AGENCY DKT. NO. 487-10/98

H.S., on behalf of her minor children,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Although petitioner's exceptions were filed outside the time period permitted by *N.J.A.C.* 1:1-18.4, the Commissioner nonetheless considered these arguments, having noted that a change of address for H.S. and M.S. delayed their receipt of the initial decision.

Upon careful and independent review, the Commissioner concurs with the Administrative Law Judge's findings and conclusions, and affirms that petitioner and M.S. were not domiciled in the Board's District until November 1, 1998. As such, petitioner is obligated to reimburse the Board the amount of $4,648.14, representing tuition costs for her three children from September 14, 1998 through October 31, 1998, that period when they were ineligible to attend school free of charge in the District.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

November 17, 1999
Date of Mailing, November 17, 1999

357-99

EDU #1642-99
C # 357-99
SB # 54-99

H.S. AND M.S., on behalf of their minor children,

PETITIONERS-APPELLANTS,

V.

BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, November 17, 1999

For the Petitioners-Appellants, Ashton E. Thomas, Esq.

For the Respondent-Respondent, Apruzzese, McDermott, Mastro & Murphy (Robert J. Merryman, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

May 3, 2000

Date of mailing MAY 05 2000

358-99

IN THE MATTER OF THE TENURE	:	
HEARING OF LAURIE ROSEN,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
HOBOKEN, HUDSON COUNTY.	:	DECISION
	:	

November 17, 1999

OAL DKT. NO. EDU 11137-98
AGENCY DKT. NO. 478-10/98

IN THE MATTER OF THE TENURE	:	
HEARING OF LAURIE ROSEN,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
HOBOKEN, HUDSON COUNTY.	:	DECISION
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. Upon such review, it is noted that the charges of unbecoming conduct certified against respondent in this matter are of an extremely serious nature, involving charges of physical assault against a student. It is further noted from review of the record that on May 18, 1999, an Order of Inactivity was issued by the OAL relative to the proceedings in this tenure hearing matter because there was an on-going criminal case arising from the same allegations as contained in the tenure charges. On October 13, 1999, the Board notified the Administrative Law Judge that respondent had resigned from the District, therefore, it was withdrawing the matter. Apparently, respondent's resignation was unilateral because there is nothing in the record to indicate that it was part of a settlement agreement entered into by the parties or a plea bargain in the criminal proceedings. [1]

Consequently, the Commissioner approves the withdrawal. However in so doing, the Commissioner reminds the City of Hoboken Board of Education and its chief school

[1] Had the resignation been part of a settlement agreement, the parties would have been required, pursuant to *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board of Education April 6, 1983, 1990 *S.L.D.* 842, 846, to submit the agreement to the Commissioner for his review and approval.

administrator of the obligation under *N.J.A.C.* 6:11-3.5 to report respondent's alleged misconduct to the State Board of Examiners and, should an Order to Show Cause be issued by the State Board of Examiners, their responsibility to cooperate in ascertaining and presenting the facts underlying such allegations.

Accordingly, the matter is no longer deemed to be a contested matter before the Commissioner and is, therefore, dismissed. However, a copy of this decision and the record of the matter shall be transmitted to the State Board of Examiners for its action as deemed appropriate.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

November 17, 1999

Date of Mailing, November 17, 1999

359-99

MARK LEIBOWITZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

November 17, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1151-99

AGENCY DKT. NO. 505-11/98

MARK LEIBOWITZ,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT

OF THE CITY OF NEWARK, ESSEX COUNTY,

Respondent.

Claudine M. Liss, Esq., for Petitioner

Cherie L. Maxwell, Esq., for Respondent
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: September 22, 1999 Decided: September 30, 1999

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on January 12, 1999, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A hearing was scheduled for September 22 and 23, 1999 at the OAL, 185 Washington Street, Newark, New Jersey. Prior to the hearing, settlement discussions were held and a settlement was reached.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

September 30, 1999
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

10/7/99
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:
Barbara A Harned

OCT 08 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

SILLS CUMMIS RADIN TISCHMAN
EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(973) 643-7000
Attorneys for State Operated
School District of the City of Newark

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SEP 22 3 30 PM '99

COMMISSIONER OF EDUCATION
OAL Docket No. EDUOR 11498-97N
Agency Ref. No. 427-10/97
OAL Docket No. EDUOR 01151-99N
Agency Ref. No. 505-11/98

MARK LEIBOWITZ

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK

VOLUNTARY SETTLEMENT AGREEMENT, WAIVER AND RELEASE

The State-Operated School District of the City of Newark ("Newark" or "District") and Mark Leibowitz ("Leibowitz"), agree to the following terms in full resolution of this matter:

WHEREAS, Leibowitz disputes the bases for the District's withholding of his 1997-1998 and 1998-1999 increments, and

WHEREAS, it appears that Leibowitz has made efforts to improve his performance during the current school year; and

WHEREAS, the parties agree that it is in the public interest to enter into this agreement in resolution of said charges in order to avoid the uncertainty and expense of litigation, and

WHEREAS, the parties further agree that the terms of this agreement will not present any risk of harm to students and/or the safe operation of the school district,

NOW, THEREFORE, the parties agree as follows:

1. The District shall, upon approval of this agreement by the State District Superintendent and the Commissioner of Education, restore Petitioner's 1998-1999 salary increment. The 1997-1998 increment withholding shall remain in effect.

2. The 1997-1998 increment withholding shall remain in effect until the end of the 1998-1999 school year, at which time Newark will review Leibowitz' observations and evaluations. If Leibowitz' annual summative evaluation reflects a satisfactory rating, he shall be placed back on the appropriate level of the salary guide, effective September 1, 1999, as if neither increment withholding had occurred.

3. Leibowitz shall, upon execution of this agreement, withdraw with prejudice the appeals filed in relation to the 1997-1998 and 1998-1999 increment withholdings, specifically OAL Docket Nos. EDUOR 11498-97N and EDUOR 01151-99N.

4. Leibowitz acknowledges that the payments reflected in this agreement constitute the full financial obligation of the District and that he shall receive no additional payments. In exchange for the above consideration, Leibowitz, on behalf of himself, his heirs, successors and assigns, hereby fully releases and forever discharges the District, its representatives, agents, officers and employees, for any and all actions, claims and liabilities of whatsoever kind in character, that he has had or may now have against any of them, relative to the litigation herein identified.

5. This agreement is subject to the approval of the State District Superintendent and the Commissioner of Education.

2b

6. The parties enter this agreement voluntarily and without coercion, after consultation with their respective counsel.

State-Operated School District of the City of Newark

Mark Leibowitz

Dated: 9-1-99

By:

Dated:

2C

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A PROFESSIONAL CORPORATION

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OCT 13 3 30 PM '99

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DAVID JAY
ERIC I. ABRAHAM
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VALERIE A. HAMILTON
DERRICK R. FREUOMIL
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SEEMA A. MISRA
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KATHLEEN CROCCO
KENNETH HAYES
JOSHUA M. SACHS
NAOMI I. COHEN
VINCENT R. LODATO
STEVEN MAGER
BRIGETTE N. SHRANK

PLEASE REPLY TO NEWARK

September 17, 1999

The Honorable Maria M. LaFiandra, A.L.J.
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

Re: Mark Leibowitz v. State-Operated School District of the City of Newark
OAL Docket No. EDUOR-11498-97N 11571-99
Agency Ref. No. 427-10/97

Dear Judge LaFiandra:

The above-referenced matter is scheduled before Your Honor for September 22 and 23, 1999. As the parties have reached an agreement, please find enclosed for review and approval a fully executed Voluntary Settlement Agreement, Waiver and Release.

Should you have any questions regarding this matter, please do not hesitate to contact me.

Respectfully yours,

Kelly Ann Guariglia

KAG:khr
cc: Eugene Liss, Esq.

OAL DKT. NO. EDU 1151-99
AGENCY DKT. NO. 505-11/98

MARK LEIBOWITZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Voluntary Settlement Agreement, Waiver and Release and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

November 17,1999
Date of Mailing, November 17,1999

360-99

IN THE MATTER OF THE TENURE	:	
HEARING OF KEVIN TAYLOR,	:	
SCHOOL DISTRICT OF NORTH BERGEN,	:	COMMISSIONER OF EDUCATION
HUDSON COUNTY.	:	DECISION
_____:		

November 17,1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5523-99

AGENCY DKT. NO. 32-3/99

KEVIN TAYLOR,

Petitioner,

v.

SCHOOL DISTRICT OF NORTH BERGEN, HUDSON COUNTY,

Respondent.

Michael Gannaio, Esq., for petitioner (Giblin & Giblin, attorneys)

Mary J. Hammer, Esq., for respondent (Bucceri & Pincus, attorneys)

Record Closed: September 29, 1999 Decided: October 1, 1999

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on June 2, 1999, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A hearing was scheduled for September 7, 8, 9, & 10, 1999 at the OAL, 185 Washington Street, Newark, New Jersey. Prior to the hearing, settlement discussions were held and a settlement was reached.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

October 1, 1999
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

10/7/99
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 08 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

jb

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BUCCERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2440
(973) 773-5665
Counsel for Respondent

IN THE MATTER OF THE TENURE :	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF
HEARING OF KEVIN TAYLOR AND :	ADMINISTRATIVE LAW
THE BOARD OF EDUCATION :	AGENCY REF. NO. 32-3/99
	O.A.L. DOCKET NO. EDU 5523-99
OF THE TOWNSHIP OF NORTH :	
BERGEN, HUDSON COUNTY :	**STIPULATION OF SETTLEMENT**

This Stipulation of Settlement is made by and between Kevin Taylor (hereinafter "Mr. Taylor") who resides at 250 First Street, Apartment 5A, Jersey City, New Jersey, and the Board of Education of the Township of North Bergen (hereinafter "the Board"). In consideration of the mutual promises and undertakings contained in this Agreement, and for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned state:

WHEREAS, Mr. Taylor has been employed as a custodian by the Board since 1980; and

WHEREAS, the Board certified tenure charges against Mr. Taylor to the Commissioner of Education by resolution of February 24, 1999; and

WHEREAS, the tenure charges against Mr. Taylor allege unbecoming conduct by virtue of excessive absenteeism, willful disregard of directives of his superior and failure to complete scheduled shifts; and

WHEREAS, Mr. Taylor has expressed a willingness to resign from all employment with the Board effective at the close of business on December 31, 1999, upon certain terms and conditions to be stipulated in this Agreement;

NOW THEREFORE, in consideration of the mutual promises of the parties in exchange for the consideration more particularly noted below, it is hereby agreed:

1. As evidenced by the letter attached hereto as Exhibit A, Mr. Taylor has submitted an irrevocable letter of resignation from all employment with the Board effective at the close of business on December 31, 1999. The Board will, by separate resolution, be permitted to accept this resignation immediately upon its entry into and acceptance of this Agreement.

2. The Board shall affirmatively resolve to grant Mr. Taylor a paid leave of absence for personal reasons for the period commencing August 13, 1999. Through this period of time, Mr. Taylor shall receive his full salary (exclusive of an employment and adjustment increment for the 1999-2000 school year) in the normal course of business, net of normal payroll deductions for State and Federal income taxes, FICA and pension contribution. Mr. Taylor agrees that his entry into this Agreement releases any claim to have the 1999-2000 increment(s) restored.

3. Throughout the paid leave of absence referred to in paragraph 2, the District agrees to continue to provide Mr. Taylor with all insurance coverages presently provided to other custodial staff members employed by the Board.

4. Upon the termination of his employment and consistent with his rights under the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA"), Mr. Taylor shall be able to purchase, at his own cost and expense, the insurance coverages presently provided to other custodial staff members employed by the Board.

5. It is understood that Mr. Taylor shall not receive any other benefits or emoluments of employment specified in the present collective negotiations agreement, except as otherwise provided for in this Stipulation of Settlement.

6. The Board agrees to withdraw the tenure charges which it certified to the Commissioner of Education and which form the basis of In the Matter of the Tenure Hearing of Kevin Taylor, School District of North Bergen, Agency Ref. No. 32-3/99, O.A.L. Docket No. EDU 5523-99, subject to the terms of this Agreement.

7. Mr. Taylor agrees to waive and abandon any claims, countercaims or actions which he may have against the Board and/or its officers, agents or representatives relating to or arising out of the proceeding entitled, In the Matter of the Tenure Hearing of Kevin Taylor, School District of North Bergen, Agency Ref. No. 32-3/99, O.A.L. Docket No. EDU 5523-99 and/or the facts underlying said proceeding.

8. The parties agree that the pursuit of this litigation through plenary hearing is not in the best interests of the students, parents or the community of the petitioner school district because litigation would entail the expense of public funds with a possible result being a 120-day suspension. This settlement is in the

best interests of all concerned, and, in particular, is in the public interest. The parties have assiduously attempted to meet standards set forth In the Matter of the Tenure Hearing of Frank Cardonick, 1982 S.L.D. ____ (Commissioner of Education, April 7, 1982), aff'd. 1983 S.L.D. ____ (State Board, April 6, 1983).

9. The parties agree that their respective covenants and entry into this Agreement does not constitute any admissions of wrongdoing or guilt on the part of either party.

10. By entering into this Agreement, each party releases and discharges the other with respect to all claims or rights that either party may have against the other. This includes all claims, including those of which either party is not aware and those not mentioned herein. The release by each party applies to all claims resulting from anything which has happened up to now. It specifically includes, without limitation, all claims which Mr. Taylor may have respecting tenure, discrimination on any basis, rights under any collective bargaining agreement, disability payments, sick leave, salary or any other matter pertaining to his employment.

11. The Board agrees that the official record of Mr. Taylor's separation from employment shall be as a result of a voluntary resignation. Mr. Taylor shall request that all prospective employers contact the Director of Personnel, in writing, to obtain verification of employment. As is customary, Mr. Taylor may request prospective employers to contact such individuals as shall be willing to provide Mr. Taylor with an employment reference.

12. Both parties have each had independent legal representation. They both fully understanding the terms and conditions set forth in this Agreement as well as their respective rights to litigate the issues in this case with a final decision to be made by the Commissioner of Education as an alternative to settlement. The decision to enter into this Agreement rather than to avail themselves of the right to litigation has been made of their own free will without duress or coercion.

13. The parties acknowledge that this settlement must be recommended by the Honorable Maria Mancini LaFiandra, A.L.J., and approved by the Commissioner of Education. In the event such approvals are not forth coming, the parties will be returned to the status quo pending at the time when this settlement was adopted, and this Agreement shall be null and void.

14. The stipulations and agreements set forth in this document are made as part of this settlement. In the event this settlement is not approved by the appropriate authorities, it is agreed that nothing set forth herein may be used as evidence in any subsequent proceedings.

15. All terms of this Agreement are material and shall be subject to the laws of the State of New Jersey.

16. The parties signing below hereby acknowledge that they have been duly authorized to enter into this Agreement. A copy of the Board's resolution is attached hereto.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

FOR PETITIONER

_____, President

FOR RESPONDENT, KEVIN TAYLOR

_____
Kevin Taylor

WITNESS:

_____, Secretary

WITNESS:

_____

Dated: 9-22-11

KEVIN TAYLOR
250 FIRST STREET, APT. 5A
JERSEY CITY, NJ 07302

September , 1999

Elaine Nicoliello, President
Board of Education of North Bergen
7317 Kennedy Boulevard
North Bergen, NJ 07047

Re: Letter of Resignation

Dear Ms. Nicoliello:

I hereby resign from my employment as a custodian employed by the Board of Education of North Bergen effective December 31, 1999. This resignation is expressly conditioned upon the Board's compliance with the Stipulation of Settlement dated September , 1999, between the Board and me and shall be null and void if the terms of that Agreement are not met. This resignation is otherwise irrevocable.

Very truly yours,

Kevin J. Taylor

Kevin Taylor

/mab

Whereas tenure charges have been certified by the Board against custodian, Kevin Taylor and are the subject matter of litigation before the Commissioner of Education, and,

Whereas, on the advice of the Board Attorney and Special Counsel, it has been determined that a settlement of these charges and litigation would be in the best interests of the district, its' students and employees,

Be it resolved that the settlement of the above entitled matter is hereby authorized in accordance with the attached Stipulation of Settlement and special counsel is directed to prepare and file any documentation necessary to effectuate this settlement, and

Be it further resolved that the Board's officers and employees are authorized to take all actions necessary to effectuate this resolution.

I HEREBY CERTIFY the foregoing to be a true and correct copy of resolution passed and adopted by the Board of Education of the Township of North Bergen, Hudson County, N.J. at a meeting held on date of 8-31-99

Secretary

August 31, 1999

Whereas tenure charges have been certified by the Board against custodian, Kevin Taylor and are the subject matter of litigation before the Commissioner of Education, and,

Whereas, on the advice of the Board Attorney and Special Counsel, it has been determined that a settlement of these charges and litigation would be in the best interests of the district, its' students and employees,

Be it resolved that the settlement of the above entitled matter is hereby authorized in accordance with the attached Stipulation of Settlement and special counsel is directed to prepare and file any documentation necessary to effectuate this settlement, and

Be it further resolved that the Board's officers and employees are authorized to take all actions necessary to effectuate this resolution.

I HEREBY CERTIFY the foregoing to be a true and correct copy of resolution passed and adopted by the Board of Education of the Township of North Bergen, Hudson County, N.J. at a meeting held on date of 8-31-99

Secretary

August 31, 1999

OAL DKT. NO EDU 5523-99
AGENCY DKT. NO. 32-3/99

IN THE MATTER OF THE TENURE	:	
HEARING OF KEVIN TAYLOR,	:	
SCHOOL DISTRICT OF NORTH BERGEN,	:	COMMISSIONER OF EDUCATION
HUDSON COUNTY.	:	DECISION
	:	

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

November 17,1999
Date of Mailing, November 17, 1999

361-99

IN THE MATTER OF THE TENURE	:	
HEARING OF NATASHA MOORE,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
CAMDEN, CAMDEN COUNTY.	:	DECISION
	:	

November 17,1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 224-96
AGENCY DKT. NO. 477-23/95

IN THE MATTER OF THE TENURE HEARING OF NATASHA MOORE, BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY

Karen A. Murray, Esq., on behalf of petitioner, Camden City Board of Education (Murray, Murray & Corrigan, attorneys)

Michael C. Damn, Esq., on behalf of respondent, Natasha Moore (Selikoff & Cohen, attorneys)

Record Closed: October 5, 1999 Decided: October 8, 1999

BEFORE **SOLOMON A. METZGER,** ALJ:

This matter arises out of tenure charges pursuant to *N.J.S.A.* 18:6-11 *et seq.*, and regulations promulgated thereunder. The matter was transmitted to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A hearing was opened on June 24, 1999, after which the parties entered into a settlement which is annexed. Having reviewed the terms of the settlement and it appearing that it was entered into voluntarily and fully disposes of all issues in controversy, I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

10/8/99
DATE

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

10/12/99
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 13 1999
DATE

Barbara
OFFICE O[illegible]

/caa

MURRAY, MURRAY & CORRIGAN
25 Sycamore Avenue
Little Silver, New Jersey 07739
(732) 747-2300
Attorneys for the Camden Board of Education

IN THE MATTER OF THE TENURE HEARING OF NATASHA MOORE.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

DOCKET NO. EDU-00224-96S
AGENCY REF. NO. 477-12/95

BEFORE: SOLOMON METZGER, A.L.J.

SETTLEMENT AGREEMENT

Preliminary Statement:

This Agreement is entered into between the Camden City Board of Education (hereinafter referred to as "Board"), and Natasha Moore (hereinafter referred to as "Moore").

Whereas, Moore has been employed by the Board as a tenured clerk since in or about 1988 at various locations; and,

Whereas, in or about December 1995, the Board certified to the Commissioner of Education tenure charges against Moore, which it felt under the circumstances were sufficient to warrant a dismissal; and,

Whereas, in or about January 1996, Moore filed an Answer to the charged denying the allegations as stated; and,

Whereas, this matter has been listed for hearing before the Hon. Solomon Metzger, A.L.J., the latest being October 5 and 7, 1999; and,

Whereas, the parties have agreed to a means of resolving this dispute in a manner consonant with the public interest, the reason being that the Board has had a full opportunity to investigate this matter and based on that investigation believes that such an agreement is fair and just, that the

settlement causes the least disruption to the Camden City School District in that witnesses will not have to be away from their normal responsibilities, that the settlement avoids the uncertainty of litigation and a lengthy and expensive hearing process at the Office of Administrative Law and possible appeals taken thereafter, and that the criminal allegations originally made against Moore were dismissed in their entirety; and

Whereas, it is understood that this Agreement is contingent upon the approval of the Office of Administrative Law and the Commissioner of Education. Nothing in this Agreement is intended to discourage or prevent the Commissioner of Education from executing his exclusive authority to decide tenure matters, nor is this Agreement intended to avoid the obligation of the Board to cooperate in any proceeding or action initiated by the Commissioner of Education.

Now, therefore, it is hereby stipulated and agreed as follows:

1. Moore will report to work upon approval of this Agreement by the Commissioner of Education. She will be contacted by the Personnel Office and will report at the date and time directed.

2. Moore will be returned to work in the Camden School District to a Clerk III position at a salary of $24,485 (step 13 - NC column) for 1999-2000. This is a twelve (12) month position. Upon the ratification of a new collective bargaining agreement, Moore shall be entitled to the benefits of that agreement as they would apply to someone in her position in the 1999-2000 school year. She will remain at the same salary and step for 2000-2001 and then will advance on the guide in the following years. Moore agrees to accept this as an increment withholding for 2000-2001.

3. Moore agrees to accept the salary and step placement set forth in paragraph 2 above and further agrees to accept, without further dispute and/or litigation, all periods of prior suspension.

without pay, subsequent to the certification of tenure charges.

4. Once returned to work, Moore agrees to serve in her position in full compliance with her job duties and all applicable Board policies and rules. Moore agrees that the Board may, without prejudice, reinstate the instant charges and/or any other charges should the Board at any time determine that Moore has violated the terms of this agreement or any of the Board's rules, regulations, policies or has committed any criminal offense. Moore further agrees that in this event, she will not use the instant settlement agreement as a defense to any substantive charges.

5. Moore agrees to be evaluated formally for a minimum of four (4) times in each of the next three (3) years, commencing with the 1999-2000 year. In addition to these evaluations, her work-related performance shall be subject to periodic review. Should her performance be deficient in any way during this time, the Board in its discretion, may refile the current charges against her, plus any new charges.

6. Moore agrees to participate in, and/or continue, counseling for twelve (12) consecutive months to address the conduct which are at issue in this case. Counseling shall be by an approved, certified psychiatrist or psychologist. There shall be no cost to the Board for this counseling if all or some is not covered by Moore's insurance. This time period of twelve (12) months shall commence in the month after the Commissioner's decision is issued. Moore agrees to authorize and request that her counselor prepare a detailed report on her progress after a six (6) month period and at the end of the one (1) year period. Moore agrees to provide the Superintendent with the name, address and phone number of her counselor at the commencement of the one year counseling period to enable the Board to provide background information to the counselor and data regarding the conduct at issue in this case so that such conduct can be fully and adequately addressed by the

counselor.

7. Moore agrees to waive any rights she has or may have to contest or litigate any of the issues relative to this case, but in the event the Commissioner does not approve this agreement or the Board reinstates the charges, Moore reserves the right to assert any defenses which she may have had prior to the execution of this agreement.

8. In return for Moore's agreement with the terms of this settlement, the Board agrees to withdraw, without prejudice, the tenure charges seeking her termination.

9. Moore agrees that she has voluntarily and without coercion entered into this settlement agreement.

10. Moore agrees that she has been fairly and adequately represented at all stages of this proceeding.

11. This Agreement shall be final and binding on the Board and Moore upon final approval by the Commissioner of Education.

12. Violation of any one or more of the provisions of this Agreement by Moore shall permit the Board to refile the tenure charges, plus any new charges it may choose to file.

For Camden Board of Education

Karen A. Murray
Murray, Murray & Corrigan
Date: 10/6/99

For Natasha Moore

Natasha Moore
Date: 9/30/99

Michael Damm, Esq.
Selikoff & Cohen
Date: 9/30/99

OAL DKT. NO. EDU 224-96
AGENCY DKT. NO. 477-12/95

IN THE MATTER OF THE TENURE	:	
HEARING OF NATASHA MOORE,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
CAMDEN, CAMDEN COUNTY.	:	DECISION
	:	

The record, Settlement Agreement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

November 17, 1999
Date of Mailing, November 17,1999

362-99

CHARLES ZEICHNER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CHESTER, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

November 22,1999

OAL DKT. NO. EDU 1158-99
AGENCY DKT. NO. 477-10/98

CHARLES ZEICHNER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CHESTER, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

November 22,1999

363-99

J.I. AND M.I., on behalf of minor child, R.I.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HIGHLAND PARK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

November 22, 1999

OAL DKT. NO. EDU 2048-99
AGENCY DKT. NO. 31-2/99

J.I. AND M.I., on behalf of minor child, R.I.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HIGHLAND PARK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

November 22, 1999

364-99

LILLIAN SIMON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF WAYNE TOWNSHIP, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

November 22,1999

OAL DKT. NO. EDU 3956-99
AGENCY DKT. NO. 63-3/99

LILLIAN SIMON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF WAYNE TOWNSHIP, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

November 22,1999

365-99

MONICA SEMPERVIVE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF GALLOWAY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

November 22,1999

OAL DKT. NO. EDU 4017-97
AGENCY DKT. NO. 107-3/97

MONICA SEMPERVIVE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF GALLOWAY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

November 22,1999

366-99

MICHELE AND TERENCE MULLANE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF NEW PROVIDENCE, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

November 22, 1999

OAL DKT. NO. EDU 1084-99
AGENCY DKT. NO. 551-12/98

MICHELE AND TERENCE MULLANE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF NEW PROVIDENCE, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

November 22,1999

BOARD OF EDUCATION OF THE BOROUGH OF FARMINGDALE, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
THE FARMINGDALE TEACHERS' ASSOCIATION,	:	DECISION
RESPONDENT.	:	

November 22, 1999

OAL DKT. NO. EDU 393-99
AGENCY DKT. NO. 525-11/98

BOARD OF EDUCATION OF THE BOROUGH OF FARMINGDALE, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
THE FARMINGDALE TEACHERS' ASSOCIATION,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

November 22, 1999

368-99

KAREN WILSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF UNION CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

November 22, 1999

OAL DKT. NO. EDU 9125-97
AGENCY DKT. NO. 268-7/97

KAREN WILSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF UNION CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

November 22, 1999

369-99

LORETTA COLANTONI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LONG HILL, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

November 22,1999

OAL DKT. NO. EDU 9839-96
AGENCY DKT. NO. 368-8/96

LORETTA COLANTONI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LONG HILL, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

November 22, 1999

370-99

BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

November 22, 1999

OAL DKT. NO. EDU 4435-99
AGENCY DKT. NO. 111-5/99

BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

November 22, 1999

371-99

LINDA McCLAY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

November 22,1999

OAL DKT. NO. EDU 5445-98
AGENCY DKT. NO. 67-3/98

LINDA McCLAY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

November 22, 1999

372-99

G.R., on behalf of minor child, R.B.,
And P.F., on behalf of minor child, M.H.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE LENAPE VALLEY REGIONAL HIGH SCHOOL DISTRICT, SUSSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

November 22,1999

OAL DKT. NO. EDU 5446-98
AGENCY DKT. NO. 129-5/98

G.R., on behalf of minor child, R.B., And P.F., on behalf of minor child, M.H.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LENAPE VALLEY REGIONAL HIGH SCHOOL DISTRICT, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

November 22, 1999

373-99

JAMES MORGAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE ESSEX COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

November 22, 1999

OAL DKT. NO. EDU 7467-98
AGENCY DKT. NO. 340-7/98

JAMES MORGAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE ESSEX COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

November 22, 1999

374-99

CHARLOTTE MARI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

November 22, 1999

OAL DKT. NO. EDU 7410-98
AGENCY DKT. NO. 193-6/98

CHARLOTTE MARI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

November 22, 1999

375-99

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, PETITIONER, V. NEW JERSEY STATE DEPARTMENT OF EDUCATION, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

November 22, 1999

OAL DKT. NO. EDU 155-92
AGENCY DKT. NO. 403-11/91

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

November 22, 1999

376-99

MIRA ANN SOROKOFSKY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

November 22, 1999

OAL DKT. NO. EDU 05216-97
AGENCY DKT. NO. 105-3/97

MIRA ANN SOROKOFSKY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

November 23, 1999

377-99

LEONARD A. BINOWSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CHESILHURST, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

November 22, 1999

OAL DKT. NO. EDU 10063-98
AGENCY DKT. NO. 436-9/98

LEONARD A. BINOWSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CHESILHURST, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

November 22, 1999

378-99

R.A. and M.A.A., on behalf of minor child, D.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

November 22, 1999

OAL DKT. NO. EDU 11346-97
AGENCY DKT. NO. 394-10/97

R.A. and M.A.A., on behalf of minor child, D.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

November 22, 1999

379-99

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	
LAURA ALEXANDER, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE BOROUGH OF	:	DECISION
SOUTH PLAINFIELD, MIDDLESEX	:	
COUNTY.	:	
_____	:	

November 22, 1999

OAL DKT. NO. EDU 10884-98
AGENCY DKT. NO. 524-11/98

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	
LAURA ALEXANDER, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE BOROUGH OF	:	DECISION
SOUTH PLAINFIELD, MIDDLESEX	:	
COUNTY.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

November 22, 1999

380-99

DAVID ANTHONY CONSTRUCTION, INC.,

PETITIONER,

V.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

November 22,1999

OAL DKT. NO. EDU 5449-98
AGENCY DKT. NO. 79-3/98

DAVID ANTHONY CONSTRUCTION, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

NOvember 22, 1999

381-99

IN THE MATTER OF THE TENURE:

HEARING OF PAULA YANCEY-DYKES, :

STATE-OPERATED SCHOOL DISTRICT :

OF THE CITY OF NEWARK, ESSEX :

COUNTY. :

:

COMMISSIONER OF EDUCATION

DECISION

November 22, 1999

OAL DKT NO. 1745-97
AGENCY DKT. NO. 586-12/96

IN THE MATTER OF THE TENURE :
HEARING OF PAULA YANCY-DYKES, :
STATE-OPERATED SCHOOL DISTRICT :
OF THE CITY OF NEWARK, ESSEX :
COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. Notwithstanding that this matter was erroneously withdrawn on the basis of respondent's notice to the court that she was withdrawing as a party to any further proceedings in this tenure matter, it is determined that, since the record reflects that respondent has resigned her tenured position with the District, there is no basis on which this matter can move forward. Therefore, the Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A* 18A:4-34c, approves the withdrawal. As such, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

However, in that the within respondent resigned from her position prior to the conclusion of the tenure proceedings against her, and due to the serious nature of the charges, which allege her participation in conduct intended to defraud the State Health Benefits Program, pursuant to *N.J.A.C.* 6:11-3.5, the State Board of Examiners is hereby notified of this matter and the file is being forwarded to that body for action as it deems appropriate. The District is also reminded of its obligation to cooperate with the State Board of Examiners in ascertaining and presenting the facts underlying its allegations herein.*

IT IS SO ORDERED.

John M. Sheeran

ASSISTANT COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

November 22, 1999

382-99

THERESA ALFIERI, THERESE MEZAK, CAROLE-ANN SCHONBERGER, JOAN SLYWKA AND MARIAN VICO,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

November 22, 1999

OAL DKT. NO. EDU 7468-98
AGENCY DKT. NO. 339-7/98

THERESA ALFIERI, THERESE MEZAK, CAROLE-ANN SCHONBERGER, JOAN SLYWKA AND MARIAN VICO,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

November 22, 1999

383-99

I.C., on behalf of minor child, M.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

November 22, 1999

OAL DKT. NO. EDU 1156-99
AGENCY DKT. NO. 484-10/98

I.C., on behalf of minor child, M.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

S.V. AND B.V.,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENT.	:	DECISION
AND	:	
R.P. AND J.P.,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

In consolidated matter, petitioning parents contended that the Board's determination not to pay for transportation costs of their children to the county vocational school was, in effect, imposing the total cost for such transportation on them.

ALJ found that since petitioners' children attended both a private school and a vocational school on a shared-time basis during the school day, they were eligible for both types of transportation benefits. They should be treated no differently from a remote student enrolled in the regular public high school and the vocational school, who admittedly would be transported to both. ALJ ordered the Board to compensate petitioners for the transportation costs to the vocational school during the 1998-99 school year (*N.J.S.A* 18A:54-20.1(a)) and to pay petitioners $704 each in lieu of transportation between home and the private school during the 1999-2000 school year (*N.J.S.A.* 18A:39-1).

Commissioner adopted findings and determination in initial decision as his own and directed the Board compensate petitioners pursuant to *N.J.S.A* 18A:54-20.1(a) and 18A:39-1.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1078-99
AGENCY DKT. NO. 476-10/98

S.V. and B.V.,
Petitioners,
v.
LINCOLN PARK BOARD OF EDUCATION,
Respondent.

R.P. and J.P.,
Petitioners,
v.
LINCOLN PARK BOARD OF EDUCATION,
Respondent.

OAL DKT. NO. EDU 1079-99
AGENCY DKT. NO. 460-10/98

S.V. and R. P, *pro se*

Eric Martin Bernstein, Esq., for respondent
(Mauro, Savo, Camerino & Grant, attorneys)

Record Closed: July 14, 1999

Decided: October 7, 1999

BEFORE: **KEN R. SPRINGER**, ALJ:

Statement of the Case

Two families who send their children to private school seek their local school district to pay transportation costs to their county vocational school. Petitioners' children spend part of the school day at a private school and part of the day at the county vocational school. Although the local district acknowledges its obligation under *N.J.S.A.* 18A:39-1 to contribute toward transportation to the private school, it is unwilling also to pay transportation costs to the county vocational school. Petitioners contend that the local district is independently required by *N.J.S.A.* 18A:54-20.1 to "send" resident students to the county vocational district. However, the local district argues that it is not legally required to pay "twice" for transportation.

Procedural History

Mr. and Mrs. S.V. filed a petition with the Commissioner of Education ("Commissioner") on October 20, 1998 appealing a determination by the Lincoln Park Board of Education ("Board") that their child is ineligible for transportation to the county vocational school. Mr. and Mrs. R.P. filed a similarly-worded petition with the Commissioner on October 27, 1998. The Board filed its answer to both petitions on December 14, 1998. Subsequently, on January 7, 1999, the Commissioner transmitted both matters to the Office of Administrative Law ("OAL") for hearing as consolidated cases. The OAL held a hearing on June 14, 1999. Witnesses and exhibits are listed in the appendix. Respondent filed a post-hearing brief on July 14, 1999.

Findings of Fact

All of the material facts are undisputed. **I FIND**:

Petitioners live in Lincoln Park. S.V. and his wife have three children, the oldest of whom is J.V. During the 1998-99 academic year, J.V., a seventeen-year-old high school junior, attended the Netherlands Reformed Christian High School ("NRCHS") in Pompton Plains, New Jersey. NRCHS is a private nonprofit school located approximately four miles from his home. In the late mornings, J.V. took landscaping classes at Morris County Vocational and Technical School ("Morris Vo-Tech"), located roughly fifteen miles from NRCHS. J.V. drove his own vehicle between NRCHS and Morris Vo-Tech. NRCHS has an enrollment of only fifty students and does not offer the specialized vocational training available at Morris Vo-Tech.

R.P. and his wife have four children, including J.P., a seventeen-year old junior also attending NRCHS. Last year, she took child-development classes at Morris Vo-Tech. Her mother drove her to and from NRCHS, a distance of about four miles. Fellow student J.V. drove her from NRCHS to Morris Vo-Tech and back. J.P. does not plan to attend Morris Vo-Tech in 1999-2000, but she has younger siblings who will likely attend in the future. Both sets of parents paid tuition for their children to attend private school.

Lincoln Park is a K to 8 school district. It sends its secondary students to Boonton High School under a sending-receiving relationship. A number of students at Boonton High School, including residents of Lincoln Park, attend classes at Morris Vo-Tech. Boonton has its own bus which transports them between Boonton High School and Morris Vo-Tech. Lincoln Park pays for transportation of its public-school students who go to Morris Vo-Tech. If petitioners' children attended Boonton High School, they would receive free transportation to Morris Vo-Tech. While there is room on the bus for petitioners' children, they have no convenient way of getting from NRCHS to Boonton High School.

Pursuant to its statutory obligation, the Board contributes to the transportation expense for petitioners' children to attend NRCHS.[1] Since the Board was unable to arrange for transportation at a cost of less than $702, it elected to pay that amount for each child in lieu of providing actual transportation.[2]

Pequannock school district has a bus route which transports its own students between NRCHS and Morris Vo-Tech. Moreover, Pequannock was willing to include petitioners' children on its bus at a per-pupil cost of $1,011. The Board proposed to enter into a transportation agreement with Pequannock if petitioners were willing to forego the $702 transportation allowance and pay the difference of $309. However, petitioners rejected this proposal, contending that "In essence, the parents then are paying for the full transportation costs (by forfeiting $702 and paying the $309)."

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that petitioners are entitled to transportation of their children to Morris Vo-Tech in addition to the $702 transportation allowance.

N.J.S.A. 18A:54-20.1(a) provides, in pertinent part, that:

> The board of education of each school district . . . in which there is a county vocational school district shall *send* to any of the schools of the county vocational school district each pupil who resides in the school district . . . and who has applied for admission to and has been accepted for attendance at any of the schools of the county vocational school district. The board of education shall

[1] *N.J.S.A.* 18A:39-1 mandates that "when any school district provides transportation for public school districts to and from school pursuant to this section, transportation shall be supplied to school pupils residing in such district in going to and from any remote school other than a public school, not operated for profit in whole or in part, located within the State no more than 20 miles from the residence of the pupil."

[2] *N.J.S.A.* 18A:39-1 further provides that if the per-pupil cost of the lowest bid shall exceed a certain amount set by statutory formula, the parents are eligible to receive that amount in lieu of transportation. In 1998-99, the amount was $702. In 1999-2000, it is $704.

> pay tuition for each of these pupils to the county vocational school district pursuant to subsection c. of this section. (Emphasis added).

Generally, the language of a statute is given its ordinary and primary meaning unless there is legislative intent to the contrary. *Merin v. Maglaki*, 126 *N.J.* 430, 434-435 (1992). *Kingsley v. Hawthorne Fabrics, Inc.*, 41 *N.J.* 521, 526 (1964). The preferred meaning of the word "send" is "to cause to go by physical means or direct volition." A secondary meaning is "to dispatch to a specified destination for a course or term" as in "to send a son to college." WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d ed. 1976). It is difficult to imagine a context in which sending does not connote transportation, transmission or conveyance. Tuition had to be addressed separately in *N.J.S.A.* 18A:54-20.1(a) because the common sense of the word "send" does not imply that tuition is necessarily included.

School law decisions interpret the foregoing statute as imposing financial responsibility on local school districts for transportation as well as tuition costs. In *M.R. v. Pompton Lakes Bd. of Educ.*, <http://www.state.nj.us.njded/legal/index.html> (Comm'r July 29, 1997), the Commissioner construed *N.J.S.A.* 18A:54-20.1 as requiring a local school district in Passaic County to pay tuition and transportation costs for its resident student to attend a vocational school in Bergen County. Reading the statute together with the regulation authorizing pupils to enroll in vocational schools outside their own district if the local school board does not offer a comparable type of program, the Commissioner held that these enactments establish "a statewide delivery system for vocational education that ensures pupil access to such education" and that "[s]uch right of access of necessity entails a concomitant right to transportation." *M.R.*, slip op at 4-5. Such authoritative interpretation of a statute by an agency charged with its enforcement is entitled to great weight. *Nelson v. Old Bridge Bd. of Educ.*, 148 *N.J.* 358, 364 (1997).

Subsequent initial decisions by administrative law judges have consistently followed the example set by *M.R.* Illustratively, in *K.B. v. Rancocas Valley Reg. High Sch. Dist.*, <http://www.lawlibrary.rutgers.edu/oal/html/initial/edu6974-99.html> (Initial

Decision Nov. 12, 1997), ALJ Joseph Martone ordered a school district in Burlington County to provide transportation to a vocational school in Gloucester County. Similarly, in *Jacobs v. Northern Valley Reg. Sch. Dist.*, <http://www.lawlibrary.rutgers.edu/oal/html/initial/edu3517-98-1.html> (Initial Decision May 4, 1999), ALJ Mumtaz Bari-Brown required a school district to pay for transportation of a home-schooled pupil who had been accepted by the district's own county vocational school. Recently, in *D.F. v. Roselle Park Bd. of Educ.*, <http://lawlibrary.rutgers.edu/oal/html/inial/edu5903-98.html> (Initial Decision May 24, 1999), former ALJ Sebastian Gaeta, now sitting on the Superior Court of New Jersey, ordered a local board of education to pay transportation costs for delivery of children to the magnet high school operated by the county vocational school.

Additional support for petitioners' position derives from *N.J.S.A.* 18A:39-1, which obligates local school districts to transport secondary-school students who live more than two and-a-half miles from "their public school of attendance." In a written directive dated August 31, 1998, the Morris County Superintendent's Office expressly advised Lincoln Park that once a pupil attends a vocational school, he or she becomes "a public school student entitled to transportation to be paid by the district of residence as per *N.J.S.A.* 18A:39-1." This conclusion results from *M.R.*, where the Commissioner recognized that a vocational school constitutes a "public school of attendance." (slip op at 5).

Although Lincoln Park cites several cases upholding the exclusion of certain categories of private school students, those limitations are inapplicable to vocational schools. Unlike the portion of *N.J.S.A.* 18A:39-1 pertaining to private schools, the statutory language applicable to public schools "excludes no categories of public school pupils and sets no limitations on the distance of the public schools of attendance." *M.R.,* at 5. Lincoln Park's attempted distinction between compulsory and optional education is equally without merit. Children who attend vocational school are subject to the same compulsory education laws as children who attend other types of public schools or private schools. Vocational schools are approved educational

placements which satisfy the statutory requirement that all children must attend "the public schools of the district or a day school in which there is given instruction equivalent to that provided in the public schools for children of similar grades and attainments." *N.J.S.A.* 18A:38-25.

Lastly, Lincoln Park's contention that it is paying twice for the same services misconceives the realities of the situation. Petitioners' children attend NRCHS and Morris Vo-Tech on a shared-time basis. Under the second paragraph of *N.J.S.A.* 18A:39-1, a local school district must provide transportation to resident students attending a nonprofit private school located within twenty miles from home. Lincoln Park acknowledges its responsibility to contribute up to $702 toward transportation of each of petitioners' children to NRCHS.

In addition, *N.J.S.A.* 18A:54-20.1(a) confers a right of access to a public vocational school if the local district does not offer a comparable program. The first paragraph of *N.J.S.A.* 18A:39-1 requires the local district to provide transportation to any public school, including a vocational school, located more than two and-a-half miles from a child's residence. Since petitioners' children attend both a private school and a vocational school during the school day, they are eligible for both types of transportation benefits. In this regard, they should be treated no differently than a remote student enrolled in Boonton High School and Morris Vo-Tech, who admittedly would be transported to the regular public high school and to the vocational school.

Order

It is **ORDERED** that Lincoln Park compensate J.V.'s parents in the amount of $1,011 for transportation costs to Morris Vo-Tech during the 1998-99 academic year, in the amount of 1/10 of $1,011 = $101 for the transportation costs to Morris Vo-Tech during the first month of the 1999-2000 academic year and arrange for transporting J.V. between NRCHS and Morris Vo-Tech for the remainder of the 1999-2000 school year.

It is **ORDERED** that Lincoln Park compensate J.P.'s parents in the amount of $1,011 for transportation costs to Morris Vo-Tech during the 1998-99 academic year.

And it is further **ORDERED** that Lincoln Park pay $704 to J.V.'s parents and $704 to J.P.'s parents in lieu of transportation between home and NRCHS during the 1999-2000 academic year.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Oct 7, 1999
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

10-13-99
DATE

Debbie Antanaitis/ase
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 14 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

1. R.P.

2. S.V.

3. Dr. David George Murray Clover, business administrator/board secretary, Lincoln Park Board of Education

List of Exhibits

No.	Description
J-1	Certified copy of extract from minutes of a meeting of the Board of Education of the Borough of Lincoln Park held on September 22, 1998
P-1	Copy of letter to Dr. David Clover from Marlene D. Aurilia, dated August 31, 1998
P-2	Copy of letter to Dr. Elaine Pace from B.V. and S.V., dated September 14, 1998
P-3	Copy of letter to Mr. and Mrs. S.V. from Elaine M. Pace, Ed.D., dated September 10, 1998
P-4	Copy of proposed joint transportation agreement between the Board of Education of Lincoln Park and the Board of Education of Pequannock Township, undated

S.V. AND B.V.,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENT.	:	DECISION
AND	:	
R.P. AND J.P.,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the ALJ that petitioners are entitled to the relief they seek. In so

concluding, the Commissioner finds the express language of *N.J.S.A.* 18A:54-20.1 and *N.J.S.A.* 18A:39-1 to be determinative.[1]

Accordingly, the Commissioner affirms the Initial Decision for the reasons expressed therein and directs that, pursuant to *N.J.S.A.* 18A:54-20.1(a), the Board reimburse J.V.'s parents the amount of $1,011 for transportation costs from the Netherlands Reformed Christian High School (NRCHS) to the Morris County Vocational and Technical School (MCVTS) for the 1998-99 school year, and for 1999-2000 school year, until the date of this decision, at a prorated amount of $5.62 per day ($1,011 divided by 180 days). As of the date of this decision, the Board is responsible for transporting J.V. between the NCHRS and the MCVTS for the remainder of the 1999-2000 school year. Additionally, pursuant to *N.J.S.A.* 18A:54-20.1(a), the Board is directed to reimburse J.P.'s parents the amount of $1,011 for transportation costs from the NRCHS to the MCVTS for the 1998-99 school year. The Board is further ordered to continue to pay J.V.'s parents and J.P.'s parents each the amount of $704, representing aid in lieu of transportation costs from the students' respective homes in Lincoln Park to the NCHRS for the 1999-2000 school year. *N.J.S.A.* 18A:39-1.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

---

[1] The Commissioner herein notes that, after issuing his final decision in *M.R., supra,* on July 29, 1997, the decision was appealed to the State Board of Education. There, the respondent Board contended for the first time that the Commissioner's determination violated the Carl D. Perkins Vocational and Applied Technology Act, 20 U.S.C. Section 2301 *et seq.* (*M.R., supra*, State Board of Education, December 3, 1997, slip op. at p. 3) Upon request of the Commissioner, the State Board remanded this matter on December 3, 1997 to the Commissioner with direction that it be transmitted to the OAL "for hearing and determination of all the issues raised [in the] appeal, including the factual question of whether the Board can offer a comparable program to petitioners in Passaic County." (*Id.* at pp. 3, 4) While at the OAL, the parties settled the matter.

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

November 29, 1999
Date of Mailing, November 29, 1999

387-99

GINA FRANCO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST HANOVER, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

November 29, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO.: EDU 9217-98

AGENCY DKT. NO. 143-5/98

GINA FRANCO

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EAST HANOVER, MORRIS COUNTY,

Respondent.

Gail Oxfeld Kanef, Esq., for petitioner
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Joseph R. Morano, Esq., represented respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: October 1, 1999 Decided: October 12,1999

BEFORE: **THOMAS E. CLANCY**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL), on September 25, 1998 for determination as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Settlement Agreement and Release.

Having reviewed the contents of the attached Settlement Agreement and Release, I **FIND:** (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, **I CONCLUDE** that the attached Settlement Agreement and Release meets the requirements of *N.J.A.C. 1:1-19.1.1*, and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **TERMINATED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

10-12-99
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALJ

Receipt Acknowledged:

10-15-99
DATE

Debbie Antanaitis/bp
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 18 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/g

OCT 1 [illegible]9

SETTLEMENT AGREEMENT AND RELEASE

Gina Franco v. Board of Education of The Township of East Hanover
Agency Docket No. 143-5/98; OAL Docket No. EDU 9217-98N

This Agreement and Release is between Gina Franco ("Ms. Franco) and the East Hanover Township Board of Education ("the Board").

WHEREAS, Ms. Franco, a half time employee of the East Hanover Township Public Schools has filed a Petition before the Commissioner of Education, Agency Docket No. 143-5/98; OAL Docket No. EDU 9217-98N, alleging that she is entitled to certain credit for the carryover of six (6) sick days for the 1997-98 school year; and

WHEREAS, the parties desire to amicably resolve the matter without the necessity of further litigation;

NOW, THEREFORE, in consideration of the mutual promises set forth below, the parties agree as follows:

1. Respondent Gina Franco agrees that she shall be entitled to carry over into her sick bank six (6) unused half time sick days from the 1997-98 school year. Ms. Franco understands that if she uses these days in the future, that she shall be paid at a half time rate (to be calculated based upon her salary at the time) for each day taken.

2. Ms. Franco, in consideration of paragraph 1, above, and in full, final and complete settlement of this matter hereby withdraws, with prejudice, the above-docketed petition, and any related complaints, thus releasing the Board and its agents, servants and employees from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings, grievances, demands for arbitration, and judicial and quasi-judicial proceedings of any kind whatsoever, arising under or relating in any way to the above-docketed matter. This includes any and all past, present or future claims, demands, obligations, actions, causes of action, claims, rights, damages, costs, losses or services, expenses and compensation of any nature whatsoever, whether based on tort, contract, statutory or other theory of recovery, specifically including, but not limited to, claims arising under the New Jersey Tort Claims Act, the New Jersey Law Against Discrimination, the Age Discrimination Act, the New Jersey Family and Medical Leave Act, the Federal Family and Medical Leave Act, all Federal laws against discrimination and the Americans with Disabilities Act, which Ms. Franco now has, or which may hereafter accrue or otherwise be acquired, on account of, or may in any way grow out of the incident described in the recitals above, including, without limitation, any and all known or unknown claims which have resulted or may result from the alleged acts or omissions of the Board; as well as, any and all claims for liquidated, compensatory and punitive damages, and attorneys' fees, disbursements and costs.

3. Ms. Franco hereby further releases the Board from any and all claims, causes of

action, suits, actions at law and in equity, administrative proceedings, grievances, demands for arbitration, and judicial and quasi-judicial proceedings of any kind whatsoever, arising under or relating in any way to the above-docketed matter.

4. The parties acknowledge that nothing in this Release shall be construed to diminish or remove from the Board the managerial prerogative to make future job decisions related to Ms. Franco's employment with the East Hanover Township Public Schools. Further, nothing in this Release shall be construed to diminish or remove from the Board the authority or responsibilities which are vested in it by law.

5. This Release and Agreement is not and shall not in any way be construed as an admission of wrongdoing by either party. Instead, this Release and Agreement constitutes the good faith settlement of all matters covered in the above docketed matter.

6. Nothing in this Agreement shall be construed as conferring any benefit upon any person, group or association not a direct signatory hereto. Further, this Agreement shall not be deemed to establish any "past practice" or "precedent" requiring or restricting the Respondent in providing any benefit to any person, group or association.

7. This Agreement shall also serve as the withdrawal with prejudice of the matter entitiled Gina Franco v. East Hanover Township Board of Education, Agency Docket No. 143-5/98; OAL Docket No. EDU 9217-98N.

IN WITNESS WHEREOF, the parties do set forth their hands and seal as of the date first above written.

EAST HANOVER TOWNSHIP BOARD OF EDUCATION

By: _____ MD
Dr. Adrian Connolly, Board President

Attest: _____

Date: 9/29/99

_____
Gina Franco

Attest: _____

Date: _____

OAL DKT. NO. EDU 9217-98
AGENCY DKT. NO. 143-5/98

GINA FRANCO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST HANOVER, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, Settlement Agreement and Release, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.
November 29, 1999
Date of Mailing, November 29, 1999

388-99R

ANITA LEWIS,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON REMAND
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	
RESPONDENT.	:	
	:	

SYNOPSIS

In consolidated matter, petitioners, two tenured teaching staff members who were riffed in May 1994, sought back pay for the District's failure to employ them during the 1994-95 and 1995-96 school years. ALJ dismissed petitions. Upon review of the record and transcripts from the hearings, the Commissioner reversed the Initial Decision finding that subsequent to the RIF in May 1994, there were positions to which both petitioners could have been assigned by virtue of their superior tenure and seniority rights. Commissioner ordered the District to calculate the sums due petitioners, mitigated compensation for school years 1994-95 and 1995-96 until the date on which they were offered positions in the District. Moreover, the Commissioner directed the District to establish job positions and titles, as appropriate, for the positions discussed, to produce job descriptions that include certification requirements, *inter alia*, for each such position, and to submit positions bearing unrecognized titles to the County Superintendent for approval of designation of appropriate certification.

District appealed to the State Board. In 1997, the State Board approved a settlement resolving the dispute with Petitioner Skawinski. Requested relief of Petitioner Lewis in the form of back pay remained. State Board reversed Commissioner's determination with regard to petitioner's entitlement to in-school suspension assignment and remanded the matter for further proceedings to determine if the particular in-school suspension assignment at issue was a teaching staff position requiring possession of an appropriate certificate, as well as whether petitioner had any entitlement to it after November 1994. State Board remanded matter for determination.

On remand, the ALJ concluded that petitioner was entitled to three full months of compensation for a total of $3,939 for the period in question. Commissioner concurred with the ALJ and directed the District to compensate petitioner for lost wages in the amount of $3,939 and related emoluments.

November 29, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7704-98

AGENCY DKT. NO. 306-7/94

ANITA LEWIS AND DEBRA SKAWINSKI,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT

CITY OF PATERSON, PASSAIC COUNTY,

Respondent.

Gail Oxfeld Kanef, Esq., appearing for Petitioner
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Michael J. McCaffrey, Esq., for Respondent
(Purcell, Ries, Shannon, Mulcahy & O'Neill, attorneys)

Record Closed: September 14, 1999 Decided: October 8, 1999

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

These are consolidated cases in which the Petitioners asserted that Respondent had violated their tenure rights during a reduction in force (RIF) in May, 1994,[1] when

[1] On October 1, 1997, the State Board of Education approved a settlement resolving the dispute between the State-Operated District and Debra Ann Skawinski. Consequently, this remand from the State Board is limited to the petition filed by Anita Lewis; references to petitioner are intended to refer to Lewis only. (See State Board of Education Decision, June 17, 1998).

her position was abolished. Petitioner claimed she was qualified for another position by virtue of seniority pursuant to *N.J.S.A.* 18A:28-12. Specifically, Lewis, who held an instructional endorsement as a Teacher of Business Education, claimed she was entitled to reinstatement as an in-school suspension instructor, a position which had been held by Robert Salviano until November 1994 or as a teacher of computers which had been held by Catherine Zehnacker. Lewis requested relief in the form of back pay for the entire 1994-95 school year and for the 1995-96 school year through the date of her reinstatement in March, 1996.

On January 30, 1997, an Administrative Law Judge (ALJ) recommended dismissing the petition because the Petitioner did not possess the required certification for the positions to which she had claimed entitlement; accordingly, her tenure rights had not been violated.

The Commissioner rejected the ALJ's recommendation, finding that Salviano's employment as an in-school suspension teacher constituted a position requiring a valid and effective certificate; moreover, the Commission found that a teacher of computers need only possess an instructional certificate. Accordingly, the Commissioner found that there were positions to which Petitioner could have been assigned by virtue of her tenure and seniority rights. He concluded that Lewis was entitled to the difference in pay between what she could have earned in those positions during the relevant time frame and what she actually earned. According to the Commissioner, however, it was unclear whether the in-school suspension position had been abolished after November, 1994; if it had been, there would be no remaining position after that date to which Lewis could claim entitlement and her relief would be limited.[2]

The State-Operated School District filed the instant appeal of the Commissioner's decision. The State Board reversed the Commissioner's determination

[2] The State Board agreed with the Commissioner that, on the basis of the facts in this case, only an instructional certificate was required. Since Skawinski had greater seniority than Lewis, according to the State Board, Skawinski would have been entitled to reinstatement in position teaching computers, leaving only the in-school suspension assignment at issue.

with regard to Petitioner's entitlement to the in-school suspension assignment and remanded the matter for further proceedings to determine if the particular in-school suspension assignment at issue was a teaching staff position requiring possession of an appropriate certificate as well as whether Petitioner had any entitlement to it after November, 1994. In addition, the State Board remanded for a determination, as a result of the foregoing, of Petitioner's claim in accordance with the State Board decision.

FINDINGS OF FACT

The parties stipulated to the following facts on the record.

1. A teaching certificate is required for the position of in-school suspension teacher.

2. Petitioner, who holds a valid teaching certificate should have been appointed to the position; consequently, she is entitled to back pay.

3. The period for which she would have been appointed was from approximately September 1, 1994 to December 7, 1994.

4. Petitioner was employed as a teacher assistant commencing September 1, 1994 at a salary of $33,231 per year.

5. Accordingly, Petitioner is entitled back pay for the period from September 1, 1994 to December 7, 1994, in an amount which reflects the difference between her earnings as a teacher assistant and her earnings as a teacher at Step 7 of the ten effective salary guide, $45,351.

6. Based on the annual salaries set forth above, there is a difference of $12,100 between Petitioner's annual salary as an assistant and what she would have

been paid as an in-school suspension teacher. Further calculation yields a difference of $1212 per month[3] and a *per diem* rate of $60.60.[4]

I **CONCLUDE**, therefore, that Petitioner is entitled to three full months from September 1, 1994 to November 30, 1994 of compensation at the rate of $1212 per month for a total of $3636 plus five working days from December 1, 1994 to December 7, 1994 at the *per diem* rate of $60.60 for a total of $303. Accordingly, I further **CONCLUDE** that Petitioner is entitled to compensation in the total amount of $3939 for the period in question.

ORDER

It is, therefore, hereby **ORDERED** that Respondent pay Petitioner $3939 as back pay for the period from September 1, 1994 to December 7, 1994.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

[3] Calculated on a 10 month basis.
[4] Calculated on the basis of 20 working days per month.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 8, 1999
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

10-15-99
DATE

Debbie Antanaitis /bg
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 18 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

jb

OAL DKT. NO. EDU 7704-98
AGENCY DKT. NO. 306-7/94

ANITA LEWIS,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON REMAND
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	
RESPONDENT.	:	
	:	

The record of this matter[1] and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions.

Upon careful and independent review of the record in this matter, and noting that the parties have stipulated as to the relevant facts on remand, the Commissioner concurs with the Initial Decision of the ALJ. Accordingly, the Initial Decision is adopted for the reasons expressed therein. The District is directed to compensate Ms. Lewis for lost wages in the amount of $3,939 and related emoluments.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] This matter was formerly captioned *Anita Lewis and Debra Skawinski v. State-Operated School District of the* City *of Paterson, Passaic County.* (See Initial Decision, footnote 1.

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

Novezmber 29, 1999
Date of Mailing, November 29, 1999

OAL DKT. NO. EDU 9797-99
AGENCY DKT. NO. 276-9/99

G.W.S., ON BEHALF OF MINOR CHILD A.F.S.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
WILLIAM PETRINO, SUPERINTENDENT AND RAHWAY BOARD OF EDUCATION, UNION COUNTY	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Rahway Board of Education's policy on extracurricular activities does not allow the participation of students not enrolled in Rahway High School (RHS). On August 24, 1999 the Board passed a motion revising its policy on extracurricular activities which allowed Rahway students currently enrolled in grades 10, 11 and 12 at the Union County Vocational-Technical Magnet School Program for Math, Science and Technology (Magnet School), a full-time program, to participate in extracurricular and intramural athletic activities but excluded students enrolling in the Magnet School as ninth graders effective September 1, 1999. Parent of 9th grade Magnet School student filed a petition and emergent relief application seeking an order reversing the Board's action.

ALJ granted motion for emergent relief ordering the Board to immediately allow petitioner's daughter to participate fully in all extracurricular activities offered at RHS and to comply with Article V (G), CL3 of the NJSIAA rules and regulations governing the participation of full-time vocational-technical school students in interscholastic sports at their resident high schools. Because there were no material facts in dispute and the parties appeared to have fully briefed the issues, the Commissioner requested return of the case from the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-3.3, so that a final decision could be issued rather than an interim decision.

As to participation in interscholastic athletic activities, the Commissioner found that the Board's policy revision constituted a blanket exclusion of Rahway's Magnet School students which had the effect of precluding the principal of RHS from complying with NJSIAA's Art. V (G), CL3, a rule which, pursuant to *N.J.S.A.* 18A:11-3, became Board policy upon Rahway's becoming a member school of NJSIAA. As to other extracurricular activities, the Commissioner found the record totally devoid of any rational basis for the policy revision. Commissioner, therefore, held that the Board's action cannot be deemed to be within its discretionary authority in the absence of the Board's (or principal's, in the case of interscholastic sports) having determined that such participation is not practicable or reasonable because of scheduling constraints, transportation costs or logistical difficulties, or other valid considerations.

Commissioner directed Board to allow petitioner's daughter, and other similarly situated Magnet School students, to participate in extracurricular activities and athletic programs at RHS, unless it can demonstrate that such participation is not practicable or reasonable as indicated above. Board was also ordered to revise its extracurricular activities policy in light of the Commissioner's holding and submit it to the Union County Superintendent of Schools for her review.

OAL DKT. NO. EDU 9797-99
AGENCY DKT. NO. 276-9/99

G.W.S., on behalf of minor child, A.F.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
WILLIAM PETRINO, SUPERINTENDENT, AND RAHWAY BOARD OF EDUCATION, UNION COUNTY,	:	DECISION
RESPONDENTS.	:	
	:	

For Petitioner: Gerard Wm. Stagnato, Esq. (Thomas J. Mallon, Esq.)

For Respondent: Alan J. Schnirman, Esq.

BACKGROUND AND PROCEDURAL HISTORY

This matter was opened before the Commissioner by way of a Petition of Appeal and application for emergent relief filed by petitioner on September 13, 1999, pursuant to *N.J.A.C.* 6:24-1.1 *et seq.* Petitioner and his daughter, A.F.S., are residents of Rahway. A.F.S. attends ninth grade at the Union County Vocational-Technical Magnet School Program for Math, Science and Technology (Magnet School), a full-time program. Rahway Board of Education's Policy 6145 on extracurricular activities does not allow the participation of students not enrolled in Rahway High School. On August 24, 1999 the Board passed a motion revising its policy on extracurricular activities which allowed students residing in Rahway who attend the Magnet School currently enrolled in grades 10, 11 and 12 to participate in extracurricular and intramural athletic activities at Rahway High School (RHS) but excluded from participation students enrolling in the Magnet School as ninth graders effective September 1, 1999. As a result, A.F.S.

is not allowed to participate in any extracurricular activities at RHS. The petition and emergent relief application seek an order from the Commissioner declaring "the policy of the Rahway Board of Education illegal, in violation of the Rules and Regulations of the New Jersey Department of Education and further, order [respondents] to immediately withdraw said motion and immediately invite all Magnet school students to fully participate in all Rahway High School extracurricular activities."

The petition and application for emergent relief were forwarded to the Office of Administrative Law (OAL) on September 18, 1999. A hearing on the emergent relief application was conducted by the Administrative Law Judge (ALJ) on October 7, 1999. On October 14, 1999, the ALJ issued an order on the emergent relief application which was received by the Commissioner on October 18, 1999. The ALJ's order reads in pertinent part that

> The Rahway Board of Education and Doctor William Petrino shall immediately and without further delay allow {A.F.S.} to fully participate in all extra-curricular activities including band clubs, dramatic or musical presentations and intramural and interscholastic sports offered by Rahway High School, and
>
> IT IS FURTHER ORDERED, that the Rahway Board of Education shall order the Principal of Rahway High School to comply with Art. V(G)-CL3 of the Rules & Regulations governing New Jersey Interscholastic Athletic Association and without further delay come to an agreement with the Principal of Union County Vocational Technical School for Math, Science and Technology (UCVTS), allowing students of the Rahway School District attending UCVTS to fully participate in Rahway High School interscholastic athletic events regardless of the number of sports programs offered at the Vocational/Technical High School.

Upon a preliminary review of the record of the emergent relief hearing provided to the Commissioner by the OAL, including the audiotape of the proceedings, and the parties' exceptions to the ALJ's order submitted by the Board on October 26, 1999 and petitioner's reply thereto submitted on October 29, 1999, it appeared that no genuine issues of material fact were in dispute and that the parties had fully briefed the issues. Consequently, on November 1, 1999,

a letter was sent to the parties indicating that the matter appeared amenable to a ruling on the merits by the Commissioner within the time accorded him by regulation for review of the emergent relief order, and the parties were accorded an opportunity to submit to the Commissioner within ten days any further arguments or affidavits not presented during oral argument on the emergent relief application, with replies, if deemed necessary, to be submitted five days thereafter. The OAL's Director and Chief Administrative Law Judge was requested to return the matter to the Commissioner, pursuant to *N.J.A.C.* 1:1-3.3, because it appeared to be in the best interest of the parties for the Commissioner to issue a determination directly since there were no disputed facts necessitating further fact-finding and the matter had been fully briefed by the parties.

No submissions were filed by the parties in response to the November 1, 1999 letter. The matter was returned by the OAL on November 17, 1999; whereupon, the record of the matter was deemed closed.

UNDISPUTED FACTS

Upon review of the entire record of this matter, the following undisputed facts material to this case have been adduced:

1. A.F.S. resides with her parents in Rahway. She is a fourteen-year-old ninth grader at the UCVT Magnet School Program for Math, Science and Technology (Magnet School) in Scotch Plains, a full-time program.

2. Rahway is paying the cost of tuition and transportation for A.F.S.'s attendance at the Magnet School.

3. Prior to August 24, 1999, students residing in Rahway who attended the Magnet School were permitted to participate in extracurricular activities and sports.

4. Board Policy 6145 on extracurricular activities does not allow for the participation of students who are not enrolled in Rahway High School. On August 24, 1999, the Board passed a motion which revised its policy on extracurricular activities and sports to permit the Principal of RHS to enter into an agreement

with the Principal of UCVT for participation of current Magnet School students in grades 10, 11 or 12 to participate in extracurricular and intramural athletic activities at RHS.

5. On August 25, 1999, the respondent superintendent sent a letter to petitioner regarding the Board's motion of August 24, 1999 relative to Policy 6145 and Magnet School student participation in extracurricular activities which reads in pertinent part:

> As a result of this motion, Rahway students enrolling in ninth grade effective September 1, 1999, will not be eligible for participation in the extracurricular activities including bands, clubs, dramatic or musical presentations, and intramural and interscholastic sports operated by the Rahway Board of Education. (Exhibit A)

6. Article V(G), CL3 of the New Jersey State Interscholastic Association (NJSIAA) Handbook, a voluntary association to which respondent belongs, governs the participation of full time vocational school students in interscholastic athletic activities in its member schools. It states:

> If a Vocational/Technical High School does not offer the particular sport in which one of its full-time students desires to participate, that student may participate in that sport at his/her sending school upon agreement of both Principals, regardless of the number of sports programs offered at the Vocational/Technical High School. (*NJSIAA Handbook* at p. 42)

7. A.F.S. desires to participate in interscholastic swimming and soccer and certain other extracurricular activities offered at Rahway High School, such as the drama club.

8. Policy 1645, as revised by the Board on August 24, 1999, precludes A.F.S. from participating in extracurricular and athletic activities operated by respondents.

9. UCVT Magnet School does not offer any interscholastic athletic activities. It does offer several extracurricular clubs.

PETITIONER'S POSITION

Essentially, petitioner contends that by statutory obligation respondents are required to provide a complete, thorough and efficient education to all public school students, which includes affording those students attending the Magnet School complete and full access to any and all extracurricular activities regularly provided Rahway High School students. He further avers that extracurricular activities are an integral/essential part of a student's education, citing in support thereof *Willet v. Colts Neck Board of Education*, 1966 *S.L.D.* 202, 206 and *Board of Education of Asbury Park v. Asbury Park Education Association*, 145 *N.J. Super.* 495, at 505 (Chanc. Div. 1976). Moreover, petitioner maintains that participation in extracurricular activities is a strong factor in determining college admission, as well as the possibility of scholarships awarded on the basis of such activities. By being denied entry to extracurricular activities as a ninth grader, A.F.S. will be unable to show a four-year commitment to any extracurricular activity, thus diminishing the likelihood of obtaining athletic or other scholarships.

Given the above, petitioner argues that the disputed policy is not only arbitrary, capricious and unreasonable but also discriminatory because it does not apply to all students residing in Rahway who attend the UCVT School, only to those who attend the UCVT Magnet School. Petitioner urges that the policy is violative of *N.J.S.A.* 18A:36-20 *et seq.*, and *N.J.A.C.* 6:4-1.1 *et seq.*, which mandate that there be no discrimination among students and further mandate equality among education programs. Of this, petitioner states "This newly announced policy of preclusion of 9th grade students constitutes discrimination against A.F.S. and other students similarly situated, based upon their social status, i.e. students of the Magnet School. In addition, the blanket exclusion of these students from extracurricular activities is arbitrary and capricious." (Petitioner's Reply Exceptions at p. 2).

RESPONDENTS' POSITION

Respondent Board and Superintendent (Board) urge that if petitioner were granted the relief he seeks it would violate its Policy 6145 which predates the creation of the UCVT Magnet School. This policy relative to extracurricular activities states, *inter alia,* that "The Board of Education specifically recognizes that only pupils of the Rahway School District shall participate in the extracurricular activities referenced herein." The Board further argues that it would violate Article V, Section 1 of the NJSIAA ByLaws which states that "[a] student to be eligible for participation in the interscholastic athletic program of a member school, must be enrolled in that school and must meet all the eligibility requirements of the Constitution, By-Laws, and Rules and Regulations of the NJSIAA." (*NJSIAA Handbook* at p. 34) As to Paragraph CL3 of Article V(G), cited above, the Board emphasizes that participation of a full-time student at a vocational/technical school in interscholastic athletics at the resident high school is allowed only upon agreement of the principals of the two schools. Thus, the rule for participation in interscholastic athletics for full-time vocational/technical school students is permissive, not mandatory.[1] The Board further emphasizes that, pursuant to its action of August 24, 1999, it does not have such an agreement for ninth grade students at the UCVT Magnet School, only those in grades 10-12. Consequently, the Board urges, an order granting petitioner the remedy he seeks "would usurp the NJSIAA ByLaws and be contrary to the well-settled principle that participation in interscholastic sports is a privilege rather than a right. *Burnside, et al. vs. NJSIAA*, 1984 *S.L.D.*, 1686, 1693, aff'd N.J. Superior Court, App. Div. 1695, cert. denied 101 *N.J.* 236 (1985)."

[1] During oral arguments at the October 7, 1999 hearing on the emergent relief application at the OAL, the Board indicated that there are shared-time students who reside in Rahway who participate in Rahway High School athletic programs but they do so because, under the NJSIAA rules, a shared-time student at a vocational/technical high school has a right to participate in interscholastic athletic programs not offered at the vocational/technical school pursuant to Article V (G), CL 2 of the NJSIAA ByLaws. Rahway's shared-time students are enrolled in Rahway High School, attending that school for part of their school day and the UCVT School for the remainder. Magnet School students are at UCVT the entire school day and, therefore, are not enrolled at Rahway High School.

The Board further believes that the decision of the Commissioner on August 31, 1998 in *E.L. and N.L., on behalf of minor, R.R. v. NJSIAA*, a case involving a private school student who desired to participate as a member of the Cranford High School ice hockey team, is supportive of its position in the instant matter. In the *E.L.* decision, the Commissioner held that one of NJSIAA's most fundamental rules is that students be enrolled in the school for which they compete on interscholastic athletic teams and, therefore, upheld the NJSIAA rules denying the student's petition.

COMMISSIONER'S DETERMINATION

Upon a thorough review of the record in this matter, the Commissioner finds and determines that the Board's action on August 24, 1999 to revise its policy for participation in extracurricular activities (Policy 6145) so as to exclude students enrolled in the ninth grade effective September 1, 1999 at the Magnet School was arbitrary, capricious and unreasonable for the reasons set forth below.

As to participation in interscholastic athletic activities, the Commissioner finds without merit the Board's argument that because A.F.S. is not enrolled in Rahway High School she is prohibited by Article V, Section 1 of the NJSIAA ByLaws to participate in Rahway High School interscholastic athletic programs. Its reliance on that provision is not applicable herein. Because A.F.S. attends a full-time vocational/technical high school, the controlling NJSIAA rule is Article V (G), CL3 which provides that where a sport is not offered at a vocational/technical school, a student attending the vocational/technical school full-time may participate in that sport at the high school "sending" the student, upon agreement of both principals.

While the Board is correct in stating that this rule is permissive, not mandatory, the Commissioner finds that the August 24, 1999 revision to Policy 6145 constitutes a blanket exclusion of Magnet School students from participation in interscholastic activities. This revision, by its very terms, has the effect of precluding Rahway High School's principal, under

any circumstance, from entering into an agreement with the UCVT Magnet School Principal for such students. Thus, the Board's action is contrary to the NJSIAA rule, which, by virtue of its participation in this voluntary athletic association is deemed to be the policy of the Board (*N.J.S.A.* 18A: 11-3).

Furthermore, while participation in interscholastic sports is discretionary, *i.e.* subject to the agreement of the principals of both the UCVT Magnet School and Rahway High School, that discretionary authority must be reasonably exercised based on *bona fide*, legitimate considerations, as it clearly was not in the present matter.

The Commissioner finds equally without merit the Board's "non-enrollment" argument based on prior decisional law. Unlike the student in *E.L., supra*, who was a private school student seeking to participate in a public high school's interscholastic athletics program, A.F.S. is not a private school student. Pursuant to the provisions of *N.J.S.A.* 18A: 54-20.1 and *N.J.A.C.* 6:43-3.11, she is attending a public vocational/technical program operated by a county vocational school. Her tuition and transportation are funded by the Rahway School District. NJSIAA rules do not preclude her participation in the sports she desires.

As to the Board's decision with respect to other types of extracurricular activities, the Commissioner finds and determines that the August 24, 1999 revision exceeds its discretionary authority because the record is totally devoid of any rational basis for the Board to have taken action to allow the participation of Magnet school students currently enrolled in grades 10, 11 and 12 but to have excluded the participation of students enrolling in the Magnet School as ninth graders effective September 1, 1999. To create a blanket exclusion of a particular group or category of public school students from extracurricular activities or intramural athletic programs without a sound rational basis for such exclusion is inherently arbitrary, capricious and unreasonable. Such an exclusion as has occurred in the instant matter, whether in terms of a particular student or a group of students, cannot be deemed to be within a

board's lawful discretionary authority in the absence of the board's (or the principal's, in the case of interscholastic athletic programs) having determined that participation is not practicable or reasonable because of scheduling constraints, transportation costs or logistical difficulties, or other valid considerations. [2]

Accordingly, for the reasons set forth above, the Board is directed to allow A.F.S., and other similarly situated Rahway students who attend the UCVT Magnet School, to participate in extracurricular activities and athletic programs at Rahway High School, unless it can demonstrate that such participation is not practicable or reasonable because of scheduling constraints, transportation costs or logistical difficulties, or other valid considerations. The Board is further directed to review and revise its Policy for student participation in extracurricular activities in light of considerations set forth herein and to submit the revised policy to the Union County Superintendent of Schools for her review. [3, 4]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

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[2] Nothing herein, however, requires a board to take unreasonable or extraordinary steps to accommodate a county vocational student's participation in extracurricular activities operated by the district which is funding that student's placement.

[3] The Commissioner notes that it may be helpful for NJSIAA guidelines to clarify that agreements between principals, as referenced above, may not be made on an arbitrary or unreasonable basis.

[4] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

ALBERT ZIEGLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, former shop teacher, alleged the Board violated his tenure rights when it terminated his contract two months into the 1998-99 school year on the assertion that he was not certified for the courses to which he was assigned.

ALJ determined that petitioner was a tenured teacher since he satisfied the requisite criteria for tenure acquisition -- he worked in a position requiring an instructional certificate; he held the appropriate endorsement (an endorsement, here the Teacher of Employment Orientation endorsement, is not invalidated when the Office of Licensing and Credentials discontinues its issuance); and he served the requisite period of time. (*N.J.S.A.* 18A:28-5) Having concluded petitioner was tenured, the ALJ found that petitioner was entitled to be reemployed by the Board since his endorsement permits him to teach courses which the Board continues to offer.

Commissioner concurred with the ALJ that petitioner had acquired tenure, pursuant to *N.J.S.A.* 18A:28-5. Commissioner, however, was not persuaded that the issue of petitioner's entitlement to reinstatement was one which should be resolved in a summary fashion. Commissioner remanded the issue of improper termination and entitlement to reinstatement to the OAL for further fact-finding.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL SUMMARY DECISION
OAL DKT. NO.: EDU 3339-99
AGENCY DKT. NO. 21-2/99

ALBERT ZIEGLER,

Petitioner,

v.

BOARD OF EDUCATION OF BAYONNE HUDSON COUNTY,

Respondent.

Gregory T. Syrek, Esq., represented petitioner
(Bucceri & Pincus, attorneys)

Robert J. Merryman, Esq., represented respondent
(Apruzzese McDermott Mastro & Murphy, attorneys)

Record Closed: August 30, 1999 Decided: October 8, 1999

BEFORE **JEFFREY A. GERSON**, ALJ

FACTS

Albert Ziegler ("Petitioner") appeals the decision by the Board of Education of Bayonne ("Board") to terminate his employment. Particularly, Petitioner claims that he was wrongfully discharged inasmuch as he was a tenured teacher.

The pertinent facts in this matter are uncontroverted. Petitioner began employment with the Board in September of 1984 as a teacher in the Alternative Education Program. He has obtained the following certificates and endorsements[1]

1) Emergency Certificate valid from March 1981 to July 1981 as a Teacher of Skilled Trades (Employment Orientation).

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[1] For purposes of clarity, the terms "certificate" and "endorsement" will be used in this memorandum consistent with N.J.A.C. 6:11-2.3 which provides:

2) Standard Instructional Certificate with an endorsement as a Teacher of Employment Orientation. Issued in July of 1982.

3) Standard Educational Services Certificate with an endorsement as a Teacher Coordinator of Cooperative Industrial Education. Issued in November of 1997.

Petitioner taught employment orientation in the Alternative Education Program from the 1984-1985 school year until the 1993-1994 school year, a period of ten consecutive years. During those years, Petitioner taught students in grades five through eight.

In 1994, Petitioner was transferred to Bayonne High School where he taught students in grades nine through twelve. The transfer was a result of a reorganization which eliminated the Alternative Education program. Petitioner and other teachers were placed under the supervision of the principal of Special Programs.

Petitioner taught at the high school level for the 1994-1995 and 1995-1996 school years. During this time, he taught Shop 9 and Shop 10 (also called Introduction to Vocational Trades).[2] There was a break from employment during the 1996-1997 school year because of budgetary constraints. However, Petitioner was reemployed by the Board for the 1997-1998 school year and assigned to teach Shop 9 and

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> Consistent with N.J.S.A. 18A:6-38, the State Board of Examiners shall issue three educational certificates: the Instructional Certificate, the Administrative Certificate and the Educational Services Certificate. The Board may issue for each teaching, administrative or service position a special endorsement under the appropriate certificates. [Ibid.]

The different types of endorsements are listed and described in N.J.A.C. 6:11-6.2. The parties and documents included in the record, on the other hand, have mistakenly used the terms "certificate" and "endorsement" interchangeably. See Howley v. Ewing Twsp. Bd. of Educ., 6 N.J.A.R. 509 (1982).

[2] The curriculum for these courses is set forth as follows:

SHOP 9 - Shop 9 is a cluster of several different mini-shop courses designed to give the students exploratory exposure to several different careers on a rotating basis. The course content of each rotation includes: safety, awareness of the trade, and hands-on experiences so that the student can select a trade option as a career.

INTRODUCTION TO VOCATIONAL TRADES 10

This course includes a review of Shop 9 content and shop and personal safety. Emphasizing this course centers on the trade areas of Carpentry, Masonry, Plumbing and Electricity as they relate to the industrial building trades. The students will learn and develop their skills and competencies constructing foundations, rough framing, roof framing, exterior and interior finishing, and wiring and plumbing on a modified scaled model house. The student will learn how to do estimating that will involve material cost, labor cost and general expense. [Bayonne High School Curriculum Offerings and Proficiencies 1998-1999, at 41-42.]

Shop 10. The Board also reemployed Petitioner for the 1998-1999 school year. He was assigned to teach Shop 9, Shop 10, Industrial Technology and Maintenance and Repair.[3] However, Petitioner was unable to complete the 1998-1999 term because he was informed on November 24, 1998 that the Board terminated his employment at its meeting held on November 23, 1998. Pursuant to his employment contract, Petitioner received sixty days' notice and continued working until January 25, 1999.

The Board's determination to terminate Petitioner was the result of several inquiries made in the Fall of 1998 regarding Petitioner's certifications. Specifically, the Hudson County Superintendent's office and the Board's Superintendent questioned whether Petitioner was properly certified to teach the courses he was teaching. By letter dated September 29, 1998, the County Superintendent informed the Board's Superintendent that Petitioner holds a Certificate of Employment Orientation and a Certificate as a Teacher Coordinator of Cooperative Industrial Education. The County Superintendent stated the following regarding these certificates:

> Teacher of Employment Orientation Certificate
>
> This certificate is obsolete. The New Jersey State Department of Education discontinued this certificate in 1983 and no longer issues a certificate of this type.
>
> Teacher Coordinator of Cooperative Industrial Education
>
> This endorsement is required for the position of teacher and coordinator of part-time cooperative vocational education in skilled trade, industrial and/or service occupations. The endorsement entitles the holder to teach related vocational subjects in such classes and to act as coordinator between school and industry. (See N.J.A.C. 6:11-11.3) [Respondent's Brief dated June 11, 1999 ("Respondent's Brief"), Exh. J; Petitioner's Brief dated July 2, 1999 ("Petitioner's Brief"), Exh. BB.]

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3 These courses are described as:

INDUSTRIAL TECHNOLOGY I

Wood shop is an introductory study of today's industrial technological society through the woodworking industry by implementing methods, materials, occupations and processes. Emphasis is placed upon the basic skills and knowledge needed in the operation of common woodworking tools and equipment. It also includes the development of good work habits and attitudes including an appreciation of the importance of safety.

MAINTENANCE AND REPAIR

This course is designed to prepare the students to safely handle, diagnose, repair and/or replace the defective parts on small appliances to make the unit functional. Course content covers instruction on safety, use of diagnostic equipment, measuring devices relevant to the trade of servicing and repairing small appliances. [Bayonne High School Curriculum Offerings and Proficiencies 1998-1999, at 41 and 44.]

Subsequently, the Board's Superintendent contacted the New Jersey Department of Education's Office of Licensing and Credentials inquiring about Petitioner's certifications. The Coordinator of Licensing Programs responded by letter dated November 9, 1998, wherein she provided in part:

> In response to your inquiry regarding Mr. Ziegler's certification status, this is to advise that Mr. Ziegler hold [sic] standard certification in the areas of Teacher Coordinator of Cooperative Industrial Education and Teacher of Employment Orientation."[4] [Respondent's Brief, Exh. K; Petitioner's Brief, Exh. DD.]

The Board's Superintendent sent Petitioner a copy of the letter from the Office of Licensing and Credentials along with a letter advising Petitioner that based on the correspondence, he intended to recommend the termination of Petitioner's employment. As such, Petitioner met with the Board's Superintendent on November 18th and 19th, 1998. By letter dated November 19, 1998, the Board's Superintendent informed Petitioner that he would recommend that Petitioner's services be terminated at the Board's meeting which was to be held on November 23, 1998. Petitioner was notified on November 24, 1998 of the Board's decision to terminate his employment and continued to receive a salary until January 25, 1999.

On January 26, 1999, Petitioner's counsel wrote to the Director of the Office of Licensing and Credentials requesting information pertaining to the validity and scope of the Teacher of Employment Orientation endorsement. The Director responded by letter dated February 4, 1999 wherein she confirmed that the endorsement was no longer issued, but did not state that the endorsement was invalid.

On May 17, 1999, the Board's Superintendent also wrote to the Director of the Office of Licensing and Credentials requesting a formal opinion on this matter. However, the Director advised the Board's Superintendent on June 2, 1999 that the Office does not render formal opinions. Inasmuch as the matter remains contested, it was transmitted to the Office of Administrative Law.

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4 N.J.A.C. 6:11-4.1 provides that "[t]he standard certificate is a permanent certificate issued to candidates who have met all requirements for State certification" (emphasis added). This regulatory section does not, nor does any other, require standard certificates to be rendered invalid upon a determination to discontinue a particular endorsement.

DISCUSSION

The Board avers that its determination to terminate Petitioner was appropriate. This claim is based in the Board's belief that Petitioner does not have tenure or seniority rights to a teaching position in the district. (See Respondent's Brief, at 8.) Petitioner disagrees and asserts that he has obtained tenure and is properly certified to teach the courses he was teaching. (Petitioner's Brief, at 5.) Thus, Petitioner claims that the Board violated his tenure rights by terminating his employment and seeks reinstatement and back-pay.

A. Summary Decision

The Board submitted a motion for summary decision and Petitioner has submitted a cross-motion for summary decision. Under the Uniform Administrative Procedure Rules, a party may move for summary decision if:

> the papers and discovery which have been filed, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.[N.J.A.C. 1:1-12.5(b) (emphasis added).]

The OAL summary decision rule is essentially the same as the summary judgment rule under the New Jersey Rules of Court, which permits a party to move for summary judgment if:

> the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment or order as a matter of law. *An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.* [Rule 4:46-2(c) (emphasis added).]

The Supreme Court provided further guidance for the summary judgment analysis in Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995):

> Under this new standard, a determination whether there exists a 'genuine issue of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-

> moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.' Liberty Lobby, supra, 477 U.S. at 249, 106 S.Ct. at 2511, 91 L.Ed.2d at 212. ... If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine issue of material fact for purposes of Rule 4:46-2. Liberty Lobby, supra, 477 U.S. at 250,106 S.Ct. at 2511, 91 L.Ed.2d at 213. The import of our holding is that when the evidence 'is so one-sided that one party must prevail as a matter of law,' Liberty Lobby, supra, 477 U.S. at 252, 106 S.Ct. at 2512, 91 L.Ed.2d at 214, the trial court should not hesitate to grant summary judgment. [Brill, 142 N.J. at 540.]

To reiterate, the parties have tendered cross-motions for summary decision. They agree that the underlying facts are clear and that no genuine issue of material fact exists. Consequently, this matter is ripe for summary decision.

B. Tenure Acquisition

State statutes grant teachers the right to tenure. The Tenure Act, N.J.S.A. 18A:28-1 to -18, defines the conditions under which teachers are entitled to the security of tenure. Tenure rights are designed to foster a competent and efficient school system by affording teachers and administrators a measure of security. Viemeister v. Board of Educ. of Prospect Park, 5 N.J. Super. 215, 218 (App. Div. 1949). Being of remedial purpose, the Tenure Act is to be liberally construed to achieve its beneficent ends. Lammers v. Board of Educ. of the Borough of Point Pleasant, 134 N.J. 264, 272 (1993); Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 74 (1982). The burden of proving a right to tenure rests with the teacher. Canfield v. Board of Educ. of the Borough of Pine Hill, 51 N.J. 400 (1968).

The requirements for tenure are described in N.J.S.A. 18A:28-5 which provides in pertinent part:

> The services of all teaching staff members employed in the positions of teacher ... and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education ... shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause ... after employment in such district or by such board for:
>
> (a) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (b) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or

> (c) The equivalent of more than three academic years within a period of any four consecutive academic years. [Ibid.]

This statute expressly sets forth the criteria necessary for tenure procurement: 1) work in a position for which a teaching certificate is required; 2) possession of the appropriate certificate; 3) service for the requisite period of time. See Spiewak, supra, 90 N.J. at 74.

A review of the record in the instant matter and relevant caselaw, leads to the conclusion that Petitioner satisfies the requisite criteria for tenure acquisition. First, Petitioner has worked in a position requiring an instructional certificate. Petitioner was initially hired in 1984 as a teacher. There is no question that to be employed by a school board as a teacher, a certificate is required. N.J.S.A. 18A:1-1; N.J.S.A. 18A:28-5; N.J.S.A. 18A:26-2.

The second requirement, that the person seeking tenure hold the appropriate endorsement, presents the disagreement in the matter herein. The Board maintains that because Petitioner's endorsement is no longer issued by the State board of examiners, it is obsolete and rendered invalid. Thus, the Board concludes that Petitioner did not hold an appropriate endorsement and is precluded from fulfilling the second statutory condition.

The Board relies in part upon Jennings v. Board of Educ. of the Borough of Highland Park, 1989 S.L.D. 1985, rejected, Comm'r of Educ., 1989 S.L.D. 1093, rev'd, State Bd., 1989 S.L.D. 1097, for support. Jennings involved a petitioner who taught health and served as an athletic trainer for four years. The petitioner, however, held only a physical education endorsement. Such an endorsement did not authorize him to teach health, as distinguished from a "health" or "health and physical education endorsement" which authorize holders to teach health. See N.J.A.C. 6:11-6.2(10), (11), and (17). Thus, the Administrative Law Judge ("ALJ") concluded that the petitioner had not obtained tenure since he failed to hold the appropriate endorsement for the position of teacher of health. Jennings, supra, 1989 S.L.D. at 1089. The Commissioner, on the other hand, rejected the initial decision and found that the petitioner was

not precluded from obtaining tenure. 1989 S.L.D. at 1095-96. The State Board reversed the Commissioner because it found, as the ALJ had, that the petitioner's physical education endorsement did not authorize him to teach health. 1989 S.L.D. at 1099. The State Board distinguished a physical education endorsement from a "health" endorsement and a "health and physical education" endorsement and stated, "[c]learly health education is regarded as separate and distinct from physical education." 1989 S.L.D. 1101.

The Jennings case is distinguishable from the instant matter. The State Board's holding in Jennings was premised upon the fact that the petitioner taught a subject for which he never held the appropriate endorsement. The petitioner taught health for a period of four consecutive years while holding an endorsement to teach physical education. As such, the State Board correctly found that health education is "separate and distinct from physical education" and that petitioner was precluded from obtaining tenure as a health teacher. Unlike Jennings, however, Petitioner taught a subject for which he held the appropriate endorsement - he taught employment orientation under the Alternative Education program for ten consecutive years while holding a Teacher of Employment Orientation endorsement. Therefore, Petitioner taught a subject which was not "separate and distinct" from the subject his endorsement authorized him to teach.

The Board further relies on McAneny v. Board of Educ. of the Sch. Dist. of the Chathams, 92 N.J.A.R. 2d (EDU) 208. McAneny involved a petitioner who was hired as a supplemental teacher. In this position, the petitioner provided remedial instruction in reading, writing, and arithmetic to children with academic difficulties for nearly thirteen years. However, the petitioner held an instructional certificate with an endorsement in home economics, so she did not posses the proper endorsement for the position of supplemental teacher. The ALJ reviewed the relevant caselaw and noted:

> It is recognized that tenure statutes must be liberally construed in favor of employee protection. *Spiewak*, at 74. *Dugan v. Stockton State College*, No A-3996-89T1 (N.J. App. Div. Feb. 5, 1991). Accordingly, one must not adopt a begrudging or ungenerous approach toward what constitutes "appropriate" certification for tenure purposes. Where, for example, a teacher taught a developmental reading component of a ninth grade English

> course, she was not deprived of tenure merely because she held a reading endorsement rather than an English endorsement. *Bosco v. Northern Reg. Bd. of Ed.*, 1990 *S.L.D.* __ (Comm'r Aug. 3, 1990). Here, however, even the most indulgent interpretation of the certification regulations cannot condone the teaching of supplemental instruction by a teacher certified in home economics. [92 N.J.A.R. 2d (EDU) at 210.]

Accordingly, the ALJ concluded that the petitioner did not satisfy the statutory conditions for tenure. Ibid. The Commissioner concurred with the ALJ's decision. 92 N.J.A.R. 2d (EDU) 211. The State Board affirmed stating, "we emphasize that our decision in *Jennings v. Board of Education of the Borough of Highland Park*, decided by the State Board, February 28, 1989, was limited to the circumstances presented to us by that case." 92 N.J.A.R. 2d (EDU) 212, 213.

The instant case is distinguishable from McAneny. The McAneny decision was accurately rendered given the undisputed[5] fact that the petitioner therein had taught a subject for which she never possessed the appropriate endorsement; that is, she taught supplemental instruction while holding a home economics endorsement. Contrary to the petitioner involved in McAneny, Petitioner herein taught a subject for which he held the appropriate endorsement - he taught employment orientation under a Teacher of Employment Orientation endorsement.

Both of the cases discussed above are distinguishable from the facts here inasmuch as Petitioner was qualified to teach the course he was hired to teach. Nonetheless, based on the decisions, the Board claims:

> At the time he was hired in 1984, petitioner's Teacher of Employment Orientation certificate was invalid. He could not earn tenure under a certificate that was no longer recognized by the Department of Education. Therefore, the only certificate held by petitioner that would enable him to be employed in the Bayonne School District is the Coordinator Teacher [sic] of Cooperative Industrial Education which he obtained in 1997.
>
> ....
>
> Since he never served the requisite period under a valid certificate, petitioner has not met the statutory requirements for tenure. [Respondent's Brief, at 9-10.]

The Board's assumption is incorrect, for Petitioner's endorsement has not been invalidated by the board of examiners or a statutory or regulatory provision. Moreover, the documents contained in the

5 The parties agreed that the petitioner did not possess the proper endorsement for the position of supplemental teacher. McAneny, *supra*, 92 N.J.A.R. 2d at 209.

record regarding correspondence by the Department of Education's Office of Licensing and Credentials do not state that the Department refuses to recognize the Teacher of Employment Orientation endorsement.

Additional support is found in Hughes v. Board of Educ. of the Twsp. of West Orange, 1987 S.L.D. 2338, aff'd in part and rejected in part, Comm'r of Educ., 1987 S.L.D. 2347, aff'd, State Bd., 1988 S.L.D. 2467, aff'd, No. A-4558-87T1 (App. Div. June 20, 1989.) Hughes involved a petitioner who sought seniority rights as a guidance counselor. The petitioner had worked on a full time basis under a teacher/counselor endorsement which was no longer issued[6] and specified, "[t]his certificate is required for any teacher who is assigned at least half-time *but not full time* in carrying out guidance and student personnel services." 1987 S.L.D. at 2343 (emphasis added). The endorsement expressly forbade the petitioner from working on a full time basis under the endorsement. The Commissioner, therefore, held that the petitioner possessed the wrong endorsement, the teacher/counselor endorsement, for the full-time guidance counselor position, but obtained tenure and seniority rights beginning with his subsequent procurement of the proper endorsement. 1987 S.L.D. at 2349. The Commissioner's determination was based upon the explicit language of the teacher/counselor endorsement, not on the fact that the particular endorsement was no longer issued. Ibid.; see also Ackerman v. Board of Educ. of the City of Hackensack, 95 N.J.A.R. 2d (EDU) 149, 150 (demonstrating that the non-issuance of an endorsement does not lead to its invalidity).

The above analysis of pertinent caselaw demonstrates that a particular endorsement is not invalidated once a decision is made to discontinue its issuance. Further, statutory and regulatory provisions do not direct that certificates with endorsements no longer distributed are invalidated. Because Petitioner's endorsement as an employment orientation teacher was not invalidated, suspended or revoked,

6 It appears that the teacher/counselor endorsement was no longer issued since regulations were adopted in 1966 which installed the pupil personnel services endorsement, made available by the introduction of educational services certificates. Hughes, *supra*, 1987 S.L.D. at 2349.

the Board mistakenly believed that Petitioner held an inappropriate endorsement. Petitioner held a valid certificate and satisfied the second statutory requirement for tenure.

The third statutory condition for tenure acquisition is that the individual serve the requisite period of time. Like the first requirement, Petitioner easily satisfies this one. N.J.S.A. 18A:28-5 requires a teaching staff member to serve for at least three consecutive years. The Board employed Petitioner from the 1984-1985 school year until the 1998-1999 school year, with the exception of the 1996-1997 school year. He served as a Teacher of Employment Orientation for ten years in the Alternative Education Program. Once transferred to the high school level, he taught for an additional three and a half years. Given the years of service by Petitioner, he fulfills the three years statutory minimum. As such, Petitioner has complied with the criteria necessary for tenure acquisition under his employment orientation endorsement and is a tenured teacher.

C. Petitioner's Employment Rights

Having determined that Petitioner is a tenured teacher, the next issue requiring resolution is whether he is entitled to be reemployed by the Board. The Board contends that since it discontinued the Alternative Education Program (which had an employment orientation course in its curriculum), it no longer offers an employment orientation course. According to the Board's Superintendent, Petitioner was assigned to teach the following courses while at the high school:

1994-1995	**Shop 9 and Shop 10**
1995-1996	**Shop 9, Intro/Shop 9, Intro/Shop 10**
1997-1998	**Shop 9, Intro/Shop 9**
1998-1999	**Shop 9, Intro/Shop 9, Intro/Shop 10, Industrial Technology**

[Certification of Dr. Malanowski, at 2, ¶ 6, Exh. E.]

Although the exhibit fails to include the maintenance and repair course for the 1998-1999 school year, both parties agree that Petitioner was assigned to teach this course. Nonetheless, the Board now avers that Petitioner is not qualified to teach any course it currently offers. (Respondent's Brief, at 11; Respondent's Reply-Brief dated July 19, 1999 ("Respondent's Reply-Brief"), at 1-2.).

Petitioner certifies that when he was transferred to the high school due to a reorganization in the district, he was assigned to teach courses whose content remained the same as that of employment orientation. Thus, he asserts that although the course names changed inasmuch as he taught Shop 9 and Shop 10 for several years, the classroom instruction did not change. (Ziegler's Certification dated July 2, 1999, at 9-13).

In Figurelli v. Jersey City Bd. of Educ., OAL DKT. EDU 2003-86 (Oct. 28, 1986), adopted, Comm'r of Educ., aff'd, St. Bd. of Educ., 1987 S.L.D. 2607, an ALJ held that a tenured teacher may be transferred to a position with a different title where the duties are substantially similar. Figurelli's position as Director of Pupil Personnel Services was abolished and she was transferred to the position of School Psychologist at a reduced salary. As a result, Figurelli claimed violations of her tenure and seniority rights. In the alternative, Figurelli asserted that if the abolition of her position was upheld, she was entitled to be appointed to the substantially similar position of Assistant Superintendent of Pupil Personnel Services which the Board had filled with a non-tenured individual.

After determining that Figurelli had obtained tenure in the position of Director of Pupil Personnel Services, the ALJ found that the evidence supported the Board's decision to abolish the position due to budgetary considerations which required reductions in personnel. Id. at 17. However, on Figurelli's claim that she was entitled to the Assistant Superintendent position, the ALJ concluded that inasmuch as the duties performed by Figurelli as Director of Pupil Personnel Services were substantially similar to the duties performed by the teacher appointed to the Assistant Superintendent position, Figurelli was entitled to the Assistant Superintendent position. The Commissioner agreed that the duties of the Director and Assistant Superintendent were "substantially similar" and adopted the findings and determinations of the ALJ. Id. at 29-32. The State Board of Education affirmed. 1987 S.L.D. 2607.

Petitioner submits various documents attached to his certification to support his claim that he continued to teach employment orientation although assigned to teach Shop 9 and Shop 10 at the high school level. At a Board meeting held on January 26, 1998, the Board adopted a resolution assigning Petitioner from the "Office of the Superintendent of Schools" to "Bayonne High School Teacher of Employment Orientation." (Petitioner's Brief, Exh. Z.) This document is quite telling since it demonstrates that as late as January 1998, Petitioner was deemed a Teacher of Employment Orientation by the Board.

Once tenure is granted, teachers shall not be dismissed except for inefficiency, incapacity, unbecoming conduct or other just cause. N.J.S.A. 18A:28-5. Moreover, pursuant to N.J.S.A. 18A:28-9, boards of education may reduce their teaching staff for reasons of economy. Petitioner's employment was not terminated for any of these reasons. Rather, as discussed, the Board dismissed Petitioner as a result of its assumption that Petitioner's teaching endorsement was invalid. Since Petitioner's endorsement was valid and he was entitled to tenure in his position, his transfer to the high school level was appropriate. The Board's subsequent assignment of the Shop 9 and Shop 10 courses to Petitioner was also appropriate.

CONCLUSION

Petitioner has fulfilled the statutory criteria necessary for tenure acquisition. Petitioner worked as a teacher, which is a position that requires an instructional certificate. Further, contrary to the Board's assertion, Petitioner's standard certificate with an endorsement as a Teacher of Employment Orientation is valid although it is no longer issued. Therefore, Petitioner holds an appropriate endorsement. Petitioner has also served the requisite number of years under his employment orientation endorsement to acquire tenure. Therefore, the factors set forth by the Legislature in N.J.S.A. 18A:28-5 and clarified by the Supreme Court in Spiewak v. Board of Educ. of Rutherford, 90 N.J. 63 (1982) have been fulfilled and Petitioner is a tenured teacher.

Having concluded that Petitioner is tenured, his dismissal could only result from inefficiency, incapacity, unbecoming conduct, other just cause, or a reduction in force. Inasmuch as Petitioner's dismissal was premised on a mistaken assumption that he held an inappropriate endorsement, Petitioner should be reinstated and permitted to teach as he had for over thirteen years. Accordingly, the Board's motion for summary decision is denied and Petitioner's cross-motion for summary decision is granted.

It is **ORDERED** that Petitioner be reinstated with full benefits.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

10-14-99
DATE

JEFFREY A. GERSON, ALJ

Receipt Acknowledged:

10-15-99
DATE

Debbie Antanaitis /pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 18 1999
DATE

Barbara A Harnes
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 3339-99
AGENCY DKT. NO. 21-2/99

ALBERT ZIEGLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Both parties filed exception and reply arguments, in accordance with *N.J.A.C.* 1:1-18.4, and these arguments were considered by the Commissioner in issuing his decision.

Upon careful and independent review of the record in this matter, the Commissioner determines to affirm in part, and reverse in part, the recommended decision of the ALJ. Initially, for the reasons carefully outlined by the ALJ in his decision, the Commissioner concurs that, under these circumstances, petitioner has acquired tenure.

However, in order to determine whether the Board improperly terminated petitioner on November 23, 1998 and whether petitioner is entitled to reinstatement to his tenured position of employment (Petition of Appeal at p. 3), it is also necessary to examine what skills are required to be taught, and are actually taught, by a teacher of Shop 9, Shop 10, Maintenance and Repair and Industrial Technology.

In this connection, petitioner asserts that the four courses he taught in the early part of the 1998-99 school year, notwithstanding that they were identified as "Industrial Arts" courses, were essentially "Employment Orientation" courses. Petitioner avers that

> [g]iving the course titles such as Shop 9 and Shop 10 does not make them Industrial Arts courses, if, in fact, the curriculum is the same as that taught in Employment Orientation. I prepared Course Requirements for the students in my Maintenance and Repair, Shop 10, Shop 9 and Industrial Technology Classes. (Exhibit UU) These requirements are the same as I have always taught, including my Employment Orientation classes.
>
> The course titles may have changed, but the subject matter is still Employment Orientation. Students in 1998-99 received general introductory or exploratory instruction in various trades. The Board is attempting to make a distinction that has no real difference. ***" (Petitioner's Certification at p. 13, paragraphs 27 and 28)

The Board, however, maintains its position that the courses, which petitioner was teaching in the 1998-99 school year, prior to his termination, *are* properly designated as Industrial Arts courses, which petitioner is not certified to teach. The Board contends that

> It is clear from the descriptions of the Employment Orientation program that the program is a highly structured program designed to evaluate a student's aptitude, teach skills related to finding a job, develop work habits and provide introductory training in the occupational area suited to the student's aptitudes and abilities in consultation with the student's counselor and parent(s). *Such a program does not exist in Bayonne High School.* (emphasis added) (Board's Post-Hearing Reply Brief at p. 4)
>
> *** [The courses taught by petitioner in the 1998-99 school year] are not designed to evaluate and profile students based on their individual aptitudes and abilities. Instead, these are basic instructional courses designed to provide students, who are interested, with a minimum of training and knowledge in a particular area such as wood working, carpentry, plumbing, electricity or small appliance repair. (*Id.* at p. 6)

Notwithstanding these assertions, the Commissioner notes that the record shows the following: petitioner's Professional Improvement Plan for the 1995-96 school year was prepared *after* petitioner's position was placed under the auspices of the Industrial Arts program and at that time petitioner was teaching the *same courses* he taught at the time of his termination in 1998.[1] The plan states that petitioner shall strive:

> [t]o offer a curriculum of occupational and related academic experiences structured on a highly individual basis and flexible enough to meet the varied needs of the students.
>
> [t]o evaluate each student in terms of his or her employment potential and apply the appropriate instructional techniques to make them employable; to provide a basic introductory course that would span the various skilled trades, to his or her liking. (Petitioner's Certification, Exhibit V)

Additionally, as the ALJ notes, the Board's resolution adopted at its meeting of January 26, 1998, assigned petitioner to the position of "Teacher of Employment Orientation." (*Id.* at Exhibit Z)

Therefore, based on the record as a whole, including the parties' arguments in support of their respective motions for summary decision which clearly dispute the skills which are taught within the Board's Industrial Arts program, as well as their arguments on exception,[2] the Commissioner is not persuaded that the issue of petitioner's entitlement to reinstatement is one which should be resolved in summary fashion, pursuant to *N.J.A.C.* 1:1-12.5.

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[1] Certification of Dr. Richard Malanowski, at p. 2, paragraph 6.

[2] The Commissioner notes, in particular, the Board's argument that the ALJ, "never looked at the actual scope of the employment orientation endorsement; never considered the description of the courses which he now finds that petitioner is authorized to teach; and never explained how courses which are taught by individuals who hold industrial arts and/or teacher of skilled trades certification can now be taught with an employment orientation endorsement. The Administrative Law Judge has, without factual or legal support, concluded that employment orientation is the same as industrials arts. Such conclusion is unsupported factually and legally and is beyond the authority of an Administrative Law Judge." (Board's Exceptions at p. 9)

This matter, therefore, is remanded to the OAL for further fact-finding as necessary to determine (1) the actual duties of, and skills taught by, a teacher of Shop 9, Shop 10, Maintenance and Repair and Industrial Technology within the Board's Industrial Arts Program; (2) whether petitioner's endorsement as a Teacher of Employment Orientation permits him to teach any or all of these courses; and (3) if petitioner *is* entitled to teach any or all of these courses, what back pay and emoluments are now due as a result of his improper termination.

In so remanding, the Commissioner notes that, contrary to the Board's position, *nothing* in the record of correspondence from either the County Superintendent or the Office of Licensing and Credentials provides a reasonable basis for its continued assertion that its decision to terminate petitioner was a "good faith reliance on the advice of Department officials." (Board's Reply at p. 2)

Accordingly, the Initial Decision of the ALJ is affirmed to the extent that the Commissioner concurs that petitioner has acquired tenure, pursuant to *N.J.S.A.* 18A:28-5. As to petitioner's claim that he was, therefore, improperly terminated and is entitled to reinstatement, the Commissioner remands this issue to the OAL for proceedings in accordance with parameters set forth above.[3]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

November 29, 1999

Date of Mailing, November 29, 1999

392-99

NICHOLAS DUVA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner alleged that the District violated his tenure and seniority rights when it abolished his position as Director of Research, Planning and Evaluation and employed him as a school psychologist. Petitioner asserted entitlement to a supervisory position.

ALJ found that petitioner was tenured in the separately tenurable position of director and that he never served in the position of supervisor. Consequently, based upon the applicable law, the ALJ concluded that the tenure rights he accrued in the position of director could not be transferred to the separately tenurable position of supervisor. ALJ determined that petitioner did not obtain tenure in the position of supervisor absent experience and time served in that position. Moreover, a comparison of the job descriptions for the director position held by petitioner and those of the supervisor positions held by intervenors did not show similarities. Accordingly, the ALJ concluded that petitioner was not entitled to the supervisor positions held by the intervenors. (*Nelson* New Jersey Supreme Court decision; *Howley*; and *Brenner*) Petition was dismissed.

Commissioner agreed with and adopted as his own the recommendation of the ALJ to dismiss the petition essentially for the reasons set forth in the Initial Decision.

December 3, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9801-98
AGENCY DKT. NO. 431-9/98

NICHOLAS DUVA,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,

Respondent.

Louis P. Bucceri, Esq., for petitioner (Bucceri & Pincus, attorneys)

Charlotte Kitler, General Counsel, for respondent

Robert M. Schwartz, Esq., for intervenors Sharon Bartley and Belinda Mays-Stokes

Record Closed: July 20, 1999 Decided: October 14, 1999

BEFORE **EDITH KLINGER**, ALJ:

On September 18, 1998, petitioner, Nicholas Duva, filed a Verified Petition with the Department of Education, Bureau of Controversies and Disputes, alleging that the State-Operated School District of Jersey City (District) violated his tenure and seniority rights when it abolished his position as director of research, planning and evaluation

and employed him as a school psychologist instead of offering him a supervisory position to which he believes himself entitled. The District filed its Answer to the petition on October 5, 1998, and on October 29, 1998, the Commissioner of Education transmitted the appeal to Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

As the result of a telephone conference with the parties, it was determined that three individuals who held supervisory positions might be adversely affected by this matter and they were given the opportunity to intervene. Two of the three, Sharon Bartley and Belinda Mays-Stokes, elected to become intervenors. The third supervisor, Joanna Veloz, did not.

It was further determined that the material facts in this matter could be stipulated and the appeal heard upon the papers. The parties prepared a joint stipulation of facts and a briefing schedule was established. The record closed on July 20, 1999, when it appeared that no additional submissions were to be received from the parties.

JOINT STIPULATION OF FACTS

1. Petitioner's employment history in respondent's district is as follows:

YEAR	POSITION
1968-69	Elementary Teacher (emergency certification)
1969-70	Elementary Teacher (provisional certificate)
9/70-12/31/70	Substitute Teacher
1/1/71-6/30/71	Elementary Teacher (provisional certificate)
1971-72	School Psychologist
1972-73	School Psychologist
1973-74	School Psychologist
1974-75	School Psychologist
1975-76	School Psychologist
1976-77	School Psychologist

1977-78	School Psychologist
1978-79	School Psychologist
1979-80	School Psychologist
9/1/80-10/15/80	School Psychologist
10/15/80-81	Director, Research, Planning and Evaluation
1981-82	Director, Research, Planning and Evaluation
1982-83	Director, Research, Planning and Evaluation
1983-84	Director, Research, Planning and Evaluation
1984-85	Director, Research, Planning and Evaluation
1985-86	Director, Research, Planning and Evaluation
1986-87	Director, Research, Planning and Evaluation
1987-88	Director, Research, Planning and Evaluation
1988-89	Director, Research, Planning and Evaluation
1989-90	Director, Research, Planning and Evaluation
1990-91	Director, Research/Planning/Evaluation
1991-92	Director, Research/Planning/Evaluation
1992-93	Director, Research/Planning/Evaluation
1993-94	Director, Research/Planning/Evaluation
1994-95	Director, Planning/Evaluation/Grants
1995-96	Director, Planning/Evaluation/Grants
1996-97	Director, Planning/Evaluation/Grants
1997-98	Director, Planning/Evaluation/Grants
1998-99	School Psychologist

2. Petitioner holds the following certificates and endorsements:

SUBJECT AREA	ISSUE DATE
School Psychologist	6/72 (Exhibit A)
Supervisor	9/79 (Exhibit B)
School Administrator	8/84 (Exhibit C)

3. The job description for director of research, planning and evaluation under which petitioner was employed beginning in October 1980 is in evidence as Exhibit D.

4. The revised job description, effective April 1990, for director of research/planning/evaluation under which petitioner was employed is in evidence as Exhibit E.

5. As a result of the State takeover of the Jersey City public school system, all supervisory and administrative positions in the District were abolished, including petitioner's, effective on or before April 4, 1990. The District's administration was reorganized as of that date. Petitioner was retained. (Exhibit G)

6. The job description, effective May 1994, for director of planning/evaluation/grants under which petitioner was next employed is in evidence as Exhibit F.

7. By memorandum of July 8, 1998, the respondent's State-District superintendent ordered an administrative reorganization. (Exhibit H)

8. By letters of July 8, 1998 (Exhibit I) and July 31, 1998 (Exhibit J), petitioner was informed that his position as director would be abolished effective July 8, 1998, as a result of the reorganization and that he would be reassigned as a school psychologist for the 1998-99 school year at a lower salary rate.

9. As of July 8, 1998, respondent employed the following non-tenured supervisors:

   Sharon Bartley, supervisor of special education
   Belinda Mays-Stokes, mathematics supervisor
   Joanna Veloz, bilingual supervisor

10. Ms. Bartley, Ms. Mays-Stokes and Ms. Veloz are all certified as supervisors.

11. The following job descriptions are all in evidence:

    Supervisor, Special Education - Exhibit K
    Mathematics Supervisor - Exhibit L
    Bilingual Supervisor - Exhibit M

12. The certificates and endorsements held by Sharon Bartley are:

Supervisor, issued 8/93 (Exhibit N)
Speech Language Specialist, issued 10/90 (Exhibit O)

13. Petitioner's salary during the 1997-98 school year was $99,670.

14. A supervisor at petitioner's level of training and experience would have been paid $92,021 for 1998-99.

15. Petitioner's annual salary as a school psychologist for 1998-99 was $82,750.

The only question to be resolved in this matter is whether Duva was entitled to be employed in the position of supervisor of special education, or any other supervisory position held by any non-tenured employee, for the 1998-99 school year by virtue of his tenure as director under *N.J.S.A.* 18A:28-6. In a tenure dispute, the burden of proving a tenure right rests with the teacher. *Canfield v. Board of Educ., Borough of Pine Hill*, 51 *N.J.* 400 (1968).

THE POSITIONS OF THE PARTIES

Petitioner argues that he has a tenure right to the position of supervisor, special education, that is held by intervenor Bartley. Pet. Br. at 5. Petitioner bases this argument on the job description for the position, which requires an administrative certificate with a supervisor endorsement and an educational services certificate with either a school social worker, LDTC or school psychologist endorsement. Pet'r Br. at 5. Since petitioner has the appropriate certificates, a supervisor endorsement and school psychologist endorsement, and was a tenured teaching staff member in the respondent school district, he claims that his right to the position supersedes Bartley's, since she is a non-tenured teaching staff member. Pet'r Br. at 5.

Petitioner further alleges that "the imposition of additional requirements beyond supervisory certification cannot defeat a tenure claim to a supervisory position." Pet'r

Br. at 5-6. As such, petitioner claims that he has a right to either the mathematics supervisor position held by intervenor Mays-Stokes, or the bilingual supervisor position held by Veloz and argues:

> Thus, even as to [these] positions . . . petitioner was entitled to be appointed over the non-tenured staff members, despite the inclusion of a subject area certification requirement and various non-certification requirements. Since these job descriptions do not require teaching duties, the requirement of teaching endorsements cannot be used to bar the claim of a riffed tenured supervisor. . . . Based on the foregoing, petitioner had an absolute right to be appointed as a Supervisor in place of a non-tenured Supervisor upon the abolition of his position.
>
> [Pet'r Br. at 6.]

Respondent contends that despite petitioner's long-term employment with the District, and his possession of a supervisor's endorsement, he has never served in a position of supervisor, and therefore has no tenure rights to such a position. Resp't Br. at 1, 4. Respondent cites to decisional law for its argument that tenure "attaches to a position," and since petitioner has never served in the position of supervisor, he has no tenure entitlement to such a position. Resp't Br. at 6-10.

The District relies upon decisions of the Commissioner and State Board, as well as the New Jersey Supreme Court's holding in *Nelson v. Board of Education of the Township of Old Bridge*, 148 *N.J.* 358 (1997), and the 1996 amendment to *N.J.S.A.* 18A:28-5 of the Education Tenure Act, *N.J.S.A.* 18A:28-1 to -18 (Act), in support of its argument that the "position of supervisor is 'separately tenurable' and hence requires actual service in that specific position to attain tenure in it." Resp't Br. at 11. It concludes with:

> The petitioner acquired tenure in the position of Director, Planning/Evaluation/Grants. He never served a day in the distinctly different position of supervisor, which involves ongoing evaluation of instructional staff, direct monitoring of

> services to pupils and development of subject curricula, and he therefore never acquired any rights to any position of supervisor. Upon abolition of his position of Director . . . he was properly placed in his former tenured position of school psychologist. He was accorded all the tenure rights and protection to which he was entitled.
>
> [Resp't Br. at 18-19.]

The arguments asserted by intervenors Bartley and Mays-Stokes mirror those of the respondent. In short, the intervenors contend that "Petitioner appears to be making the assumption that the title of director and supervisor are interchangeable for tenure purposes. In fact, the opposite is true." Int. Br. at 4.

Like the respondent, the intervenors rely upon the 1996 amendment to *N.J.S.A.* 18A:28-5 and the Supreme Court's holding in *Nelson*. In this regard, the intervenors argue that "even if the required endorsement for the two titles, director and supervisor, were the same, Petitioner's claim must still fail because tenure is not transferable. Simply put, service in one position may not confer tenure in a wholly separate position absent service in that position." Int. Br. at 5. In conclusion, they state:

> What is undisputed in this case is that the Petitioner never served in the title of supervisor. It is clear from the statute, as well as the case law, that service in a supervisory title is a prerequisite to a petitioner to accrue tenure as a supervisor. Having never served as a supervisor, Petitioner's claim of tenure must fail under N.J.S.A. 18A:28-5. That both the qualifications and the duties of the positions held by the Intervenors are wholly distinct from the positions previously held by the Petitioner only further supports this conclusion.
>
> [Int. Br. at 9.]

Petitioner responds that the state of the law prior to the 1996 amendment "clearly established that tenure as a supervisor extends to claiming any other supervisory position held by a non-tenured person." Pet'r Reply Br. at 1-2. He

contends that prior to the amendment, school law decisions "maintained that individuals serving in jobs which were not specifically listed in the statute [*N.J.S.A.* 18A:28-5] had generalized bumping rights within the scope of their administrative endorsements, excluding those specifically listed jobs in the statute." Pet'r Reply Br. at 3. Petitioner then argues that the 1996 amendment and the Supreme Court's holding in *Nelson* reinforced this long-standing practice, and concludes as follows:

> Since neither the title of director nor the title of supervisor are listed in *N.J.S.A.* 18A:28-5 achieving tenure in one such title allows a tenure claim to any of the others, in the absence of additional certification requirements for which particular duties are involved. . . . The fact that a position claimed might have a different scope, in terms of grades or subjects, is irrelevant. . . . Since petitioner has all of the certificates required for the position of Supervisor, Special Education, there is no need to even analyze the extra certificates specified in the job descriptions for Mathematics/BSIP Supervisor, or Bilingual/ESL/World Languages Supervisor. However, in both cases petitioner notes that instructional certificates are specified in addition to the supervisor certificate. However, since no instructional duties are listed in the job descriptions, petitioner would have a right to those two jobs as well. . . . For all of these reasons, petitioner's tenure under his administrative certificate requires the finding that he was entitled to one of the supervisory positions at issue.
>
> [Pet'r Reply Br. at 8-9.]

DISCUSSION OF LAW

The acquisition of tenure by educational personnel is governed by the Education Tenure Act, *N.J.S.A.* 18A:28-1 through -18 (hereinafter the "Act"). Any interpretation of the Act requires application of several general principles. First, tenure rights are designed to foster a competent and efficient school system by affording teachers and administrators a measure of security. *Viemeister v. Board of Educ. of Prospect Park*, 5 *N.J. Super.* 215, 218 (App. Div. 1949). Second, because the Act is remedial it is

liberally construed to achieve its beneficent ends. *Kletzkin v. Board of Educ. of Borough of Spotswood, Middlesex County*, 136 *N.J.* 275 (1994); *Spiewak v. Rutherford Bd. of Educ.*, 90 *N.J.* 63, 74 (1982). Third, in a tenure dispute, the burden of proving a tenure right rests with the teacher. *Canfield, supra*, 51 *N.J.* 400.

Certain rules and regulations implementing the Act are relevant to the controversy herein. The State Board of Examiners issues only three educational certificates: instructional, administrative and educational services. *N.J.A.C.* 6:11-2.3. Petitioner has been issued an administrative certificate, governed by *N.J.A.C.* 6:11-9.1 through -9.7, and an educational services certificate, governed by *N.J.A.C.* 6:11-10.1 through -11.20.

The State Board of Examiners also issues for each teaching, administrative or service position a special endorsement under the appropriate certificates. *N.J.A.C.* 6:11-2.3. There are four endorsements to the administrative certificate: school administrator, principal, supervisor and school business administrator. *N.J.A.C.* 6:11-9.3. Petitioner holds endorsements as a supervisor and school administrator. Under an educational services certificate there are several endorsements. *N.J.A.C.* 6:11-11.3 to -11.20. Petitioner has satisfied the requirements for the school psychologist endorsement and there is no dispute that he has accrued tenure in the position of school psychologist.

The section of the Act pertinent to the matter herein provides:

> The services of all teaching staff members employed in the positions of teacher, principal, other than administrative principal, assistant principal, vice-principal, assistant superintendent, and all school nurses . . . and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, . . . shall be under tenure during good behavior and efficiency and they shall not be dismissed or

> reduced in compensation except for inefficiency, incapacity, or conduct unbecoming . . . or other just cause . . . .
>
> For purposes of this chapter, tenure in any of the administrative or supervisory positions enumerated herein shall accrue only by employment in that administrative or supervisory position. Tenure so accrued shall not extend to any other administrative or supervisory position and nothing herein shall limit or restrict tenure rights which were or may be acquired pursuant to N.J.S. 18A:28-6 in a position in which the individual actually served.
>
> [*N.J.S.A.* 18A:28-5.]

It generally takes three consecutive academic or calendar years to achieve tenure. *Ibid.*; *see also N.J.S.A.* 18A:7A-44(c) (which provides that in a State-operated school district tenure may be obtained in a position in the more abbreviated time period, two to three years, afforded under *N.J.S.A.* 18A:28-6).

N.J.S.A. 18A:28-5 was amended in response to the Appellate Division's unpublished opinion in *Nelson v. Board of Education of the Township of Old Bridge*, No. A-6441-94 (App. Div. Apr. 29, 1996), which held that tenure accrued under a supervisor endorsement of an administrative certificate is transferable to a principal endorsement under the same certificate, rejecting the long-standing practice of the Commissioner and State Board that positions listed in *N.J.S.A.* 18A:28-5 are separately tenurable. In its statement to the amendment, the Legislature found and declared that

> a clarification of [*N.J.S.A.* 18A:28-5] is necessary in order to continue the traditional practice of providing that tenure is acquired in one of the specifically enumerated positions only if the individual has served for the requisite statutorily required period of time in that position.
>
> [Legislature's Statement to L.1996, c.58, § 1, eff. June 28, 1996.]

The resulting amendment, which effectively reversed the Appellate Division's decision, is embodied in the final paragraph of *N.J.S.A.* 18A:28-5, *supra*.

In addition to the legislative "clarification" of the statute, the Appellate Division was reversed by the Supreme Court in *Nelson v. Board of Education of the Township of Old Bridge*, 148 *N.J.* 358 (1997). The Court agreed with the State Board's position that the specifically enumerated positions set forth in *N.J.S.A.* 18A:28-5 are separately tenurable. 148 *N.J.* at 368. The Court observed that prior to the Appellate Division decision, the distinction between separately tenurable positions and those not listed in the statute had "been recognized consistently" by the State Board, the Commissioner and the Appellate Division. *Id.* at 365.

The Court also agreed with the State Board's position that the Appellate Division's decision would promote unsound education policy if an educator could transfer tenure rights to a separately tenurable position. *Id.* at 367-68. Elaborating on that position, the Court contrasted Nelson's tenured supervisory position, chairperson of industrial arts, achieved under the supervisor endorsement to his administrative certificate, with the principal position he claimed entitlement to based upon the principal endorsement he held under the same certificate, even though he had never served as a principal.

The Court found that the two positions were "not significantly similar even though both endorsements fall under the [same] administrative certificate." *Id.* at 367. Nelson's supervisory position had "primarily involved the supervision and assessment of high school industrial arts teachers" while the principal position he claimed entitlement to was the "school's chief administrative post with the sole responsibility for establishing policy for the entire school and controlling every facet of its operation, including all issues concerning staff, students, buildings, and budgets." *Id.* at 367. The Court concluded its analysis of the issue as follows:

> After the Appellate Division decision in this case, the Legislature amended [*N.J.S.A.* 18A:28-5] to make clear that the positions listed [therein] are indeed separately tenurable. Accordingly, deference to the State Board's longstanding interpretation . . . is even more compelling. The State Board's determination was neither unreasonable, unsupported by the record, nor violative of any legislative will. We continue to defer to the expertise of the State Board in tenure matters and recognize the educationally-unsound policy results that would flow from applying Nelson's rationale to the positions listed in Section 28-5.
>
> [*Id.* at 368.]

As recognized in *Nelson, supra*, 148 *N.J.* 358, the positions of supervisor and principal are separately tenurable positions. *See also Rogers v. Board of Educ. of Highland Park*, 1990 *S.L.D.* 691 (where the State Board referred to the position of "supervisor" as separately tenurable). Accordingly, to obtain tenure in either position requires actual service in the position.

The *Nelson* opinion and the concept of "separately tenurable" can be better understood if the terms "position" and "endorsement" are distinguished. As previously discussed, endorsements are specifically provided by regulation under the three educational certificates issued by the State Board of Examiners. "[A]n endorsement is not synonymous with a 'position,' although in some cases they may actually be the same. For example, the endorsement 'principal' entitles the holder to serve in the . . . 'positions'" of, among others, principal and vice-principal. *Howley v. Ewing Bd. of Educ.*, 6 *N.J.A.R.* 509, 515 (1982). Tenure is acquired in a position, not an endorsement, by an employee who holds the appropriate certificate and endorsement. *Id.* at 517.

The Act defines "position" as including any office, position or employment. *N.J.S.A.* 18A:28-1. "Every position must have a position title which is recognized in the administrative code. *N.J.A.C.* 6:11-3.3(a). This position title either corresponds to one of the enumerated endorsements, is specifically designated within the endorsement

description . . . or has been specifically approved by the county superintendent who has made a determination of the appropriate certification and title for the position. *N.J.A.C.* 6:11-3.3(b)." *Howley, supra*, 6 *N.J.A.R.* at 516. The endorsement description of "school administrator" includes the positions of superintendent, assistant superintendent, executive superintendent and director.

Petitioner has served in two positions in respondent school district since the State takeover and reorganization in 1990; director of research/planning/evaluation from April 1990 through the 1993-94 school year and director of planning/evaluation/grants from May 1994 until July 8, 1998, when his position was abolished. According to the job descriptions, the positions required an administrative certificate with either a supervisor or principal endorsement. Petitioner possesses a supervisor endorsement.

The facts indicate that petitioner served in both director positions for four years each, exceeding the number of years required by *N.J.S.A.* 18A:28-6 to obtain tenure. Like the positions of supervisor and principal, the position of director is separately tenurable. *See Brenner v. Board of Educ. of Middlesex*, 96 *N.J.A.R.*2d (EDU) 81. Having served a total of eight years in the position of director, under the Act and *Nelson* petitioner has obtained tenure in that position.

Consequently, since petitioner is tenured in the separately tenurable position of director, he is not entitled to any of the supervisor positions currently held by the intervenors. While he possesses a supervisor endorsement, he has never served in the position of supervisor. The tenure rights he accrued in the position of director cannot be transferred to the separately tenurable position of supervisor. *See Nelson, supra*, 148 *N.J.* at 367-68. Absent experience and time served in the position of supervisor, tenure is not obtained.

While unnecessary to the resolution of this matter, it is worth noting that a comparison of the job descriptions for the positions of director held by petitioner with

the supervisor positions held by the intervenors shows no similarities. The supervisor positions are limited to an assigned school and involve the supervision of instructional personnel. The director positions were district-level positions involved in evaluating and developing the quality of the District's educational programs and securing grants for the District.

Parenthetically, a review of *N.J.A.C.* 6:11-9.3 indicates that the position title of director is not recognized in the New Jersey Administrative Code as a title that corresponds with a supervisor endorsement. *See N.J.A.C.* 6:11-3.3 and -9.3(c). As a result, that part of respondent's qualifications for the director position requiring a supervisor endorsement is incorrect. The position title of director is an appropriate title for the school administrator endorsement, *N.J.A.C.* 6:11-9.3(a), and the principal endorsement, *N.J.A.C.* 6:11-9.3(b). Fortunately, petitioner has held a school administrator endorsement since August 1984, therefore, his tenure in the position of director is unaffected because he holds the proper certificate and endorsement for the position.

CONCLUSION

I **FIND** that petitioner is tenured in the separately tenurable position of director. I **FIND** that he has never served in the position of supervisor. Consequently, based upon the applicable law, I **CONCLUDE** that the tenure rights he accrued in the position of director cannot be transferred to the separately tenurable position of supervisor. Absent experience and time served in the position of supervisor, tenure is not obtained. Accordingly, I **CONCLUDE** that petitioner is, therefore, not entitled to the supervisor positions currently held by the intervenors.

ORDER

Based upon the above, petitioner is entitled to no relief in this matter and it is **ORDERED** that his petition is hereby **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 14, 1999
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

10-19-99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 21 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

md

APPENDIX

Exhibits

Exhibit A	Certificate, School Psychologist
Exhibit B	Certificate, Supervisor
Exhibit C	Certificate, School Administrator
Exhibit D	Job Description: Director of Research, Planning and Evaluation
Exhibit E	Job Description: Director, Research/Planning/Evaluation
Exhibit F	Job Description: Director, Planning/Evaluation/Grants
Exhibit G	Letter, Scambio to Duva, April 4, 1990
Exhibit H	Memorandum, DiPatri to Administrative Staff, July 8, 1998
Exhibit I	Letter, DiPatri to Duva, July 8, 1998
Exhibit J	Letter, Donahue to Duva, July 31, 1998
Exhibit K	Job Description: Supervisor of Special Education
Exhibit L	Job Description: Supervisor of Mathematics
Exhibit M	Job Description: Supervisor of Bilingual Education
Exhibit N	Certificate, Supervisor (Bartley)
Exhibit O	Certificate, Speech Language Therapist (Bartley)

OAL DKT. NO. EDU 9801-98
AGENCY DKT. NO. 431-9/98

NICHOLAS DUVA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and Initial Decision issued by the Office of Administrative Law have been reviewed. Petitioner's exceptions and respondent's reply exceptions, in which Intervenors Bartley and Mays-Stokes join, were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Petitioner's exceptions urge that the Administrative Law Judge's (ALJ) finding that, as a matter of law, service in the title of director restricts the tenure rights of an individual to other positions with the title of "director" is contrary to the plain language of *N.J.S.A.* 18A:28-5 and all prior decisions. In support of this assertion, petitioner essentially reiterates at length the arguments he advanced before the ALJ as part of his Brief in Support of Cross-Motion for Summary Judgment and Reply Brief which shall not be repeated herein. Additionally, he excepts to the ALJ's reliance on *Brenner, supra,* averring that the legal conclusion in that matter is totally irrelevant to his claim because he is claiming a job as supervisor, not one as principal. As to this point, he emphasizes that the title of supervisor is not listed in *N.J.S.A.* 18A:28-5 and argues, *inter alia,* that "[b]oth the title 'supervisor' *and* the title 'director' were removed from the

amendments to N.J.S.A. 18A:28-5 by the legislature before passage of L. 1996, c. 58, §2. *Lisa v. Bd. of Ed., Washington Twp.*, 97 N.J.A.R. 2d (EDU) 478, 484, fn. 3. Their removal means those titles are not the ones as to which tenure must separately accrue." (emphasis in text) (Petitioner's Exceptions at p. 2)

Petitioner's exceptions also argue that:

> Since neither the title of director nor the title of supervisor are listed in N.J.S.A. 18A:28-5 achieving tenure in one such title allows a tenure claim to any of the others, in the absence of additional certification requirements for which particular duties are required.***
>
> The fact that a position claimed might have a different scope, in terms of grades or subjects, is irrelevant.***
>
> Since petitioner has all of the certificates required for the position of Supervisor, Special Education (Exhibit K), there is no need to even analyze the extra certificates specified in the job descriptions for Mathematics/BSIP Supervisor (Exhibit L), or Bilingual/ESL/World Languages Supervisor (Exhibit M). However, in both cases petitioner notes that instructional certificates are specified in addition to the supervisor certificate. However, since no instructional duties are listed in the job descriptions, petitioner would have a right to those two jobs as well. [*Galbraith v. Lenape Regional High School District*, 96 *N.J.A.R.* 2d (EDU) 396, *aff'd* N. J. Superior Court 97 *N.J.A.R.* 2d (EDU) 558 (App. Div.)]
> (*Id.* at p. 7)

Petitioner concludes his exceptions with the following statement:

> Since the petitioner held an endorsement as both a School Administrator (N.J.A.C. 6:11-9.3(a)) and a Supervisor (N.J.A.C. 6:11-9.3(c)) while employed for the time required by N.J.S.A. 18A:28-5, it does not matter which endorsement was the legally correct form of licensure. The jobs as supervisor claimed by petitioner would be properly performed under either endorsement and tenure achieved under one such endorsement would extend to the other as long as the positions claimed were not specifically enumerated in N.J.S.A. 18A:28-5. Since no position as supervisor is enumerated in the statute, petitioner's claim to one of the positions of supervisor held by non-tenured employees must be

> upheld. The decision of the Administrative Law Judge must be reversed. (*Id.* at p. 8)

Respondent's reply exceptions urge affirmance of the ALJ's decision, emphasizing, *inter alia*, that petitioner never actually served in any position as supervisor; thus, the ALJ ruled that the tenure rights he accrued in the position of director could not be transferred to the separate position of supervisor. Pointing to the fact that the ALJ found that the job descriptions for the two positions petitioner is seeking showed no similarities in duties and that state code prescribes different endorsements for the positions of supervisor and director, respondent argues:

> In this case, petitioner acquired tenure in the position of Director, Planning/Evaluation/Grants, a position involving the conduct of studies, gathering of data and writing of proposals for funding, but entailing no evaluation or guidance of staff engaged in the delivery of educational services to students (See Job Description, Exhibit F). He never served a day in any position of supervisor for any of the educational programs of the District (such as, special education, mathematics, bilingual education, etc.) which do involve ongoing direction and evaluation of staff (See Job Descriptions, Exhibits K, L & M). Not only is the position of Director a "recognized title," it is recognized in State Code (*N.J.A.C.* 6:11-9.3(a) & (b)) as separate and distinct from the position of Supervisor (N.J.A.C. 6:11-9.3(c)), requiring a different endorsement (either school administrator or principal), and not the endorsement of supervisor. Therefore, since the petitioner never served in any position of Supervisor, he had no rights to such a position, as the ALJ correctly held ***. (Reply Exceptions at p. 3)

Upon careful and independent review of the record in this matter, the Commissioner agrees with and adopts as his own the recommendation of the ALJ to dismiss the petition essentially for the reasons set forth in the Initial Decision. As correctly recognized by the ALJ, the endorsement required to serve as a director is that of school administrator or principal, *N.J.A.C.* 6:11-9.3(a) and (b). The supervisor endorsement, *N.J.A.C.* 6:11-9.3(c), does

not authorize service as director. Moreover, petitioner never served in the position of supervisor. Consequently, in keeping with the principles articulated in *Nelson, supra*, along with the aforementioned regulations specifying the authorization for service under the endorsements of supervisor, school administrator and principal, it is found and determined that the positions of supervisor and director must be deemed to be separately tenurable, notwithstanding the fact that the Legislature removed those positions from proposed legislation prior to its enactment as *L.* 1996, *c.* 58, §2.

L. 1996, *c.* 58 was introduced on June 10, 1996 and signed into law on June 28, 1996. Introduction of this legislation was specifically undertaken to remedy the April 29, 1996 Appellate Division interpretation of *N.J.S.A.* 18A:28-5 in *Nelson,* which construed the language of the statute to allow, contrary to longstanding case law, supervisors who held a principal endorsement and who were subject to a reduction in force to bump into a principal position, notwithstanding that they never served in, nor acquired tenure in, a principal position. The sole purpose of the proposed legislation, which was introduced and enacted within 60 days of the court's decision, was immediate restoration of the *status quo* of prior decisional law, *i.e.* "to continue the traditional practice of providing that tenure is acquired in one of the specifically enumerated positions only if the individual has served for the requisite statutorily required period of time in that position." *L.* 1996, *c.* 58, § 1.

The fact that the Legislature chose at this juncture not to add "supervisor" and "director" to the list of specifically enumerated positions does not have the import petitioner suggests, that is, a deliberate legislative exclusion of these two positions from the universe of positions which are to be held separately tenurable. To the contrary, the enactment's history suggests instead a recognition that the bill as initially drafted would have added a new element to

the statute, which was neither necessary to address the issue created by the *Nelson* decision nor appropriate for legislation designed to express the intent of the Legislature with regard to an existing law so as to restore the *status quo* to its interpretation as quickly and efficiently as possible. As stated by the New Jersey Supreme Court in *Schmoll v. Creecy*, 54 *N.J.* 194, 203 (1969), "inaction can mean only that the Legislature did not act." *See also Donaldson v. Bd. of Ed. of No. Wildwood*, 65 *N.J.* 236, 240-241 (1974).

Given the above, the Commissioner is in full agreement with the ALJ's conclusion on page 13 of the Initial Decision that reads:

> [s]ince petitioner is tenured in the separately tenurable position of director, he is not entitled to any of the supervisor positions currently held by the intervenors. While he possesses a supervisor endorsement, he has never served in the position of supervisor. The tenure rights he accrued in the position of director cannot be transferred to the separately tenurable position of supervisor. See *Nelson, supra*, 148 *N.J.* at 367-68. Absent experience and time served in the position of supervisor, tenure is not obtained.

Lastly, the Commissioner agrees with the ALJ that a comparison of the job descriptions for the director job held by petitioner and those of the supervisor positions at issue herein do not show similarities.

Accordingly, for the reasons well-expressed by the ALJ in the Initial Decision and as clarified herein, the Petition of Appeal is dismissed.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 3, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

393-99

IN THE MATTER OF THE TENURE	:	
HEARING OF MYRNA MARRERO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF BAYONNE, HUDSON COUNTY.	:	
	:	

SYNOPSIS

Board certified tenure charges of unbecoming conduct against respondent secretary for alleged improper handling of school funds.

ALJ found that although the criminal charge of theft was reversed on appeal, that result is not binding in the administrative forum. Here the burden of persuasion is preponderance of credible evidence, not guilt beyond a reasonable doubt applicable on the criminal side. ALJ found that the Board met its burden of establishing by a preponderance of credible evidence that respondent intended to convert school money into her own use and would have done so if not for the sting operation involving the police department and school administrators. Moreover, the ALJ concluded that the conduct engaged in by respondent, who had been in a position of trust, was sufficiently serious to warrant the sanction of dismissal. ALJ ordered respondent dismissed from her employment as a secretary.

Having reviewed the audiotapes of the hearing and being satisfied that the ALJ's recitation of the testimony of the witnesses was both accurate and thorough, the Commissioner concurred with the ALJ's reasoning finding respondent's explanation of the events incongruous. Citing Redcay, the Commissioner found that the particular circumstances of this matter to be "sufficiently flagrant" to warrant respondent's dismissal. Commissioner adopted findings and determination in initial decision as his own and directed respondent be dismissed as of the date of this decision.

December 3, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1341-97

AGENCY DKT. NO. 603-12/96

BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,

Petitioner,

v.

MYRNA MARRERO,

Respondent.

James L. Plosia, Esq., for petitioner, (Appruzzese, McDermott, Mastro & Murphy, attorneys)

Gregory T. Syrek, Esq., for respondent, (Bucceri & Pincus, attorneys)

Record Closed: September 7, 1999 Decided: October 12, 1999

BEFORE **DANIEL B. MC KEOWN,** ALJ (t/a)

INTRODUCTION

The City of Bayonne Board of Education (Board) certified a charge of unbecoming conduct against Myrna Marrero (respondent), a secretary with a tenure status in its employ, to the Commissioner of Education for determination under *N.J.S.A.* 18A:6-10, et seq. Respondent was simultaneously suspended from her employment without pay pending disposition of the charge. After the matter was transferred to the Office of Administrative Law as a contested case under the

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provisions of *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to-13, a plenary hearing was conducted before Administrative Law Judge Mary Louise Lucchi-McCloud. Simultaneous briefs were filed on September 2, 1998. ALJ McCloud became physically disabled after the briefs were filed but before she had the opportunity to issue her initial decision. On or about May 18, 1999 and, pursuant to *N.J.A.C.* 1:1-14.13 (b), the undersigned was temporarily assigned as an administrative law judge to prepare an initial decision based on the record in the matter. Counsel to the parties agree that the issues presented may be decided on the record supplied, without the need for further testimony or submissions.

The record consists of the charges filed by the Board, respondent's answer to the charges, the prehearing order prepared by ALJ McCloud, discovery motions, interrogatories and a request for admissions and responses thereto, documents (P-1 through P-8 and R-1 through R-5) admitted into evidence and as more fully described on the attached Documents in Evidence list, and the respective briefs of the parties. Counsel requested the undersigned to review audio tape recordings of the testimony received at hearing. This initial decision is based on a review of the entire record., including all testimony received at hearing as is recorded on audio tapes which were received by the undersigned on September 6, 1999.

CHARGES

The Board essentially alleges respondent engaged in theft through her failure to make proper disposition of money given her by a student for a particular purpose and, that by her conduct, she intended to convert such money for her own private purpose. The specifications to the charge certified by the Board against respondent are these:

> 1. Ms. Marrero has been employed as a secretary of the Bayonne Board of Education since September 1, 1988 and is currently tenured.
>
> 2. During the 1995-1996 school year Ms. Marrero was assigned to the [Midtown] Community School as a secretary.

3. Prior to March 28, 1996 and for about one and one-half years there had been a series of thefts of cash at the Midtown Community School. Some involved school monies and others involved the theft of the pay of several employees from their pocketbook while in the secretarial care of the main office.

4. On March 28, 1996 the Principal, Patricia McGeehan, arranged to have envelopes containing school picture money brought to each of the regular secretaries working that day. Two such envelopes were given to Myrna Marrero, each containing $25.00 and clearly marked as school picture money. The other secretary was also given similar envelopes with the same amount of cash in them.

5. In spite of the principal's policy that all such monies should be turned in upon receipt, Ms. Marrero did not turn in the envelopes that morning, whereas the other secretary did. The principal and vice-principal purposely made numerous trips past the desk of Ms, Marrero after they knew she had the envelopes, but she never attempted to turn the envelopes over to either of them.

6. At lunch time Ms. Marrero left the building and the principal and vice principal checked the desk to see if the envelopes were there. When they saw they were not there, they called the detective working on the case of the thefts.

7. Based on the call, Det. Goscinski and policewoman Sullivan stopped Ms. Marrero on the street within several blocks of the school. Ms. Marrero allowed a search of her pocketbook and the envelopes were discovered in the pocketbook with the cash inside. She was charged with the theft of the $50.00.

8. On August 27, 1996, Ms. Marrero, who had pleaded not guilty to the charges, was found to be guilty by Hon. Frank Carpenter, a Judge of the Bayonne Municipal Court, after a trial in which she was represented by legal counsel. Ms.

Marrero has filed an appeal of that conviction, which is pending as of this date [December 17, 1996].

9. The Bayonne Board of Education concluded, based upon this evidence that Myrna Marrero had stolen the property from the Midtown Community School. These actions represent conduct unbecoming a secretary.

FACTS

It is noted that respondent's conviction was reversed in the Law Division of New Jersey Superior Court. Except as otherwise noted, the facts established by a preponderance of credible evidence based on the record as a whole are these. Part I of the factual recitation is based on undisputed facts established by the evidence. Part II of the recitation is based on credibility assessments of witnesses who testified at hearing.

I

Respondent has been employed as a secretary by the Board since 1988. Between her initial employment and 1992, she had been assigned as secretary at the Board's Roosevelt school. Respondent was transferred to the Midtown School in 1992, when the facility was initially opened. The evidence shows that respondent was considered a valuable employee because of her performance and bi-lingual ability. (See R-1 through R-4) Indeed, the evidence shows respondent was relied upon to answer questions for other secretaries should the need arise. (See R-5)

There are three secretaries at the Midtown School; Cathleen O'Connell, Patricia Friscia, and respondent. Ms. O'Connell has been at Midtown since September 1994, Ms. Friscia has been a permanent substitute secretary since September 1995, and respondent. The school principal since 1992 is Dr. Patricia McGeehan (or principal). The vice-principal is Christina Mercun (or vice-principal). Secretaries O'Connell and Friscia worked for the principal and vice-principal, while respondent was assigned as secretary and reported to the bi-lingual education

program director identified only as Mrs. Monaghan. Respondent' desk was in the same central office area as the other secretaries, which is immediately adjacent to the main office where the principal' office is located. The vice-principal's desk was located in the same area as the secretaries. The office of bi-lingual director Mrs. Monaghan is adjacent to the central location of the secretaries.

Despite the fact respondent was assigned as secretary to the bi-lingual program director, she also was responsible according to her own testimony to greet members of the public who appeared in the office for various reasons, she provided translation of the Spanish and English languages because many of the school's students and parents only spoke Spanish and none of the administrators speak that language, she did typing, answered telephones, and prepared payroll for those assigned to the after care program. In short, respondent was in all respects a secretary in the Midtown school who happened to be assigned the director of the bi-lingual program.

Sometime in 1994, along with her duties to the bi-lingual program, respondent took on the additional task of being secretary to what is called the "after-care program" for which she received a stipend from the Board. This program is operated in conjunction with a "before-care program,' both of which are operated to benefit parents whose children require adult supervision before school begins and after it ends for the day. Both programs are operated by the Board under the leadership of a Mrs. Finby, who is the Director of Community Education. Mrs. Finby's office is adjacent to the central area where the secretaries are situated. Respondent registered children for the after-care program, she collected fees for the program from parents and occasionally from students in the program whose parents had them bring the fees to her, and she performed ministerial tasks for the teachers involved in the program. When parents came after hours to pick up their children, they would go to respondent who would use the school's intercom system to announce to that particular child to report to the office so their parents could then take them home. The fee for the program was $35 per week which was generally paid at two week intervals. Payment was requested to be made by check, although some parents sent in cash. When students brought after-care fees to her, respondent testified she made out receipts for the students in exchange for the fees with the amount of money tendered.

Respondent's daily working hours were from 8:30 a.m. to 4:00 p.m. for the bi-lingual program, and from 4:00 p.m. to 6, 7, 8, or 9 p.m. for the after-care program depending on the activities taking place. For a short while, Ms. Friscia was also the secretary for the before-care program.

It is not disputed that secretaries were the intermediary recipients of various monies collected by students throughout the year. Sources of such funds included school picture money from many of the approximately 1,100 pupils in the school, field trip money, Parent-Teacher Organization (PTO) fund-raiser money, Dad's Club money, Cheerleading Association money, and other fund-raisers. Teachers would send students to the office with collected money for the various activities to the office for submission to one of the three secretaries. The secretaries, in turn, were obligated to insure that the money received was turned over either to the principal or vice-principal, or to Ms. Finby when the money represented fees for the before- or after-care programs.

At the time of first employment, secretary O'Connell was told by her predecessor that money collected from students or teachers must be turned over as soon as possible to either the principal or vice-principal . In the event neither administrator was available at the time, O'Connell was instructed to place the collected money in either a designated lockbox located in the principal's office or, if the principal's office was locked at the time then the secretary could get the key to the office from the vice-principal or janitor. If the key to the principal's office could not be secured, then the money was be placed in the principal's mailbox located behind the secretarial desks in the main office.

Secretary Friscia was also instructed that money given her by students or teachers for a school activity was to be given directly to the principal, or to the vice-principal or, if appropriate, placed in the designated lock box. Ms. Friscia testified that as a general rule she immediately gave one of the two administrators whatever money was given her by students or teachers because one or both of them would always be in or about the office. Rarely, she explained, did she ever place

money in the principal's mailbox or in the designated lock box. Indeed, there is no evidence in the record to show that the appropriate collection boxes were inaccessible to the secretaries at any time. Nor is there evidence to show that either the principal or vice-principal were not available to the secretaries at least sometime during the school day.

The principal and vice-principal testified that because of a rash of missing money incidents which had been occurring in the school, secretaries were instructed on several occasions that any money they received from teachers was not to be held by them. Rather, each secretary who received money from students sent or who appeared at the office with money was instructed to place the money in a lock box in the principal's office, or turn over the money directly to the principal or vice-principal, or place the money in the principal's mailbox immediately behind the secretaries' desks in the central office. The testimony of the principals and secretaries, including respondent, establishes that the central concern was the chain of custody of submitted receipts until such time the receipts were safely in a lock box or in the possession of the school administrators for eventual disbursement to the proper party. The evidence shows the emphasis of the school administrators was that secretaries not maintain possession of submitted receipts in order to eliminate the increasing number of missing money incidents which were occurring.

Prior incidents of missing money referenced above include secretary O'Connell in 1995-96 missing $100 from a larger collection made for a party for a staff member who was about to retire; an entire class's picture money was missing after it had been turned in ; $100 was missing from candy sale money which had been turned into respondent but could not be thereafter located; an undisclosed amount of money was missing from various envelopes the vice-principal had placed on a window sill and had asked respondent to watch while she vacated the area for a short time; field trip moneys were missing, as was money from, what I understand the vice-principal's testimony to be, community egg money. These incidents all occurred between 1993 and 1996 and they all occurred after the money reached the secretarial main office area.

The incident which precipitated the "sting" operation referred to in paragraphs four through seven of the specifications to the charge against respondent is this. On or about March

15, 1996 secretary Friscia had $300 stolen from her pocketbook while at work. She testified she and respondent were friendly at the time. Indeed, Ms. Frsicia testified she was staying beyond her normal quitting time of 3:45 p.m. waiting for respondent to finish her work for the after-care program so they could go and have a drink together. It is also noted that during the course of the regular school day, respondent learned before lunch-time her daughter at home was having an asthma attack and had to be taken to the doctor immediately. Ms. Friscia, knowing respondent's automobile was inoperable, called her own daughter and instructed her to drive respondent and her daughter to the doctor immediately, which her daughter did. When Ms. Friscia learned her daughter did not wait at the doctor's office with respondent to insure everything was all right with her daughter, Ms. Friscia instructed her daughter to return to the doctor's office immediately. Respondent acknowledges this sequence of events having occurred on March 15, 1996 and that Ms. Frsicia was waiting for her to finish work to go out and have a drink together.

March 15 was a Friday. Ms. Friscia had just cashed her paycheck, placed the money in a bank envelope, and placed the envelope in her purse. She was at her desk in the central office area, and respondent was at her desk. The teacher who ran the school coffee club, Mr. Walsh, entered the area to receive Friscia's coffee club dues. Ms. Friscia took her pay envelope out of her purse, paid the teacher her $20 coffee club dues, placed the pay envelope back in her purse, and placed the purse back on the floor under her desk. This transaction was observed by respondent who was sitting at her desk no more than 15 feet from Ms. Friscia..

As the transaction was occurring, the teacher asked respondent to make copies of music for him. Ms. Friscia offered to do the copying because at that time she had finished her own work and was simply waiting for respondent to finish her work. The teacher left the music he wanted copied, and made his exit from the central office area. No one was else was present in the office at this time which was about 4:30 p.m. When Friscia went to make the copies on the principal's copy machine which was located immediately behind respondent's desk, respondent urged her to use the copier in the office of the director of the bi-lingual program, Ms. Monaghan, located down the corridor out of view of the secretarial area. Respondent explained that that machine was newer and made better copies. At hearing, respondent testified she instructed Ms. Friscia to use

the bi-lingual copier because the after-care program uses the bi-lingual copier and anything that must be copied after the regular school day is considered by her to be after-care work.

Initially, Ms. Friscia was reluctant to use the bi-lingual program's copy machine because she understood it was to be used only for bi-lingual related tasks. Copying of music for the teacher was related to the regular school program and she believed she was to use the principal's copier. Nevertheless, at respondent's urging and because respondent was senior to her, Ms. Friscia accompanied respondent to the bi-lingual office to use that machine and for respondent to explain how to use it. Once the explanation was done and Friscia understood, respondent returned to her desk in the central office area. Friscia remained in the bi-lingual office out of view of respondent to make the copies.

Friscia was away from her desk and out of view of respondent for about 15 minutes while making copies. The thought of her having left her purse in the office with her pay envelope occurred to her while she was making copies, but she reasoned she need not worry because respondent was in the office. When she finished making the copies and returned to her desk, she looked into her pocketbook for her pay envelope. The entire envelope, including the money, was missing or as Ms. Friscia testified, she was "robbed!". Ms. Friscia became very upset that her money was missing, and she searched throughout the office in a vain attempt to locate it. Teachers who were returning to the school building that evening for a student production assisted in the search but without success. Respondent remained at her desk without comment while Ms. Friscia and two or three teachers who came into the office were searching the immediate area for the money. Respondent testified she did not assist in searching for the money because there were too many persons around Ms. Friscia's desk.

Ms. Frsicia telephoned the vice-principal that her money was missing and was advised to telephone the police. When members of the Bayonne Police Department arrived at the school, Ms. Friscia gave them a statement outside the main office area. When she returned to her desk area inside the main office, she was given a message that respondent had left for home because her daughter became ill again. Despite the date being in March when the weather is still cold,

respondent left her long leather coat in the office area while the police were taking Ms. Friscia's statement. Respondent testified she did leave the office between 5:30 and 6 p.m. because her daughter became ill and she had to take her to the doctor. She acknowledges she left her coat in school because at the time she was not thinking of her coat; she was thinking only of her daughter.

In the meantime, the principal had returned for a school function that evening and Ms. Friscia had told her what happened regarding her missing money. The vice-principal had also returned to school for the same function and talked with the principal about the missing money. Both school administrators suspected respondent was responsible for the missing money although they did not share those suspicions with Ms. Friscia that evening. The following Monday, Ms. Friscia came to them and said that after having the weekend to think about her missing money she suspected respondent to be the person responsible. The principal told Bayonne Police Detective Goscinski of their suspicions and he, in turn, suggested setting up the "sting" operation. The plan was for the principal to place currency in envelopes plainly marked so there could be no mistake regarding the purpose of the money inside, take the envelopes to a kindergarten teacher, have the teacher send the envelopes back to the main office, hand the envelopes to the respective secretaries, and wait for the respective secretaries to follow established administrative policy of immediately surrendering the envelopes to either administrator or placing them in the lock-box, or otherwise transferring possession in an acceptable manner.

In the meantime, the principal and vice-principal again emphasized to the secretaries not to retain possession of money handed in for various school activities in light of the disappearance of Ms. Friscia's $300. Indeed, the secretaries were instructed not to leave money in the principal's mailbox anymore; rather, they should be certain to hand the money directly to either the principal or vice-principal. It is also noted that while the evidence in the record, including the testimony of respondent, is that the principal and vice-principal had reduced to writing their concerns of insuring the safety of funds collected, copies of the memoranda were not retained. Respondent did testify she saw such memoranda and she also testified she was present when the principal would emphasize to all secretaries the need for safety of money received.

The "sting" was carried out on March 28, 1996. Respondent was present at her desk, as was secretary O'Connell and a substitute for Ms. Friscia who was out sick that day. Respondent had just returned from being absent several days in a row. The principal placed $25 in each of two envelopes which she subsequently sealed, and which had sufficient markings on them for anyone to know the purpose of the money inside. She took the envelopes to a kindergarten teacher and instructed the teacher to send two of her students to the office to give the sealed envelopes to secretary O'Connell. Both the principal and vice-principal insured they would be in and around the office all day so that it could not later be said by anyone that they were not available to give them the sealed envelopes containing the money. The students did as they were instructed by their teacher and went to the office and gave O'Connell the envelopes. Secretary O'Connell immediately gave the two envelopes containing the money to the principal as she and the other secretaries were instructed to do.

Next, the principal took two more envelopes with sufficient markings on the outside so there could be no dispute regarding the purpose of the money inside the envelopes. One envelope (P-2, pp. 1-2) is clearly an envelope of the company, Life-Touch, that takes student pictures and which uses the envelopes for the submission of picture orders and money. The principal placed $25 in this envelope, sealed it, placed a check mark in the appropriate place on the face of the envelope that $25 was inside the envelope for "A Complete Package/Paquete Completo" of pictures, placed a student's name on the envelope, the name of the student's teacher, and the school's initials. Next, the principal placed $25 in a plain envelope (P-2, pp.3-4) and sealed it. The principal wrote on the face of the envelope a student's name and "25 $ Picture", along with the classroom and classroom teacher's name. The principal took the envelopes to the kindergarten teacher and instructed her to send the envelopes back to the office with two of her students and to give to respondent. The teacher and students did as requested. The envelopes were given respondent, who was the only secretary in the office at that time, by the two kindergarten students around 11:30 a.m. The principal and vice-principal insured they were in and out of the main office area from 11:30 on for respondent to give one of them the envelopes containing the picture money. Respondent did not do so; she retained possession of the sealed

envelopes. The vice-principal testified she deliberately engaged respondent in conversation between 12:30 and 1 p.m. talking about respondent's health to make it easy for respondent to simply give her the envelopes. In the face of the very convincing testimony that the principal and vice-principal made themselves available to respondent between 11:30 and 1 p.m. on March 28, she testified neither administrator was available for her to give the envelopes to.

The principal notified detective Goscinski through a prearranged telephone call to his pager that respondent left the building without having turned in the envelopes. The detective and a uniformed female police officer had stationed themselves near the school facility. They saw respondent walking away from the school and intercepted her at an intersection. In response to the officers' questions, respondent denied having school property in her possession. Respondent did give them permission to pat down her coat, after which they requested she accompany them back to the school. They proceeded to the school multi-purpose room where the uniformed officer, having received respondent's permission, searched her purse and found the two envelopes - unsealed. Respondent, when asked what the envelopes were, stated she thought the money was for the after-school program. Respondent was placed under arrest and charged with theft. She was then transferred to police headquarters for booking and additional questioning by the police. Detective Goscinski testified respondent explained she thought the money was for the after school program and that she really did not look at the envelopes. She further explained she denied having school property in her possession because when she was asked if she did, she thought she was being asked if she had some thing of the school's with her; she did not think of the envelopes or the money as property. He testified respondent said she was instructed by Ms. Finby, the after-care director, to hold all fee money until she reported for work at 2 p.m. and that she was simply doing what she was instructed by Ms. Finby to do.

Ms. Finby had retired prior to the commencement of the hearing in the matter. She was not called to testify in the proceeding. Goscinski testified that when he talked with Ms. Finby she denied ever telling respondent to hold money until she arrived at 2 p.m.; that she did not authorize anyone to take school money off school property that day; and, finally, Ms. Finby told the detective that her office was open that day and respondent should have put the money in her

lockbox if she did not give it to either administrator. In response to the detective's specific question, respondent denied having intended to steal the money in the envelopes that day.

Respondent says she understood her responsibility concerning the acceptance of money from students in this manner. Respondent testified she disposed of moneys given by students for regular school activities in the lock-box in the principal's office or give it to the vice-principal or principal. She testified she never received any special instructions for the handling of after-care money. Respondent testified when she received money representing fees for the after-care program, or on occasion for the before-care program, .she would place the money in a box designated for that purpose which was in a closet in Ms. Finby's office or retain the money until Ms. Finby reported for work at 2 p.m. Respondent would secure the key to Ms. Finby's office if Ms. Finby was not yet present from either the principal, vice-principal, or school janitor. If she received money related to a PTO fund-raiser, she would deposit the money in the P.T.O. lock box or, if the money was related to a school activity such as picture money or candy money, she would turn the money over to the principal or vice-principal. Respondent also testified that on occasion, Ms. Finby would authorize her to take after-care money off school premises in order to convert the cash received for the student fees into money orders. Secretary Friscia also testified that when she had been assigned the before-care program and was responsible for collecting those student fees, Ms. Finby had asked her on one occasion to convert cash into money orders. Ms. Friscia refused to do that because she felt uncomfortable taking school money off school property and she knew taking school money off school property was prohibited which she never did.

Respondent testified that March 28 was her first day back to work from a series of sick days she had taken and, consequently, had a number of purchase orders she had to type for the following school year. Respondent acknowledges she received two envelopes from two kindergarten children about 11:30 a.m., and because she was so busy typing purchase orders, she simply placed the envelopes on the top of her desk with the intention of getting to them later. She testified she presumed the envelopes contained after-care money from the parents of the students who delivered the envelopes. When she prepared to go to lunch at 1 p.m., she recalled the envelopes were still on her desk in, she says, an unopened state. Because she assumed money

was in the envelopes, she decided to put them in her purse while she went to lunch. She would then turn over the envelopes to Ms. Finby when she came to work at 2 p.m. Respondent explained she did not put the envelopes in her desk for safekeeping because she does not have a key to lock her desk, and because of the heightened concern regarding the handling of money she did not want to leave the envelopes unattended. Respondent says she did not turn the envelopes over to either administrator because neither administrator was available for her to surrender the envelopes and/or she says because after-care money goes directly to Ms. Finby.

The principal testified that from the date of respondent's suspension from her employment to the present, no incidents of missing money have occurred at the Midtown School.

II

The preponderance of the evidence establishes that the events prior to and on March 28, 1996 occurred as described by the witnesses for the Board. Each Board witness, I find, was truthful, forthcoming in responses to questions posed, and unbiased. That the principal and vice-principal concluded respondent was considered to be a likely suspect responsible for the rash of missing money does not in the circumstances confronting the administrators render their testimony of the entire matter biased.

The evidence does not support respondent's testimony that the entire matter is a misunderstanding of her responsibility as secretary for the after-care program. Her claim that it is not unusual for her to have after-care money off school property is, in the context of the charge against her, rejected as ill-founded. The threshold fact to be established in the matter is not whether respondent was authorized by Ms. Finby to be in possession of after-care money off school property on March 28, and even if it was, the evidence establishes she was not so authorized by anyone other than her own view of what she could or could not do. Rather, the essential fact to be decided is whether under all the circumstances respondent, more likely than not, knew the money in the envelopes she opened on March 28 before being arrested was intended to be school picture money.

Respondent, through the course of her duties as the secretary for the after-care program, got to know all the children by sight, no more than 25, who were enrolled in the after-care program. Thus, she had to know the children who delivered the envelopes to her were not after-care students. As secretary for the after-care program who registered students for the after-care program, she knew or had reason to know, no children from the morning kindergarten classes were enrolled in the after-care program. She knew by virtue of the time of day the envelopes were delivered that the two kindergarten children were from the morning kindergarten classes. The envelopes were plainly marked as containing picture money, an activity wholly unrelated to the after-care program. It is not reasonable for a secretary, knowing the problems the school experienced with missing money, to accept two envelopes from kindergarten children and not look at the envelopes being accepted. A mere glance at the envelopes is sufficient for any reasonable person to know that the contents of the envelopes were designated as containing money for school pictures.

Respondent testified that merely seeing school picture envelopes is not a compelling signal to her that the money enclosed was for that purpose. She explained that after-care fees were sent her in all kinds of envelopes including Public Service envelopes for the payment of bills, church envelopes, and so on. The weakness in this explanation is she claims not to have even looked at the envelopes on March 28. It is unlikely that she, a secretary of close to ten years experience, accepted envelopes from kindergarten children without being secure in knowing precisely what the contents of the envelopes were for. Finally, respondent testified she knew all 26 students by sight in the after-care program and she knows that the student whose name was on one of the envelopes given her March 28 was not in the program. Nevertheless, she insists she believed the envelopes were after-care money because she says she reasoned that the named pupil could have just started in the program. But, in light of the fact respondent registers the children for participation in the program and she did not register this particular program, respondent explains that away by saying someone else could have registered him.

The envelopes were sealed when delivered to respondent by the two kindergarten children. When respondent was intercepted by the police and had her purse searched, the envelopes were opened. Consequently, at some point between the time of acceptance and the time of interception by the police, respondent opened the envelopes and saw the cash inside. The Light Touch envelope, together with the student's name and order for the complete package, together with the markings on the second envelope, clearly identified the money was for pictures; not for anything else. Finally, respondent did not give the students receipts for the money contained in the envelopes which she insists she believed to be after-care money despite the clear markings on the envelopes that the money inside was for school pictures. Respondent's explanation at hearing rings hollow that when she returned from lunch she would check with the kindergarten children who gave her the money exactly what part of the after-care program the money was for and then give them a receipt or mail a receipt to their parents. As emphasized by Board counsel during cross-examination of respondent, her claim that she would check with kindergarten students she knew did not participate in the after-care program what part of the after-care program the money they gave her in the morning was for is ludicrous.

Respondent testified she put the envelopes on the top of her desk when she received them at 11:30 a.m. because she was so busy and because she was then talking with a teacher whose identity she could not recall at hearing. The vice-principal is positive that at the time of delivery of the envelopes, respondent was not engaged in conversation with anyone. The principal and vice-principal made it a point to be in and out of the main secretarial area at this time to provide respondent with every opportunity to turn in the envelopes to them. Despite being in close proximity to respondent's desk, neither administrator saw the envelopes on the top of her desk after delivery by the students. Indeed, the vice-principal engaged respondent in a thirty minute conversation between 12:30 and 1 p.m. so that respondent would again have the opportunity to turn in the envelopes.

Respondent's testimony she did not have a key for her desk is rejected as untruthful. The believable evidence presented by the Board through the testimony of the vice-principal is that respondent did have a key to her desk which was given her when she was first assigned to the

Midtown school and that respondent has on prior occasions locked her desk. There is no evidence that respondent ever reported her key missing or lost to anyone in authority at the Midtown school. Respondent's testimony that neither administrator was available to give the envelopes is rejected as being untruthful because she acknowledges she had a conversation with the vice-principal for thirty minutes between 12:30 and 1 p.m. Respondent's testimony that she did not look closely at the envelopes to know what they were for is rejected. The envelopes need not be inspected with a microscope to determine the purpose for which they were being submitted and it is abundantly clear that the envelopes were not intended for the after-care program. Furthermore, respondent's testimony that she believed the student whose name is on the envelope was newly enrolled in the after-care program solidifies her testimony as incredible that she did not know what the money inside the envelopes was for because she did not look at the envelopes.

Respondent's testimony that she was going to turn over the envelopes to Ms. Finby at 2 p.m. is rejected. I infer that when respondent took the envelopes from the kindergarten children she knew because of the markings there was cash money in them. I infer respondent then opened the envelopes surreptitiously, discovered the amount of money inside, and placed the envelopes immediately into her purse. I specifically infer and, consequently find as fact, that respondent had every intention of retaining possession of the combined $50 for her own personal use and only claimed she thought the money was for after-care when she was intercepted by the police to avoid having to face the truthful reality of her conduct.

CONCLUSION

Having found that respondent intended to convert school money into her own personal use, it cannot be gainsaid in the entire circumstance of the event that such conduct is conduct unbecoming a school employee. One is not employed as a secretary by public boards of education to work themselves into positions of trust in order to convert public moneys collected for their own use in that position of trust. While respondent may have been inartfully charged with "theft," this is not the forum where the criminal charge of theft under *N.J.S.A. A.* 2C:20-1 is to be tried.

The criminal charge was tried upon which respondent was initially found guilty, which verdict was reversed on appeal.

The sequence of events in municipal court and then the New Jersey Superior Court, Law Division, and the results obtained therein, is not binding in this forum. Here, the charge of "theft", particularly in light of the specifications to the charge, manifests an intention of the Board to administratively charge respondent with conduct unbecoming an employee. In this administrative forum, the burden of persuasion is preponderance of credible evidence; not guilt beyond a reasonable doubt applicable on the criminal side. The Board has met its burden of establishing by a preponderance of credible evidence that respondent fully intended to convert school picture money into her own use on March 28, 1996 and would have done so had it not been for the sting operation involving the Bayonne Police Department and school administrators.

Prior to this incident, respondent had been considered a valuable employee; a person to whom newer employees could go for answers to questions regarding their job should the need arise. She was trusted by administrators and undoubtedly other professional employees to use her bi-lingual talents in a manner helpful to the efficient operation of the school. The special manner in which respondent was viewed by her supervisors, with which respondent was keenly aware, render this offense to be especially egregious. Respondent knew the special trust placed in her to be collecting money in the first instance; she knew that by being responsible for the collection of after-care program fees that she was trusted by those with whom she worked. Her conduct in this matter destroyed that trust in a blinding instant to the extent the principal is convinced respondent should not ever be allowed to return to her position of employment in the Midtown School. The victims of the rash of missing money incidents now have a likely suspect who turns out to be a colleague. No incidents of missing money have occurred in the Midtown School since respondent was suspended on the charge.

One incident of conduct unbecoming may be sufficiently serious to warrant the ultimate sanction of dismissal. In this case, the underlying conduct is sufficiently egregious to warrant the ultimate sanction of dismissal when viewed from the perspective of the conduct itself as well as

the conduct being committed by someone in a position of trust as was respondent. The evidence shows respondent's conduct destroyed her capacity to be part of the team of employees upon whom the Board may rely in carrying out its mission to provide its pupils with a thorough and efficient program of education.

In consideration of the conduct engaged in by respondent as established by the Board by a preponderance of credible evidence, I conclude Myrna Marrero must forfeit her tenure employment as a secretary with the Bayonne Board of Education. It is so **ORDERED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P. O. Box 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 12, 1999
DATE

Daniel B. McKeown by FDJ
DANIEL B. MCKEOWN, ALJ t/a

Receipt Acknowledged:

10-19-99
DATE

Debbie Antanaitis/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 21 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cc

DOCUMENTS IN EVIDENCE

P-1 Supplemental Investigation Report

P-2 Photographs

P-3 Arrest Report

P-4 Arrest Notes

P-5 Request for Admissions

P-6 Responses to Request for Admissions

P-7 Interrogatories

P-8 Answers to Interrogatories

R-1 Evaluation

R-2 Evaluation

R-3 Evaluation

R-4 Evaluation

R-5 Memorandum

OAL DKT. NO. EDU 1341-97
AGENCY DKT. NO. 603-12/96

IN THE MATTER OF THE TENURE	:	
HEARING OF MYRNA MARRERO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF BAYONNE, HUDSON COUNTY.	:	
	:	

The record of this matter, which it is noted contained audiotape recordings of the hearing conducted at the Office of Administrative Law (OAL),[1] and the Initial Decision of the OAL have been reviewed. Respondent's exceptions and the Boards's reply thereto were filed in accordance with the directives of *N.J.A.C.* 1:1-18.4.

Respondent's exceptions essentially recast and reiterate those arguments previously advanced to the ALJ in her post-hearing brief. She again argues that the Board did not meet its burden of proof on its charge that she stole money from the school on March 28, 1996. (Respondent's Exceptions at p. 3) In this regard, respondent repeats her allegation that the Board's witnesses "had preconceived opinions regarding [her] guilt," and, as a result, their testimony must be viewed as biased. (Respondent's Exceptions at p. 2) Such bias, she asserts, is particularly relevant when attention is directed to "differences in testimony" regarding procedures for collecting and handling money and the possession of funds outside the school building. (*Id.* at p. 3)

Respondent once again emphasizes that the charge lodged against her was that she stole money from the school on March 28, 1998, not, she argues, that she violated school policy

[1]Hearing in this matter was conducted on August 11 and 12, 1998.

by taking money off school premises; that she failed to properly record the funds when they were turned over to her; or that she violated a procedure when she did not deposit the funds in the P.T.O. Box. (*Id.* at p. 3) Next, respondent again advances that because the Board's charge was "theft," guidance as to the extent of the Board's burden in establishing such charge may be gained from an examination of the criminal definition of theft, *N.J.S.A.* 20C:20-3, which, she avers, is the unlawful taking, or unlawful control over the property of another "with purpose to deprive him thereof." (*Id.* at p. 4) As such, respondent maintains, in order for the Board to sustain its burden here it was obligated "to prove that [respondent] had the purpose, or intent, to deprive the [school] of the property." (*Id.*) Respondent contends that the Board has failed to meet its burden of proof in this matter, requiring that the tenure charges be dismissed and that respondent be restored to her position.

Finally, respondent urges that if the Commissioner finds "some form of improper conduct," the circumstances of this matter do not warrant her dismissal but, rather, some lesser penalty should be imposed. (Respondent's Exceptions at p. 6)

In reply, the Board advances that the ALJ's initial "decision is not only well-reasoned and correct on the merits, but reaches the only possible conclusion based upon the evidence presented to him." (Board's Reply Exceptions at p. 3) With regard to respondent's charge of "bias" of the witnesses, the Board argues that to give credence to such a contention would be tantamount to accepting "that the Board's witnesses are lying in order to 'frame' an innocent employee," a finding which is fully belied by the record. (*Id.*) Further, it posits, the testimony of each of the Board's witnesses is fully consistent "on every crucial point." (*Id.*) Respondent's testimony, in sharp contrast, it asserts, "is either flatly contradicted by that of others, is inconsistent, or is just simply incredible." (*Id.* at p. 4) The Board presents, what it purports are, numerous testimonial examples in support of this contention. (*Id.* at pp. 4-7) As

such, it reasons, the ALJ "correctly concluded that Ms. Marrero was untruthful in her sworn statements, and that her attempts to explain her actions were illogical, absurd, and, in the Court's own language, 'ludicrous.'" (*Id.* at p. 7)

The Board next states that respondent's attempt to mask her responsibility for her actions by clothing herself in the mantle of criminal law is no more than an effort to obfuscate the real question before the Commissioner, "whether the Board proved by a preponderance of credible evidence (that is, was it more likely than not) that Marrero took the money with an intent to make it her own." (Board's Reply Exceptions at p. 8) It avers that, based on the within record, an affirmative answer to this question is the inevitable conclusion. (*Id.*)

Finally, the Board advances that the within respondent has presented "no mitigating factors" which might serve to justify alleviation of the ALJ's recommended penalty of dismissal which, it avers, is fully warranted in this matter. (*Id.* at p. 10)

Upon his independent and comprehensive review of the record, including all testimony proffered at the hearing, the Commissioner, finding respondent's exceptions without merit, determines to affirm the findings and conclusion of the ALJ that the Board has established, by a preponderance of the credible evidence, its charge of unbecoming conduct[2] against respondent, and that such conduct warrants respondent's removal from her tenured position.

In reaching his determination here, the Commissioner was fully cognizant that this matter, to a great extent, turns on the credibility of witnesses and the weighing of evidence. The Commissioner's comprehensive review of the audiotapes of the hearing provides him with no basis to challenge the credibility determinations of the ALJ. Rather, he is fully satisfied that

[2]As was aptly noted by the ALJ, "[w]hile respondent may have been inartfully charged with 'theft,' this is not the forum where the criminal charge of theft under *N.J.S.A.* 2C:20-1 is to be tried." (Initial Decision at p. 17) Rather,

the ALJ's recitation of testimony is both accurate and thorough, and that he carefully measured conflicts, inconsistencies, and plausibility of content in deciding which testimony to credit. Moreover, the Commissioner was especially mindful that:

> Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances.*** (*In re Perrone,* 5 *N.J.* 514, 522 (1950))

For the reasons aptly detailed by the ALJ on pp. 15-17 of his Initial Decision, the Commissioner finds respondent's explanation of the events which transpired on March 28, 1996 incongruous.

In considering the appropriate penalty in this matter, the Commissioner duly took into account respondent's lengthy, apparently unblemished record with the Board but, nonetheless, determines that the charge established herein, under the particular circumstances of this matter, is "sufficiently flagrant" to warrant respondent's dismissal. (*See Redcay v. State Board of Education,* 130 *N.J.L.* 369, 371 (Sup. Ct. 1943); *aff'd* 131 *N.J.L.* 326 (E. & A. 1944).)

Accordingly, the Commissioner adopts the recommended decision of the OAL, for the reasons clearly stated therein, and hereby orders that Myrna Marrero be dismissed from her tenured position with the Board of Education of the City of Bayonne as of the date of this decision.[3]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 3, 1999

"[h]ere, the charge of 'theft,' particularly in light of the specifications to the charge, manifests an intention of the Board to administratively charge respondent with conduct unbecoming an employee." (*Id.* at p. 18)

[3] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.,* within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

393-99

EDU #1341-97
C # 393-99
SB # 57-99

IN THE MATTER OF THE TENURE :

HEARING OF MYRNA MARRERO, : STATE BOARD OF EDUCATION

SCHOOL DISTRICT OF THE CITY OF : DECISION

BAYONNE, HUDSON COUNTY. :

Decided by the Commissioner of Education, December 3, 1999

For the Petitioner-Respondent, Appruzzese, McDermott, Mastro & Murphy (James L. Plosia, Jr., Esq., of Counsel)

For the Respondent-Appellant, Bucceri & Pincus (Gregory T. Syrek, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

May 3, 2000

Date of mailing MAY 05 2000

394-99

BOARD OF EDUCATION OF THE TOWNSHIP OF HAZLET, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION AND THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	
RESPONDENTS.	:	

December 3, 1999

AGENCY DKT. NO. 350-11/99

BOARD OF EDUCATION OF THE TOWNSHIP OF HAZLET, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION AND THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	
RESPONDENTS.	:	

For Petitioner, Kenney, Gross and Kovats, L.L.P. (Michael J. Gross, Esq.)

For Respondent Athletic Association, Herbert, Van Ness, Cayci & Goodell, P.C. (Steven P. Goodell, Esq.)

For Respondent Board of Education, McDonald, Rogers & Rizzolo (Michael J. Rogers, Esq.)

This matter was opened before the Commissioner of Education by way of a Petition for Emergent Relief filed on November 30, 1999. Therein, Petitioner (Hazlet) alleged that at the conclusion of a November 19, 1999 semifinal playoff game under the auspices of respondent New Jersey Interscholastic Athletic Association (NJSIAA), with Hazlet's Raritan High School team facing the team from respondent Somerville Board of Education (Somerville), "the officials made an unreasonable, unexplained, and clearly erroneous decision," resulting in Hazlet losing the game and Somerville winning the right to proceed to the NJSIAA Central Group II final championship game scheduled for Sunday, December 5, 1999 (Hazlet's papers state December 4). Hazlet officials immediately sought "reversal, clarification and/or

explanation" of the officials' decision, but were denied. Hazlet then filed a protest with NJSIAA seeking the same relief, but were once again denied based upon Article VII of the NJSIAA bylaws, which provides that "protests based upon an official's judgment, or misinterpretation (misapplication) of the playing rules, will not be honored."

Petitioner submitted a certification of the Raritan High School Athletic Director describing in detail the specific events underlying its application, wherein it sought from the Commissioner a reversal of the officials' decision at issue, stay of the final championship game pending the outcome of this appeal, an immediate date for a final hearing as to the legitimacy and validity of the disputed decision, a directive that NJSIAA provide a written explanation setting forth the officials' decision-making process and rationale for the disputed decision, and a declaration that NJSIAA bylaws are illegal, unconstitutional and in violation of the State and federal anti-trust laws.

In response to Hazlet's application, both NJSIAA and Somerville filed reply papers as directed, including certifications, on December 2, 1999.

Hazlet's fundamental argument is found in that allegation of its petition claiming that "the determination by the officials in this case goes beyond a mere judgment, misinterpretation or misapplication of the rules of football. Rather, their decision and the process utilized in reaching that determination calls into question the integrity and reputation of the entire interscholastic sports system. Therefore, the exclusionary provisions of Article VII are not properly applied to this matter." That allegation is echoed by the statement of the Athletic Director noting that "it continues to be the position of the Petitioner that the [disputed decision] was not a judgment, application or interpretation of the rules governing varsity football, but was, rather, a blatant error which is incorrect and invalid on its face, and subject to reversal." As to

the need for emergency action, Hazlet argues that it will clearly suffer irreparable, immediate and dramatic harm if relief is not granted, in that it will lose an unrecoverable opportunity to play for the Group II Championship and no subsequent legal or equitable remedy can compensate for such loss.

The essence of Hazlet's argument, then, is that, in the interest of fairness, due process and integrity, an error by game officials, particularly if sufficiently obvious, egregious or consequential to the team against which the call is made, cannot be considered to be a "judgment" or a "misinterpretation (misapplication)" of playing rules for purposes of review on appeal to the NJSIAA or the Commissioner.

Upon careful consideration of this matter, and granting every inference to Hazlet for purposes of this proceeding, the Commissioner is unable to grant the relief requested.

Initially, the Commissioner cannot find that the circumstances and disputed decision herein, which are described in detail in Hazlet's papers and characterized by Hazlet itself as an "error," constitute anything other than a judgment call on the part of game officials. As such, even granting, *arguendo*, that the decision at issue was not correct, under the clear and explicit bylaws of NJSIAA, it is not reviewable. Further, those bylaws, by law, are adopted as controlling policy by boards of education when they elect to join the NJSIAA, which is a fully voluntary organization. N.J.S.A. 18A:11-3. Thus, Hazlet, as every other district, is aware that game officials will make judgment calls and applications of rule which cannot be challenged on the basis of error, and that there is no allowance for exception, even in the case of those errors which are deemed egregious by the affected party. Such awareness is based both upon the explicitness of the bylaws and explanatory guidelines themselves, and upon the consistent interpretation of them over the years.

While the consequences of any given official call may be unfortunate for a team, NJSIAA's rule recognizes the reality that game officials' calls are routinely disputed, and that permitting such calls to be challenged on the basis of error would result in both endless litigation and scheduling quagmires, since no game could be considered final if its outcome were in dispute as a result of an alleged error by field officials. Granting the relief sought by Hazlet herein would, in effect, establish both an exception to the rule and a slippery slope wherein challenges would routinely arise based upon the question of how obvious, or serious, or consequential, an error must be in order to be reversable. This result is neither fair nor practicable.

Accordingly, the Commissioner finds that the decision herein disputed is not reviewable by him, that the determination of the NJSIAA not to honor Petitioner's protest was a correct and lawful application of that organization's bylaws under the circumstances, and that the bylaw at issue, as interpreted herein, does not offend the due process rights of teams and student athletes whose districts adopt it as policy when joining the NJSIAA so as to enjoy the privilege of participation in interscholastic athletics. The application for emergent relief is denied and the petition dismissed.[12]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 3, 1999

[1] No finding is made as to Petitioner's antitrust allegations, which are not appropriately before the Commissioner in this context.

[2] Nothing herein precludes Petitioner, should it so desire, from writing the Commissioner or NJSIAA to request consideration of a prospective change in NJISAA's bylaws as they pertain to situations of the type that gave rise to the within dispute.

395-99

CHERYL CHASE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY	:	DECISION
RESPONDENT.	:	
	:	

December 6, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5750-99
AGENCY DKT. NO. 69-4/99

CHERYL CHASE,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,
Respondent.

Ashton E. Thomas, Esq., for petitioner

Arsen Zartarian, Associate Counsel, for respondent,

Record Closed: October 18, 1999 Decided: October 18, 1999

BEFORE: **KEN R. SPRINGER**, ALJ:

This matter was transmitted to the Office of Administrative Law on June 10, 1199, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.*. 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached consent order indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Oct. 18, 1999
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

10-20-99
DATE

Debbie Antanaitis/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 21 1999
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

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RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

OCT 18 1 55 PM '99

The Newark Public Schools
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102
(973) 733-7139
Attorneys for Respondents

CHERYL CHASE,
Petitioner,

v.

STATE DISTRICT SUPERINTENDENT, BEVERLY L. HALL, Ed. D. OF THE NEWARK PUBLIC SCHOOLS,

Respondents.

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY

OAL DKT. NO.: EDU 570-99
AGENCY REF. NO.: 69-4/99

CONSENT ORDER

THIS MATTER being opened by the Petitioner before the Commissioner of Education; and the Respondents having answered; and the matter having been referred to the Office of Administrative Law for consideration; and the parties having participated in a telephone conference of the matter before the Honorable Ken R. Springer, ALJ; and the parties having agreed to a resolution; and it appearing that Petitioner submitted to a psychiatric evaluation on the 22nd day of September, 1999 in accordance with said resolution; and for good cause shown;

IT IS on this 18th day of October, 1999,

ORDERED that upon completion of said evaluation and upon a finding that the Petitioner is able to perform her job duties, the Petitioner shall be immediately reinstated; and it is further

ORDERED that the Petitioner shall be transferred to a school within the school district in accordance with the agreement between The Newark Public Schools and the Newark Teachers Union.

Honorable Ken R. Springer, ALJ

The undersigned hereby consent to the form and entry of this Consent Order:

The Newark Public Schools
Office of the General Counsel
Attorneys for the Respondents

By: _____
Arsen Zaratarian, Esq., Associate Counsel

Dated: 10/6/99

By: _____
Ashton E. Thomas, Esq.
Attorneys for the Petitioner

Dated: 10/13/99

OAL DKT. NO. EDU 5750-99
AGENCY DKT. NO. 69-4/99

CHERYL CHASE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY	:	DECISION
RESPONDENT.	:	
	:	

The record, Consent Order and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the parties' Consent Order as settlement of this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 6, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

396-99

DONALD BEATTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CHESTER, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT

OAL DKT. NO. EDU 9333-99
Agency Dkt. No. 255-8/99
and
OAL DKT. NO. EDU 9334-99
Agency Dkt. No. 191-7/99

DONALD BEATTY,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF CHESTER, MORRIS COUNTY
Respondent.

Martin R. Pachman, Esq., for petitioner

Joseph R. Morano, Esq., for respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: October 13, 1999 Decided: October 19, 1999

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF CASE

This case was transmitted to the Office of Administrative Law (OAL) on August 20, 1999 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

IS AN EQUAL OPPORTUNITY EMPLOYER

The parties entered into an agreement and have prepared a stipulation of settlement which is attached and fully incorporated herein.

I have reviewed the record and the stipulation of dismissal and **FIND**:

1. The parties have voluntarily agreed to a dismissal of this matter.

2. The agreement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and should be approved. I approve the stipulation of dismissal and therefore **ORDER** that the parties comply with the agreement.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

October 19, 1999
DATE

Mumtaz Bari-Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

10-22-99
DATE

Debbie Antonates/sp
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 26 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cb

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLP
Ten James Street
Florham Park, NJ 07932
(973) 301-0001
Attorneys for Chester Township Board of Education

DONALD BEATTY,	:	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	AGENCY DKT. NOS. 191-7/99 and 255-8/99
vs.	:	OAL DKT. NOS. EDU-OT 09333-99N and EDU-OT 09334-99N
BOARD OF EDUCATION OF THE TOWNSHIP OF CHESTER,	:	
Respondent.	:	**STIPULATION OF SETTLEMENT AGREEMENT**

WHEREAS, Donald Beatty, a member of the Chester Township Board of Education, has filed certain Petitions before the Commissioner of Education regarding Board member access to certain information; and

WHEREAS, The Board is desirous of permitting Mr. Beatty, as well as all Board members the opportunity to review the information requested so that they may fulfill their functions as Board members, while at the same time allowing for the orderly administrative operation of the school district and the timely filing of district vacancies; and

WHEREAS, the parties desire to amicably resolve the matter without need of further litigation;

NOW, THEREFORE, IT IS STIPULATED AS FOLLOWS:

1. The Board agrees that, in accordance with Horner v. Board of Educ. of Kingsway Regional H.S. Dist., 1990 S.L.D. 752, all Board members shall be

granted access to complete employee application information, including application forms, interview summaries and/or administrators' notes that are incorporated into documents such as evaluation forms or interview summary sheets, relating to all employees or prospective employees who are candidates for an initial position with the district, a promotion, a transfer, or any other personnel action requiring a vote of the Board of Education.

2. Notwithstanding the above, Mr. Beatty also agrees and recognizes, in accordance with Horner v. Board of Educ. of Kingsway Regional H.S. Dist., 1990 S.L.D. 752, as well as the Commissioner's Interim Decision on Motion in the within matter, Agency Docket Nos. 191-7/99 and 255-8/99; OAL Docket Nos. EDU-OT 09333-99N and EDU-OT 09334-99N, that nothing in this agreement shall limit or reduce the Board's ability and full authority to adopt written policies and procedures which place reasonable conditions and limitations upon Board member review of employee applicant materials, including the times and places for review of said materials by individual Board members, so that the orderly administration and operation of the district and the timely filing of vacancies will not be compromised by demands for access on the part of individual Board members.

3. This Stipulation of Settlement Agreement is not and shall not in any way be construed as an admission of wrongdoing by either party. Instead, this Agreement constitutes the good faith settlement of all matters covered in the above docketed matters.

4. This Agreement shall also serve as the withdrawal with prejudice of the matters entitled Donald Beatty v. Chester Township Board of Education, **Agency Docket Nos. 255-89/99 and 191-7/99; OAL Docket Nos. EDU-OT 09333-99N and EDU-OT 09334-99N.**

5. This Stipulation of Settlement Agreement, upon its approval by the parties shall be enforceable at law and the parties agree to comply with the terms hereof immediately upon execution of this Stipulation of Settlement.

IN WITNESS WHEREOF, the parties do set forth their hands and seal as of the date first above written.

CHESTER TOWNSHIP BOARD OF EDUCATION

By: _____
Jeffrey Koch, President,
Chester Township Board of Education

Attest: _____

Date: 9/21/99

_____
Donald Beatty

Attest: _____

Date: _____

OAL DKT. NOS. EDU 9333-99 AND EDU 9334-99
AGENCY DKT. NOS. 255-8/99 AND 191-7/99

DONALD BEATTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CHESTER, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, Stipulation of Settlement Agreement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, were returned from the Office of Administrative Law. However, by letter dated October 29, 1999, the Commissioner was informed by counsel for petitioner that the settlement agreement appended to the Initial Decision, dated September 20, 1999, was *not* the parties' final agreement.[1] Counsel for petitioner therein provided a copy of the final agreement, which agreement is dated September 28, 1999, signed by both parties, and states, *inter alia*, that it

> shall also serve as the withdrawal with prejudice of the matters entitled *Donald Beatty v. Chester Township Board of Education,* Agency Docket Nos. 255-89/99 (sic) and 191-7/99; OAL Docket Nos. EDU-OT 09333-99N and EDU-OT 09334-99N. (Stipulation of Settlement Agreement, September 28, 1999 at pp. 3-4)

[1] Petitioner's counsel submitted a copy of his comments to the Board's counsel.

Accordingly, the Commissioner approves the withdrawal of the within matters and determines that these matters shall be dismissed with prejudice.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 6, 1999

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

399-99

FERDINAND M. WATSON, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

December 9, 1999

OAL DKT. NO. EDU 8347-98
AGENCY DKT. NO. 355-7/98

FERDINAND M. WATSON, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

December 9, 1999

400-99

DOUGLAS E. WICKS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

December 9, 1999

OAL DKT. NO. EDU 9799-98
AGENCY DKT. NO. 393-8/98

DOUGLAS E. WICKS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

December 9, 1999

401-99

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

December 9, 1999

OAL DKT. NO. EDU 6386-97
AGENCY DKT. NO. 195-6/97

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

December 9, 1999

402-99

TRENTON EDUCATION ASSOCIATION AND EMERSON SIMMONS, PETITIONERS, V. BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, AND SYLVAN LEARNING SYSTEMS, RESPONDENTS.	:	COMMISSIONER OF EDUCATION DECISION

December 9, 1999

OAL DKT. NO. EDU 6351-98
AGENCY DKT. NO. 88-4/98

TRENTON EDUCATION ASSOCIATION AND EMERSON SIMMONS, PETITIONERS, V. BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, AND SYLVAN LEARNING SYSTEMS, RESPONDENTS.	:	COMMISSIONER OF EDUCATION DECISION

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

December 9, 1999

403-99

C.P., and L.P., on behalf of minor child, E.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

December 9, 1999

OAL DKT. NO. EDU 1777-99
AGENCY DKT. NO. 25-2/99

C.P., and L.P., on behalf of minor child, E.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

December 9, 1999

404-99

IN THE MATTER OF THE TENURE	:	
HEARING OF ANITA DAY,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	
	:	

December 9, 1999

OAL DKT. NO. 1744-97
AGENCY DKT. NO. 547-11/96

IN THE MATTER OF THE TENURE	:	
HEARING OF ANITA DAY,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. Notwithstanding that this matter was erroneously withdrawn on the basis of respondent's notice to the court that she was withdrawing as a party to any further proceedings in this tenure matter, it is determined that, since the record reflects that respondent has resigned her tenured position with the District, there is no basis on which this matter can move forward. Therefore, the Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. As such, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

However, in that the within respondent resigned from her position prior to the conclusion of the tenure proceedings against her, and due to the serious nature of the charges, pursuant to *N.J.A.C.* 6:11-3.5, the State Board of Examiners is hereby notified of this matter and the file is being forwarded to that body for action as it deems appropriate. The District is also reminded of its obligation to cooperate with the State Board of Examiners in ascertaining and presenting the facts underlying its allegations herein.*

IT IS SO ORDERED.

December 9, 1999

ASSISTANT COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

405-99

BOARD OF EDUCATION OF ISLAND HEIGHTS, OCEAN COUNTY, PETITIONER, V. NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE AND BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY, RESPONDENTS.	:	COMMISSIONER OF EDUCATION DECISION

December 9, 1999

OAL DKT. NO. EDU 8577-98
AGENCY DKT. NO. 365-8/98

BOARD OF EDUCATION OF ISLAND HEIGHTS, OCEAN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE AND BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY,	:	DECISION
RESPONDENTS.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

December 9, 1999

406-99

EUGENE CONNORS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASCACK VALLEY REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

December 9, 1999

OAL DKT. NO. EDU 7078-98
AGENCY DKT. NO. 190-6/98

EUGENE CONNORS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASCACK VALLEY REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

December 9, 1999

JOHN BALWIERCZAK, FRANCIS J. DUNNE, JOHN C. JOHNSON, JR., ROBERT KREIG, JAMES LESAK, PETER MARTINO, JAMES MATERIA, FRED MELCHIOR, RAMON PEREZ, AND TOMMASO PUGLIESE,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF BERKELEY HEIGHTS, UNION COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioners, school custodians who became employees of the Berkeley Heights School District subsequent to the dissolution of the Union County Regional High School District in 1996, alleged the Berkeley Heights Board failed to recognize their appropriate level of salary when they transferred to that constituent District from the Regional. Petitioners contended that the Board denied them their rights to salary guide placement to which they were statutorily entitled pursuant to *N.J.S.A.* 18A:13-64. Board sought to dismiss the petition as untimely under the 90-day rule, *N.J.A.C.* 6:24-1.2(c).

ALJ concluded that the Board violated petitioners' statutory entitlement to be placed on the salary guide at a step and level commensurate with their service in the now-dissolved Regional District. ALJ found that petitioners' entitlement derived directly from statute and was not an element of the employment contract. Pursuant to *Lavin*, the ALJ found that the right to relief was not governed by the regulatory limitation period. ALJ ordered the Board to compensate petitioners for the 1997-98 school year and to place them on the appropriate step of the salary guide for succeeding years, where applicable.

Commissioner determined to reverse the recommended Initial Decision and to dismiss the petition as untimely pursuant to *N.J.A.C.* 6:24-1.2(c). Commissioner noted that petitioners received notice of their salaries for 1997-98 by letter, dated June 9, 1997; yet, their petition was filed October 10, 1997, beyond the 90-day limitation period. Commissioner observed that petitioners neither disputed that their petition was outside of the 90-day limitation period, nor did they provide any explanation or excuse for its untimeliness. Citing *Kaprow*, the Commissioner stressed that the 90-day rule is strictly applied. Moreover, the Commissioner found without merit petitioners' assertion that their claim for relief was a "statutory entitlement" within the intendment of *Lavin*, in that such claim to additional salary and correction of their salary guide

placement was based solely on the benefits granted them by operation of *N.J.S.A.* 18A:13-64, triggered by the dissolution of the Regional District and bore no relation to their service to the Board. Specifically he determined that, upon the dissolution of a regional district, *N.J.S.A.* 18A:13-64 operates as a "save harmless" provision to preserve and protect benefits earned by affected individuals by virtue of their service in such regional district. Absent rights and benefits accrued through petitioners' prior employment, *N.J.S.A.* 18A:13-64 does not operate to independently create a benefit for them. Because petitioners were not entitled to any right or benefit independent from the administration of a school system but, rather, any right or benefit to be afforded them herein was wholly predicated upon services they previously rendered as Regional District employees, their claim did not fall within the narrow prescriptions delineated in Lavin which might entitle them to a waiver of the mandatory filing timelines. Consequently, *N.J.A.C.* 6:24-1.2(c) applied here to bar petitioners' claims and the Commissioner found no compelling or exceptional circumstances to relax the 90-day rule. Petition was dismissed as untimely.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11247-97

AGENCY DKT. NO. 390-10/97

JOHN BALWIERCZAK, FRANCIS J. DUNNE, JOHN C. JOHNSON, JR., ROBERT KREIG, JAMES LESAK, PETER MARTINO, JAMES MATERIA, FRED MELCHIOR, RAMON PEREZ, and TOMMASO PUGLIESE,

Petitioners,

v.

BOARD OF EDUCATION OF BERKELEY HEIGHTS,

Respondent.

Louis P. Bucceri, Esq., for petitioner
(Bucceri & Pincus, attorneys)

Vito A. Gagliardi, Jr, Esq., for respondent
(Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen, attorneys)

Record Closed: December 16, 1998 Decided: September 23, 1999

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an appeal by ten school custodians who became employees of the Berkeley Heights School District ("Berkeley Heights") after the breakup of the Union County Regional High School District ("Union County Regional") in 1996. Petitioners, who had previously worked for Union County Regional, contend that Berkeley Heights failed to recognize their appropriate level of salary when they transferred to that surviving district. Although all petitioners had achieved tenure as custodians in Union County Regional, they do not base their claim on the tenure law. Rather, they maintain that Berkeley Heights violated their statutory entitlement under *N.J.S.A.* 18A:13-64, which prescribes the rights of employees of a regional school district "in the event of dissolution." In particular, petitioners allege that Berkeley Heights and the collective-negotiating unit representing existing custodial employees improperly renegotiated their unexpired two-year contract to provide lower salaries for incoming custodians from Union County Regional.

At the outset, Berkeley Heights seeks to dismiss the petition as untimely under the ninety-day rule, *N.J.A.C.* 6:24-1.2(c). If the merits are reached, Berkeley Heights asserts that the historic practice in the district has been to fix custodians' salary on factors other than seniority. Furthermore, Berkeley Heights argues that the revised salary scale is the binding product of collective negotiations.

Procedural History

Respondent Berkeley Heights filed a motion to dismiss the petition, together with supporting certification and legal brief, on July 31, 1998. Petitioners filed a cross-motion for summary decision, with legal brief, on August 8, 1998. Both parties filed a stipulation of facts on August 24, 1998. Berkeley Heights filed a reply brief and opposing certification on August 21, 1998. Thereafter, petitioners filed a reply brief and

opposing certification on September 2, 1998. The Office of Administrative Law heard oral argument on the cross-motions on December 16, 1998.

Findings of Fact

All of the material facts are stipulated or undisputed. **I FIND:**

Union County Regional was a regional high school district comprised of several local school districts including Berkeley Heights. Voters of Union County Regional approved the dissolution of the regional district at a public referendum held on May 14, 1996. As a result, the dissolution of Union County Regional took effect on June 30, 1997.[1] Petitioners had been employed by Union County Regional in various custodial or maintenance capacities until that date. In December 1996, all regional employees, including petitioners, participated in a process to select which of the constituent local districts would become their employer after the regional district ceased to function. Prior to making their selection, petitioners had the opportunity to review the custodial salary guide incorporated in the collective agreement negotiated by the Berkeley Heights Janitorial Association ("Association") for the 1996-97 and 1997-98 school years.[2] Each of the ten petitioners chose to transfer to Berkeley Heights.

Although the negotiated agreement was not due to expire until June 30, 1998, Berkeley Heights met with the Association to renegotiate the contract for the 1997-98 school year. These negotiations occurred prior to the start of petitioners' employment in Berkeley Heights. Since petitioners were not yet employees of Berkeley Heights, they were not members of the Association and had no say on whether to accept the

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[1] Once the dissolution of a regional district has been approved by the voters, the Commissioner of Education determines the effective date of the dissolution. *N.J.S.A.* 18A:13-59.

[2] The Berkeley Heights Janitorial Association was the recognized majority representative for custodial and maintenance employees in Berkeley Heights throughout the 1996-97 and 1997-98 school years. It is an independent organization unaffiliated with either the New Jersey Education Association or the American Federation of Teachers.

revised terms. On June 9, 1997, Berkeley Heights and the Association entered into a new collective agreement revising the salary guide for custodial and maintenance employees employed by the local district in the 1997-98 school year. Basically, the modified contract created a series of intermediate steps which fell between the original steps and the next higher steps on the salary guide.[3] Illustratively, Step H on the guide for regular custodians was $31,100 and Step G was $32,600. Under the revised contract, an additional step of $32,000 was interposed between Step H and Step G. Similar adjustments were made at Steps F through C. Every staff member who had previously been an employee of Berkeley Heights was placed on a guide step that had existed in the original contract. Except for Ramon Perez, each petitioner was placed on one of the newly-created intermediate steps. When petitioners filed their original petition, they alleged that they first learned of their salary guide placement on July 15, 1997, when they received their first pay checks as employees of Berkeley Heights. Subsequently, however, they amended their petition to conform to the proofs that Berkeley Heights sent them a notice of their salaries on June 9, 1997 and that they received such notices "within a few days of that date."

Review of the salaries of preexisting custodians reveals no consistent method for fixing compensation. During oral argument, board counsel conceded that the old salary guide was "anomalous." One such anomaly is that W. Rehberger, a prior employee with five years of service, received $35,000, whereas T. McEnroe, a prior employee with the same length of service, received only $32,600. Another is that D. Shelhorn, a prior employee with eight years of service, received $38,000, compared to F. Simon, a prior employee with nine years of service, who earned only $36,300. According to board counsel, custodians in Berkeley Heights "move laterally along the guide rather than moving up." In other words, they receive an adjustment increment to adjust for cost of living or to meet competitive demands, but not an employment increment to reflect greater experience. Whatever criteria may have been used to

[3] In addition, the guide added new stipends for supervisory positions at the high school. These changes were necessitated by the addition of a new high school to the local district.

place custodians on the salary guide, seniority does not appear to have been the determinative factor.[4]

Despite apparent randomness in the distribution of custodians' salaries, one clear pattern that emerges is the inequality of treatment between those previously employed in the district and those coming from Union County Regional. John Balwierczak, who had seven years of service in Union County Regional, was put on a newly-created intermediate step earning $32,000, while David Shelhorn, a district employee with eight years of service, is on Step C earning $38,800. If Balwierczak were placed one step below Shelhorn, he would be earning $36,300 or a difference of $4,300. Francis J. Dunne has worked for fifteen years in Union County Regional and was placed at an intermediate step earning $36,800. Meanwhile C. Billingslea, with seventeen years of service in Berkeley Heights, is at Step A earning $40,800 and R. DeBisco, with eleven years of service, is at step C earning $38,800. If Dunne were placed at step B between Billingslea and DeBisco, he would be earning $40,800 or a difference of $4,000. Dunne retired on December 31, 1997, so he is claiming the difference for only six months or a total of $2,000.

John C. Johnson Jr., who had six years of service at Union County Regional, is earning $32,000, while Alan Bebbino and Michael Percario, with three years of service in Berkeley Heights, are at Step G earning $32,600. If Johnson were placed one step above T. McEnroe, who has five years in the district, he would be at Step F earning $33,400 or a difference of $1,400. Fred Melchior had sixteen years of service at Union County Regional and was at an intermediate step of $36,800. Like Dunne, if he had been placed at Step B directly below original employee Billingslea, Melchior would have earned $40,800 or a difference of $4,000. Melchior has notified Berkeley Heights of his intent to retire effective October 31, 1998.

[4] It is possible that the certain custodians were placed at a higher step on the guide when initially hired and that their relative advancement since then has remained stable.

Petitioners Robert Kreig, James Lesak, Ramon H. Perez and Tommaso Pugliese each have eleven years of service as custodians at Union County Regional.[5] Kreig was put at an intermediate step earning $33,800; Lesak at $36,800; and Pugliese at $33,100. Perez is the only former Union County Regional employee who was placed on a regular step of the prior salary guide. He was placed at Step F earning $33,400. Every original district employee with eleven years of service is at Step C making $38,800. If this group of petitioners were moved to Step C, the difference would be $5,000 for Kreig, $2,000 for Lesak, $5,700 for Pugliese and $5,400 for Perez.

Some of the petitioners were supervisory staff at a higher pay scale. Peter Martino is a head custodian with seventeen years of service at Union County Regional, but he was placed off the guide at $35,800. In comparison, head custodian A. Amiano, who has worked as head custodian in Berkeley Heights for seventeen years, was at Step A of the head custodians' guide earning $45,600. If Martino had received the same treatment, he would also be making $45,600 or a difference of $9,800. James Materia is a high school "night supervisor" with eight years of service at Union County Regional. He was paid as a regular custodian earning $34,500.[6] The lowest level on the corresponding salary guide for head custodians is Step C earning $44,100. If Materia were placed on Step C of the appropriate guide for head custodians, he would be receiving $44,100 or a difference of $9,600. As of July 1, 1998, both Martino and Materia are no longer members of the Berkeley Heights Janitorial Association, but instead are covered by a separate agreement for custodians with supervisory responsibilities. Accordingly, their claim is limited to the one year from July 1, 1997 through June 30, 1998.

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[5] Perez's official title was groundskeeper, but there is no suggestion that his duties were not custodial in nature.

[6] Although school business administrator William Van Tassel alleges that the title of "night supervisor" is not interchangeable with "head custodian," the district's own revised salary guide treats night supervisor as a subcategory of head custodian.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that Berkeley Heights violated petitioners' statutory entitlement to be placed on the salary guide at a step and level commensurate with their service in the now-dissolved regional district.

First, Berkeley Heights urges that the petition is untimely under *N.J.A.C.* 6:24-1.2(c), which provides that:

> The petitioner shall file a petition no later from the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case.

Recently, the New Jersey Supreme Court upheld the ninety-day limitation period as a reasonable procedural requirement to promote repose in educational affairs and to protect school districts against unanticipated liabilities. *Kaprow v. Berkeley Twp. Bd. of Educ.*, 131 *N.J.* 572, 582 (1993). *Accord*, *Nissman v. Long Beach Island Bd. of Educ.*, 272 *N.J.* 373 (App Div. 1994), certif. den. 137 *N.J.* 315 (1994). Since petitioners received notice of their salary on June 9, 1997 and did not file their petition until October 10, 1997, their cause of action was instituted thirty-three days after expiration of the ninety-day period.

New Jersey's highest court has carved out an exception to the general approach that the limitation period should be strictly enforced. In *Lavin v. Hackensack Bd. of Educ.*, 90 *N.J.* 145 (1982), the Court held that a limitation period could not be applied to cut off a right which was mandatorily established by the Legislature rather than by agreement of the parties. *Lavin* involved a salary credit for military service designed "to reward veterans for service to their country in time of war." 90 *N.J.* at 151. Differentiating between benefits "directly related to employment service" and those "awarded for a totally unrelated reason," the Court refused to apply the limitations period to statutory entitlements. 90 *N.J.* 150. *See also North Plainfield Educ. Ass'n v.*

Plainfield Bd. of Educ., 96 *N.J.* 857, 594, where the Supreme Court reiterated that if the particular benefit were a matter of statutory entitlement, "the period of limitations contained in *N.J.A.C.* 6:24-1.2 would not apply, and the petition for prospective relief would have been timely." In *North Plainfield*, however, the Court determined that an annual salary increment is not a matter of statutory right because it can be denied for inefficiency or other good cause and, therefore, that it is subject to the time bar provided in the regulation.

Pointing out that no other reported decision since *Lavin* has found a statutory benefit to constitute an absolute entitlement, Berkeley Heights argues that the situation is analogous to *North Plainfield* and that salary disputes are subject to the ninety-day rule. However, the circumstances of the instant case are much closer to *Lavin* than to *North Plainfield.* Petitioners are not entitled to a higher salary as a reward for past service to the school district or to encourage quality in performance. *North Plainfield*, at 593. Instead, their entry-level salary dovetails with the existing salary scale in the constituent district as a legislative policy declaration of fundamental fairness and equity. Indeed, the State Board of Education has expressly stated that "the events that follow approval of an application to dissolve a regional school district occur by operation of statute, and the employment status of members of the regional staff is not dependent on board action." *Stagaard v. Contini*, 97 *N.J.A.R.* 217 (Comm'r Dec. 6, 1996), *modified* Dkt. No. 88-96 (St. Bd. Feb. 5, 1997) (slip op. at 7). Their entitlement derives directly from statute and is not an element of the employment contract. Accordingly, the right to relief is not governed by the regulatory limitation period.

Even if the ninety-day rule does apply, the Commissioner may nevertheless relax the rule under appropriate circumstances. Pursuant to *N.J.A.C.* 6:24-1.15, the Commissioner has discretion to dispense with any general rule of practice "where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." Exercise of this power is used sparingly and not merely to avoid a harsh result. *Pacio v. Lakeland Reg. High Sch. Dist.,* 1989 *S.L.D.* 2060, 2064 (Comm'r June 29, 1989); *Union Twp. Educ. Ass'n v. Union Twp. Bd. of Educ.*, 1986 *S.L.D.* 2516, 2527 (Comm'r Oct. 22, 1986). However, the Commissioner has found good cause to relax

the limitation period in instances "[w]here a substantial constitutional issue is presented, where judicial review is sought of an informal administrative determination, and where a matter of significant public interest is involved." *Pacio*, at 2064. *Miller v. Morris Sch. Dist.*, 1980 *S.L.D.* __ (Comm'r Feb. 25, 1980).

Here there is a question of significant public interest justifying relaxation of the ninety-day rule to prevent a manifest injustice. Dissolution of a regional district is contentious enough already without creating artificial divisions among categories of the affected employees. Berkeley Heights renegotiated an unexpired contract for the obvious purpose of depriving former Union County Regional custodians of the benefits enjoyed by existing Berkeley Heights custodians. Petitioners attempted to comply with the time requirements by filing their petition within ninety days of their first pay checks. Regardless of procedural technicalities, Berkeley Heights knew of its potential liability shortly after commencement of the academic year and had adequate opportunity to plan for payment of this expense out of its current operating budget. Thus, the situation is distinguishable from one in which a school district is exposed to unanticipated demands for back pay. *Kaprow*, at 582.

On the underlying merits, petitioners are clearly entitled to relief. *N.J.S.A.* 18A:13-64 mandates that all employees of the regional district shall continue "in each of the constituent districts in the event of a dissolution and all their rights of tenure, seniority, pension, leave of absence and other similar benefits shall be recognized and preserved[.]" In *Stagaard v. Conti*, *supra*, the State Board of Education upheld the Commissioner's direction that::

> [S]taff transferring to a withdrawing constituent district from a regional district were to be placed on the salary guide of the constituent district at the step and level appropriate for their years of service in the regional district, that their rights of leave and other similar benefits were to be preserved, and that they were to be accorded all other benefits held by employees of the constituent district. 97 *N.J.A.R.* at 220.

An earlier Commissioner's decision also determined that *N.J.S.A.* 18A:13-64 was intended to prohibit "two levels of compensation and benefits for comparable levels of training and experience, one for its long time employees and one for its newly acquired employees." *Central Reg. High Sch. Dist. v. Lacey Twp. Bd. of Educ.*, 1980 *S.L.D.* 553, 571 (Comm'r June 6, 1980). Such authoritative interpretation of a statute by an agency charged with its enforcement is entitled to great weight. *Nelson v. Old Bridge Bd. of Educ.*, 148 *N.J.* 358, 364 (1997). *See G.E. Solid State, Inc. v. Dir., Div. of Taxation*, 132 *N.J.* 298, 306 (1992).

Finally, Berkeley Heights avers that the Commissioner should not interfere with a salary scale that is the result of the collective-negotiating process. While terms and conditions of employment, including salary, are generally held to be negotiable, a collective agreement does not supersede a statute mandating a particular level of rights or benefits for employees. *In re IFPTE Local 195 v. State*, 88 *N.J.* 393, 403 (1982); *State v. State Supervisory Employees Ass'n*, 78 *N.J.* 54, 81-82 (1978). Berkeley Heights cannot be allowed to circumvent the specific statutory provisions protecting former employees of a dissolved regional school district.[7]

Order

It is **ORDERED** that Berkeley Heights pay John Balwierczak an additional amount of $4,300 for the 1997-98 school year and place him on the appropriate step of the salary guide for succeeding years.

It is further **ORDERED** that Berkeley Heights pay Francis J. Dunne an additional amount of $2,000 for the 1997-98 school year.

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[7]Petitioners have not made a sufficient "showing of overriding and compelling equitable reasons" to justify the award of pre-judgment interest against a public entity. *Newark Bd. of Educ. v. Levitt*, 197 *N.J. Super.* 239, 244 (App. Div. 1984). Insofar as the granting of prejudgment rests within the reasonable discretion of the judge, petitioners' request is denied. *Hudson Cty. Chamber of Commerce v. Jersey City*, 310 *N.J. Super* 208, 221-222 (App. Div. 1997).

It is further **ORDERED** that Berkeley Heights pay John C. Johnson, Jr. an additional amount of $1,400 for the 1997-98 school year and place him on the appropriate step of the salary guide for succeeding years.

It is further **ORDERED** that Berkeley Heights pay Robert Kreig an additional amount of $5,000 for the 1997-98 school year and place him on the appropriate step of the salary guide for succeeding years.

It is further **ORDERED** that Berkeley Heights pay James Lesak an additional amount of $2,000 for the 1997-98 school year and place him on the appropriate step of the salary guide for succeeding years.

It is further **ORDERED** that Berkeley Heights pay Peter Martino an additional amount of $9,800 for the 1997-98 school year

It is further **ORDERED** that Berkeley Heights pay James Materia an additional amount of $9,600 for the 1997-98 school year.

It is further **ORDERED** that Berkeley Heights pay Fred Melchior an additional amount of $4,000 for the 1997-98 school year and place him on the appropriate step of the salary guide for the succeeding year until the date of his retirement.

It is further **ORDERED** that Berkeley Heights pay Ramon Perez an additional amount of $5,400 for the 1997-98 school year and place him on the appropriate step of the salary guide for succeeding years.

And it is further **ORDERED** that Berkeley Heights pay Tommaso Pugliese an additional amount of $5,700 for the 1997-98 school year and place him on the appropriate step of the salary guide for succeeding years.

OAL DKT. NO. EDU 11247-97

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Sept. 23, 1999
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

Sept. 28, 1999
DATE

D. N. Cantanaites Jr.
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 30 1999
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

al

OAL DKT. NO. EDU 11247-97
AGENCY DKT. NO. 390-10/97

JOHN BALWIERCZAK, FRANCIS J. DUNNE, JOHN C. JOHNSON, JR., ROBERT KREIG, JAMES LESAK, PETER MARTINO, JAMES MATERIA, FRED MELCHIOR, RAMON PEREZ, AND TOMMASO PUGLIESE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERKELEY HEIGHTS, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions and petitioners' reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4.

The Board's exceptions "vehemently object" to the Administrative Law Judge's (ALJ) decision, alleging that in reaching his conclusion therein the ALJ "misread" and/or "ignored" binding precedent and found facts which are unsupported by the record. (Board's Exceptions at p. 2) It argues that if the Initial Decision is left to stand, this, and other constituent districts involved in dissolution, will be burdened by baseless claims of their "inherited employees" who, notwithstanding that they receive incremental salary increases, are dissatisfied with their placement on salary guides. (*Id.*)

With respect to the ALJ's finding that petitioners' claim "for salary increases" is a statutory entitlement, thus exempting their Petition of Appeal, which was concededly filed outside the mandatory timelines of *N.J.A.C.* 6:24-1.2(c), from the application of these timelines, the Board argues that such a determination clearly flies in the face of established precedent. In reaching this result, the Board argues, the ALJ relied on *Lavin, supra,* which "is the only reported case that found a statutory benefit to constitute an absolute statutory entitlement," where the court held that the limitation period did not apply "because the statute 'bears no relationship to the services to be rendered as an employee.' *Kaprow,* 131 *N.J.* at 584 (quoting *Lavin*, 90 *N.J.* at 150)." (Board's Exceptions at p. 3) The Board points out that in subsequent decisions the Supreme Court read its holding in *Lavin, supra,* narrowly. As an example, it asserts, in *Kaprow v. Berkley Tp. Bd. of Ed.*, 131 *N.J.* 572, 585-86 (1993), the Court found that tenure was not a "statutory entitlement" exempted from the mandatory 90-day limitations period, reasoning "that the proper focus is on the relationship between the statute and the employment; unless there is absolutely no functional relationship between the two, the 90-day limitations period will apply." (Board's Exceptions at p. 3) Likewise, it avers, in *North Plainfield Educ. Ass'n. v. Bd. of Educ.,* 96 *N.J.* 587 (1984), the Court concluded that the petition of two teachers seeking salary scale credit for time spent on sabbatical leave, filed subsequent to the expiration of the 90-day period, was untimely. In so doing, the Court, reasoning that a teacher's increment is basically a reward for meritorious service provided to the school district, specifically distinguished that matter from *Lavin:*

> From that perspective, salary increments accruing under *N.J.S.A.* 18A:29-11 are distinctly different from those awarded under *N.J.S.A.* 18A:29-8. The annual increment under *N.J.S.A.* 18A:29-11 accrues because of time spent in military service without regard to performance of the teacher. By contrast, the annual increment under *N.J.S.A.* 18A:29-8 is subject to annual

> evaluation of teacher performance. Consequently, that Court's analogy of an annual increment to the statutory entitlement for veterans is invalid. 96 *N.J.* at 594. (Board's Exceptions at p. 4)

The Board argues that it is evident that central to an analysis which could implicate *Lavin* is a determination "that the entitlement is wholly unrelated to performing duties for the board of education." Here, it advances, "the service of the Petitioners is the key to their claim: they contend that their service as school district employees entitles them to certain placement on the salary guide." (*Id.*) Because petitioners' claim is directly "related to the length and nature of their service as custodial employees," it does not qualify as a statutory entitlement pursuant to *Lavin*, and is, therefore, subject to the 90-day limitations period. (Board's Exceptions at pp. 4-5)

The Board charges that the ALJ ignores this persuasive precedent and proceeds to attempt to buttress his mistaken belief that, because the employment status of employees from a dissolving regional district is controlled by statute, it is a "statutory entitlement" by citing language from *Stagaard v. Contini, supra,* a case which the Board contends, did not involve a 90-day rule challenge nor did it deal with the issue of statutory entitlement pursuant to *Lavin.* (*Id.* at pp. 5-6) To illustrate the inapplicability of *Stagaard* as support for the ALJ's within determination, the Board points to two cases involving the same statutory provision and the same dissolution as is involved in the within matter, *American Federation of Teachers, Local 3417 v. Berkeley Heights Bd. of Educ.*, decided by the Commissioner November 30, 1998, and *Peter J. Lanzi v. Board of Education of the Township of Springfield*, decided by the Commissioner August 27, 1998, *aff'd* State Board December 2, 1998, wherein the 90-day rule was applied to bar employees' claims. (*Id.* at p. 6)

The Board urges that if the Commissioner disregards these previous precedential holdings to support the ALJ's recommended "nullification" of time limits, the resultant

consequences would be both illogical and dangerous. It avers that such a determination would subject "all six of the constituent school districts from which the employees of the dissolved Union County Regional District could select ***to suit at any time in the future if an employee is not satisfied with his or her placement on the constituent districts' salary guide." (Board's Exceptions at p. 7)

The Board next excepts to the ALJ's conclusion that, if the 90-day rule does apply, the facts in this case warrant the Commissioner's relaxation of the rule to "prevent a manifest injustice." (Board's Exceptions at p. 7) It proffers that his finding in this connection, that "Berkeley Heights renegotiated an unexpired contract for the obvious purpose of depriving former Union County Regional custodians of the benefits enjoyed by existing Berkeley Heights custodians (see Initial Decision at p. 9)," is unsupported by the record and incorrect given that the salary guide at issue "provides for approximately 2.0% to 4.0% raises for all custodians regardless of whether they began their career in Berkeley Heights or Union County Regional." (Board's Exceptions at pp. 7-8) Acceptance of petitioners' unfounded arguments "that their years of service at Union County Regional 'entitled' them to placement on a guide that is specifically *not* tied to seniority or years of service, [would result in] the former Union County Regional custodians [receiving] raises of between 7.8% and 31.9% ***, while the Berkeley Heights custodians' raises remain within the 2.0% to 4.0% range." (emphasis in text) (*Id.* at p. 8) As such, the Board argues, manifest injustice and inequality of treatment will result only if the Commissioner adopts the ALJ's Initial Decision. Moreover, the Board argues, relaxation of the 90-day rule in this case will subject the Board to a liability in excess of $100,000, as a result of the fact that it has been three years since dissolution during which period petitioners may be entitled to retroactive salary increases, and the fact that it took almost ten months for the issuance

of an Initial Decision in this matter. (*Id.* at p. 9) The ALJ's statement on page 9 of the Initial Decision that this case "is distinguishable from one in which a school district is exposed to unanticipated demands for back pay," it claims, is wholly erroneous. The within Board has not planned for such a liability, nor is there any way it could have reasonably been expected to do so. (Board's Exception at p. 9)

Finally, the Board excepts to the ALJ's determination that petitioners' are entitled to prevail on the merits of their claims. It advances that it is undisputed that when petitioners were placed on the lawfully negotiated salary guide in Berkeley Heights, each of them received a salary increase from their prior year's compensation as employees of the dissolved Regional District. What petitioners are objecting to herein, it advances, is that there are existing Berkeley Heights custodians with less seniority who are making more money than they are. The major defect in such a contention "is that -- as the parties stipulated -- *no custodians*, be they originally from the Berkeley Heights School District or the Regional District, are placed on the salary guide based upon seniority." (emphasis in text) (Board's Exceptions at p. 11) The Board hypothesizes that confusion in the Initial Decision may be based on specific language in *Stagaard*, 97 *N.J.A.R.*2d (EDU) at 220, which directed that teachers coming from the dissolving Regional District "were to be placed on the salary guide of the constituent district at the step and level appropriate for the years of service...." (*Id.*) *Stagaard*, it asserts, dealt with teachers moving from the dissolved Regional District to constituent school districts where all entities involved utilized years of service as the determining factor for placement on their salary guides. Here, however, it is uncontroverted that Berkeley Heights "always has been unique" with respect to its salary guide for custodians, as years of service are not considered for either initial placement or movement on its salary guide. (*Id.*) Therefore, the Board argues, the Initial

Decision, rather than prohibiting "two levels of compensation and benefits for comparable levels of training and experience, one for its long-time employees and one for its newly acquired employees," as it purportedly intends (see Initial Decision at p. 10), actually "creates" such a two-tier system by requiring that years of service be considered for placement of Regional District employees, while years of service remain irrelevant for the original Berkeley Heights employees. The anomalous result of this decision is that the original Berkeley Heights custodians receive wage increases of 2.0% to 4.0%, while the former Regional District employees receive increases in the general range of 15% to 30%. (*Id.* at pp. 11-12) Placement of the Regional custodians on the Board's existing scale, it avers, results in a more equitable result, all custodians receive raises in the same range. That some individuals with greater service would make less than others with less experience, it contends, is irrelevant. As recognized by the ALJ, such a disparity also exists among those custodians originally hired by Berkeley Heights. The Board posits that the fact that its custodian salary guide is difficult to understand does not make it unlawful and urges the Commissioner to reject the disparate result espoused by the ALJ's decision, *i.e.,* nullification of the guide only as to one class of custodians. (*Id.* at p. 12)

In their reply exceptions, petitioners assert that the Board's exceptions with respect to the essence of its argument here, *i.e.*, that petitioners' claims are barred, pursuant to *N.J.A.C.* 6:24-1.2(c), because of their failure to file within 90 days of their receipt of a June 9, 1997 salary notice, provides no supplementation to the facts and law previously presented before the ALJ. Petitioners state that they fully endorse the ALJ's "cogent and thorough analysis" of the applicable law in this regard. (Petitioners' Reply Exceptions at p. 1) Petitioners aver that the Board's attempt to distinguish the applicability of *Lavin, supra,* herein is misplaced because, as recognized by the ALJ, the factual pattern existing in *Lavin* is "much

closer" to the one existing in this matter than is any other case cited by the Board. In support of this contention, petitioners argue:

> Lavin's claim was to salary guide credit. Petitioners' claim is to salary guide credit. Lavin's claim to credit was for time that was totally unrelated to the performance of duties for her employer (i.e., military service time). Petitioners claim credit for time totally unrelated to the performance of duties in Berkeley Heights (i.e., for service time in the Union County Regional School District). Lavin's claim was solely based on the operation of a statute (*N.J.S.A.* 18A:29-11). Without that statute, Lavin would have had no right to additional salary. Petitioners' claim is solely based on the operation of a statute (*N.J.S.A.* 18A:13-64). Without that statute, petitioners would have no right to claim additional salary. (Petitioners' Reply Exceptions at p. 2)

In contrast, petitioners assert, in *Kaprow, supra,* cited by the Board, the petitioner's claim related to tenure and seniority claims, which accrued solely because of his service to a school district, and it is on this basis that the Court found that Kaprow was not exempt from the 90-day rule pursuant to *Lavin.* Here, petitioners argue, "no aspect of [their] service to the respondent is involved in their claim," precisely the situation which created the exemption established in *Lavin.* (Petitioners' Reply Exceptions at p. 2) Likewise, petitioners advance, *Plainfield, supra*, which did not pertain to a claim based on the operation of a statute, is irrelevant in the instant case. "If it were not for the mandates of *N.J.S.A.* 18A:13-64, the within petitioners could not make their claim. It is because the school laws create the petitioners' salary entitlement that the regulatory limitation period does not apply." (*Id.*)

Petitioners next charge that the Board's claim that the ALJ's findings are not supported by the record is "wholly without substance." They posit that the record clearly establishes: At the time petitioners selected positions in its district, Berkeley Heights had a collective bargaining agreement in place for 1996-97 and 1997-98; Despite the existence of a two-year agreement, on June 9, 1997, the Board and its pre-dissolution employees entered into a

new salary agreement for 1997-98; The new salary guide established as a consequence of this agreement created "in-between" steps; The only people placed on these additional in-between steps were employees coming from the dissolving Regional District; The placement of the employees coming from the Regional District was at a lesser salary amount than that of existing Berkeley Heights employees with comparable years of service. (Petitioners' Reply Exceptions at pp. 3-4)

Petitioners next challenge the Board's assertion that denial of the 90-day limitation claim in this matter presents an unreasonable burden on the budget of the District. They aver that the Board's 1997-98 budget process was, by law, concluded before July 1997 and, as such, its financial obligations were not altered by the filing of the within petition on October 10, 1997, as opposed to September 1, 1997, or some earlier date. Moreover, petitioners aver, the period of time encompassed by this particular litigation has provided the Board ample opportunity to plan and budget for this potential expenditure. (*Id.* at p. 4))

In conclusion, petitioners dismiss as irrelevant the method normally utilized by the Board for placing new employees on the salary scale. Here, they assert, citing a quotation from *Stagaard, supra,* as support, "*N.J.S.A.* 18A:13-64 mandates that employees coming from a dissolved regional district *must* be placed in the same guide position as existing employees with similar terms of service.***" (emphasis in text) (Petitioners' Reply Exceptions at p. 5)

Upon his independent and comprehensive review of the record, the Commissioner determines, for the reasons detailed below, to reverse the recommended Initial Decision and to dismiss the within Petition of Appeal as untimely pursuant to *N.J.A.C.* 6:24-1.2(c). In so concluding, the Commissioner initially observes that the parties' stipulated facts in this matter confirm that the within petitioners received notice of their salaries for 1997-98 by letter, dated

June 9, 1997, which it is acknowledged was received by each of them within a few days of this date. The record further establishes that the instant Petition of Appeal was filed on October 10, 1997. Petitioners neither dispute that their petition was outside of the 90-day limitations period prescribed by *N.J.A.C.* 6:24-1.2(c), nor do they provide any explanation or excuse for its untimeliness.

In his consideration of this matter, the Commissioner is cognizant that it is well established that claims brought before the Commissioner must be brought in a timely manner. In this regard, *N.J.A.C.* 6:24-1.2(c) specifies that:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

It is also well settled that this 90-day rule is strictly applied. *See Kaprow v. Board of Education of Berkeley*, 131 *N.J.* 572 (1993); s*ee also Nissman v. Board of Education of the Township of Long Beach Island*, 272 *N.J. Super.* 373 (App. Div. 1994), *certif. denied* 137 *N.J.* 315 (1994); *Morris-Union Jointure Commission v. Board of Education of the Borough of South River*, 92 *N.J.A.R.* 2d (EDU) 453; *Markulin & the Neptune Twp. Educ. Assn. v. Board of Education of the Twp. of Neptune,* 92 *N.J.A.R.* 2d (EDU) 406. The reasoning behind such a requirement for strict application of the limitations period was articulated by the Supreme Court in *Kaprow* wherein it stated:

> The [ninety day] limitations period provides a measure of repose, an essential element in the proper and efficient administration of the school laws. It stabilizes the relationship between teachers and the administration. ***The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days. Moreover, because local school boards operate on a cash basis,

> claims must be filed promptly so that the local board can anticipate any back-pay requirements. *** (*Kaprow* at 582)

With the state of the law and its underlying rationale, along with the undisputed facts of this matter clearly in mind, the Commissioner turns to petitioners' claim that their particular cause of action is exempt from the application of this mandatory time requirement because, pursuant to *Lavin, supra,* it is a "statutory entitlement."

As was recognized by the ALJ, in 1982 the Supreme Court "carved out an exception to the general approach that the limitation period should be strictly enforced." (Initial Decision at p. 7) In this unique case, the Court dealt with a situation in which a school nurse was claiming a statutory entitlement to salary guide credit in her school district pursuant to *N.J.S.A.* 18A:29-11, which awarded such credit based upon an individual's prior military service. In considering the petitioner's claim in that case, the *Lavin* Court stated:

> [t]he core of the issue is whether the credit for military service, *N.J.S.A.* 18A:29-11, is an essential term of the petitioner's employment contract or whether it represents a statutory entitlement granted by the State in return for military service in time of war. (*Lavin* at 149)

Next, the Court reasoned:

> [w]hether the benefit flowing from a statute is to be considered a statutory entitlement or a term of the public employee's contract of employment depends upon the nature of the benefit and its relationship to the employment. Stating the problem in terms of incorporation in the employment contract or as a statutory benefit begs the question. Rather, *attention should be directed to the purpose of the statute and its relevance and materiality to the employment.* (emphasis added) *(Lavin* at 150)

In concluding that the petitioner's claim was a statutory entitlement, thus rendering the relevant statute of limitations inapplicable, the *Lavin* Court found:

> [t]he legislative purpose of *N.J.S.A.* 18A:29-11 is to reward veterans for service to their country in time of war. The reward

> takes the form of crediting the military service as teaching experience even though there is no functional relationship between the two. ***The emolument is not for services rendered or to be rendered for school teaching as such.*** (*Lavin* at 151)

The Commissioner's review persuades him that it is evident, from its refusal to make a similar finding in subsequent cases where such a claim was raised, that the Supreme Court intended its holding in *Lavin*, which exempts a matter from applicable timelines by virtue of its nature as a "statutory entitlement," to be very narrowly construed. (*See North Plainfield, supra*; *also see Kaprow, supra.*) Confirmation of such an objective can be found in *Kaprow* where the Court, itself, observed:

> *Lavin*, however, is the *only* reported case that found a statutory benefit to constitute an absolute statutory entitlement.*** (at 584) (emphasis added)

In light of this background, the Commissioner finds without merit the within petitioners' assertion that their claim for relief in this matter is a "statutory entitlement" within the intendment of *Lavin*, because such claim to additional salary and correction of their salary guide placement is based solely on the benefits granted them by operation of *N.J.S.A.* 18A:13-64, triggered upon the dissolution of the Union County Regional School District, and bears no relation whatsoever to their service to respondent. Rather, he concludes that such contention, when examined against the evaluative criteria set forth by *Lavin*, is untenable. Key to the determination of the existence of a statutory right, pursuant to *Lavin*, is a review of the underlying statute, its purpose, and "its relevance and materiality to the employment." (*Lavin* at 150) Here, *N.J.S.A.* 18A:13-64, in pertinent part, specifies:

> [a]ll employees of the regional district shall continue in their respective positions in the withdrawing district, or in each of the constituent districts in the event of a dissolution, and all of their rights of tenure, seniority, pension, leave of absence and other similar benefits shall be recognized and preserved and any periods

> of prior employment in the regional district shall count toward the acquisition of tenure to the same extent as if all such employment had been under the withdrawing district or in any of the constituent districts in the event of a dissolution.***

It is noted that the underlying purpose of this provision was considered and addressed in *Board of Education of the Central Regional High School District v. Board of Education of Lacey Township and the Central Regional Education Association and Ronald Villano, individually, Ocean County,* 1980 *S.L.D.* 553, 565, wherein it was recognized "that the Legislative intent [of this particular provision] was to protect the employment rights of those employees [of the regional district affected by the withdrawal] who have provided good and faithful service to the school district.***"

The Commissioner concludes that, upon full consideration of the statute and its legislative intendment, it is undeniable that *N.J.S.A.* 18A:13-64 was designed to operate, upon the dissolution of a regional district, as a "save harmless" provision to preserve and protect benefits earned by affected individuals by virtue of their service in such regional district. Absent rights and benefits accrued through their prior employment, *N.J.S.A.* 18A:13-64 does not operate to independently create a benefit for them. As such, petitioners' rights here are clearly distinguishable from the petitioner's right to military service credit in *Lavin.* They are not entitled to any right or benefit independent from the administration of a school system. Rather, any right or benefit to be afforded petitioners here is wholly predicated upon services they previously rendered as Regional District employees and, therefore, does not fall within the narrow prescriptions delineated in *Lavin* which might entitle them to a waiver of the mandatory filing timelines. Consequently, *N.J.A.C.* 6:24-1.2(c) applies here to time bar petitioners' within claims.

Having eliminated petitioners' reliance on a "statutory entitlement" to excuse the untimeliness of their within petition, the Commissioner next recognizes, notwithstanding that the limitations rule of *N.J.A.C.* 6:24-1.2(c) is to be strictly applied, he may, pursuant to his authority under *N.J.A.C.* 6:24-1.15, relax this rule under exceptional circumstances or if there is a compelling reason to do so. (*See Kaprow, supra,* at 590; *also see DeMaio v. New Providence Board of Education,* 96 *N.J.A.R.* 2d (EDU) 449, 453.) Such authority, the Commissioner observes, is rarely invoked unless strict adherence to the limitations rule would be inappropriate, unnecessary or where injustice would occur, *DeMaio* at 453, or where he finds the presence of a substantial constitutional issue or other issue of fundamental public interest beyond that of concern only to the parties themselves. *Pacio v. Lakeland Regional High School District*, 1989 *S.L.D.* 2060, 2064. The Commissioner finds no such compelling or exceptional circumstances, nor other sufficient reason, to warrant relaxation or waiver of the 90-day rule. Specifically, the record reveals no indication, nor do the petitioners allege, that they suffered any loss, in either salary or benefits, such as to contravene the protection guaranteed by *N.J.S.A.* 18A:13-64. Rather, the record reflects that, upon moving from their Regional District positions to Berkeley Heights, petitioners received salary increases which were consistent with those awarded to existing Berkeley Heights custodians. Further, the Commissioner concludes that the underlying issues surrounding this matter are not of such compelling public interest so as to justify the extreme remedy of relaxation. To the contrary, he finds that, under the circumstances existing here, "the pertinent considerations of individual justice as well as the broader considerations of repose, coincide to bar [petitioners'] action." *Kaprow, supra,* at 587, quoting *Farrell v. Votator Div.*, 62 *N.J.* 111, 115 (1973).

Accordingly, the Commissioner reverses the recommended Initial Decision of the OAL, grants the Board's Motion for Summary Decision, and dismisses the within Petition of Appeal.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.
December 8, 1999
Date of Mailing, December 9, 1999

407-99

EDU #11247-97
C # 407-99
SB # 3-00

JAMES BALWIERCZAK, FRANCIS J. DUNN, JOHN C. JOHNSON, JR., ROBERT KREIG, JAMES LESAK, PETER MARTINO, JAMES MATERIA, FRED MELCHIOR, RAMON PEREZ, AND TOMASSO PUGLIESE,	:	
PETITIONERS-APPELLANTS,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERKELEY HEIGHTS, UNION COUNTY,	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, December 8, 1999

For the Petitioners-Appellants, Buceri and Pincus (Louis P. Bucceri, Esq., of Counsel)

For the Respondent-Respondent, Porzio, Bromberg & Newman (Vito A. Gagliardi, Jr., Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

May 3, 2000

Date of mailing MAY 05 2000

408-99

BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

December 13, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7686-99
AGENCY DKT. NO. 107-5/99

FORT LEE BOARD OF EDUCATION,,
Petitioner,
v.
RAMSEY BOARD OF EDUCATION,
Respondent.

Robert T. Tessaro, Esq., for petitioner

Jessica L. Wildstein, Esq., for respondent
(Fogarty & Hara, attorneys)

Arlene Goldfus Lutz, Deputy Attorney General, for the New Jersey Department of Education (John J. Farmer, Jr., Attorney General of New Jersey, attorney)

Record Closed: October 20, 1999 Decided: October 21, 1999

BEFORE: **KEN R. SPRINGER**, ALJ:

This matter was transmitted to the Office of Administrative Law on July 21, 1999, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.*. 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I CONCLUDE that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Oct. 21, 1999
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

10-27-99
DATE

Debbie Antanaitis/ps
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 28 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

OCT 28 2 16 PM '99

FOGARTY & HARA, ESQS.
16-00 Route 208 South
Fair Lawn, New Jersey
(201) 791-3340
Attorneys for Respondent
Fort Lee Board of Education

FORT LEE BOARD OF EDUCATION, Petitioner, vs. RAMSEY BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION / OFFICE OF ADMINISTRATIVE LAW OAL Docket No.: 076896-99N Agency Ref. No.: 107-5/99 **STIPULATION OF SETTLEMENT**

WHEREAS, there is an outstanding dispute before the Commission of Education, Office of Administrative Law, between petitioner, the Fort Lee Board of Education (hereinafter the "Fort Lee Board") and respondent, the Ramsey Board of Education (hereinafter the "Ramsey Board") as to the last district of residence responsible for the education costs for the period in which M.P., S.P. and D.P. attended the Ramsey Public Schools;

WHEREAS, the Ramsey Board has assessed the tuition costs for the education of the aforesaid students, during the period in question, as totalling $20,240.32;

WHEREAS, the tuition costs of $20,240.32 remain outstanding;

WHEREAS, the parties are desirous of amicably resolving their differences without the need to resort to costly and protracted litigation.

NOW, THEREFORE, in consideration of the mutual promises and covenants of the parties set forth below, the Ramsey Board and the Fort Lee Board hereby agree as follows:

1. The Ramsey Board shall reduce its outstanding tuition costs in connection with the attendance of M.P., S.P. and D.P. during the period in question from $20,240.32 to $15,000.

2. The Fort Lee Board shall remit a check in the amount of $15,000 to the Ramsey Board immediately upon execution of this Stipulation of Settlement, and upon approval of this Stipulation of Settlement by the Office of Administrative Law.

3. The Fort Lee Board shall withdraw its Petition bearing O.A.L. Docket No. EDUOS 076896-99N, Agency Ref. No. 107-5/99.

4. The parties recognize that each has been represented by legal counsel or a representative of his or its own choosing, that they sign this Stipulation of Settlement as their own voluntary acts and deeds, and they fully understand the duties and obligations enumerated herein. This Stipulation of Settlement shall be subject to the laws of the State of New Jersey.

5. The undersigned representatives of the parties hereby acknowledge that they have been duly authorized to sign this Stipulation of Settlement and that they are authorized to bind the respective parties.

6. The parties further agree that the terms and conditions set forth in this Stipulation of Settlement shall constitute the sum total of their mutual and respective rights and obligations relative to the attendance of M.P., S.P. and D.P. at Ramsey Public Schools. Neither party shall have any rights or obligations as against the other except those set forth in this Stipulation of Settlement. Nothing herein, or any document executed in accordance herewith, however, shall preclude either party from bringing an action to enforce performance of any term of this Agreement should there be a default in performance.

7. A form of the Ramsey Board's Resolution is attached hereto as Exhibit "A".

WITNESS:

Robert J. Marcotulli

ROBERT J. MARCOTULLI
Board Secretary/Business Administrator

Dated: 9/29/99

RAMSEY BOARD OF EDUCATION

By: Robert A Baxer

ROBERT A. BAXER
Board President

Dated: 9/29/99

WITNESS:

Virginia E. Smith

Dated: 10-18-99

FORT LEE BOARD OF EDUCATION

By: Rochelle R. Feler

Dated: 10-18-99

OAL DKT. NO. EDU 7686-99
AGENCY DKT. NO. 107-5/99

BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement, and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

It is noted that the Fort Lee Board paid money to the Ramsey Board, pursuant to this settlement, upon approval of the OAL. The parties are hereby reminded that effectuating settlement terms prior to their approval by the Commissioner is improper and done at the peril of the parties.

Notwithstanding the above, upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.*

IT IS SO ORDERED.

December 13, 1999

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

409-99

JAMES SCELBA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning tenured teaching staff member alleged that the Board's nonrenewal of his contract to be Head Golf Coach violated state law and regulation. Petitioner sought reinstatement with compensation.

ALJ determined that not only does a teaching staff member not accrue tenure status as a coach, but also, the Board is authorized to discontinue a coaching assignment at its discretion. *N.J.S.A.* 18A:27-10 did not apply to petitioner in his position as coach. ALJ concluded that the Board exercised its authority to terminate petitioner's assignment as coach at the conclusion of the 1997-98 school year and that the Board was in compliance with *N.J.S.A.* 18A:27-4.1 as evidenced by the Superintendent's July 1998 letter to petitioner stating the reasons why he would not be recommending petitioner for reappointment. Petition was dismissed.

Commissioner concurred with the ALJ that petitioner was not entitled to the relief he sought. Commissioner noted that petitioner could not assert that the protections afforded by *N.J.S.A.* 18A:27-10 *et seq.* were applicable to his coaching contract and he failed to demonstrate any infirmity in the Board's application of *N.J.S.A*, 18A:27-4.1 to the nonrenewal of his coaching contract. Commissioner ordered petition dismissed.

December 10, 1999
Mailing date: December 13, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10340-98

AGENCY REF. NO. 468-10/98

JAMES SCELBA,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,

Respondent.

Brent Miller, Esq., for petitioner (Starkey, Kelly, Blaney & White, attorneys)

Frances Campbell, Esq., for respondent (Kalac, Newman, Lavender & Campbell, attorneys)

Record Closed: August 23 , 1999 Decided: October 22, 1999

BEFORE **LILLARD E. LAW,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, James Scelba, alleges that the Board of Education of the Township of Jackson (Board) violated State Education Law and Regulations when it took action not to renew his contract as Head Golf Coach for the 1998-99 school year. Petitioner seeks an order from the Commissioner of Education (Commissioner) reinstating him to the position together with lost back pay, among other things.

The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The hearing was held on June 10 and 28, 1999, at the Trenton OAL, Mercerville, New Jersey. The parties submitted post-hearing briefs of law the last of which was received on August 23, 1999, which constitutes the close of the hearing record.

ISSUES

The issues to be determined by this administrative tribunal, as agreed upon by the parties and set forth in the Prehearing Order dated March 30, 1999, are as follows:

1. Whether the Board's action to not renew petitioner's contract as Head Golf Coach for the 1998-99 school year was arbitrary and capricious and in violation of *N.J.S.A.* 18A:27-4.1?

2. Whether the Board failed to provide petitioner written notice of his contract non-renewal by May 15, 1998, pursuant to *N.J.S.A.* 18A:27-10?

3. Whether the Board failed to provide petitioner with a written statement of reasons for the non-renewal pursuant to *N.J.A.C.* 6:3-4.2?

FINDINGS OF FACT

Based upon the testimony and other evidence adduced at the hearing and having given fair weight thereto, and having assessed the credibility of the witnesses, I **FIND** the following **FACTS.**

Petitioner, who is 52 years of age, has acquired tenure status as a teaching staff member with the Board. At the time of the herein hearing, petitioner had been employed by the Board for 24 years. Petitioner has also been employed by the Board as a coach of the Jackson High School golf team for more than 20 years.

On June 24, 1997, petitioner entered into a contract with the Board to serve as the head golf coach for the 1997-98 school year, beginning September 1, 1997 and ending June 30, 1998.

In petitioner's Coaches Evaluation Report at the end of the 1995-96 school year, dated June 14, 1996, the Board's Athletic Director (A.D.), Ralph Carretta, evaluated petitioner as "satisfactory" in all areas of duties and responsibilities and was complementary with respect to petitioner's major accomplishments. (P-2). In addition, A.D. Carretta set for "Goals for next season which included areas for improvement, as follows:

B. Areas for improvement:

1. Mr. Scelba should have "get togethers: at least one or two nights a week during the summer.

2. Start Middle School Golf "Clubs"

3. Sign students up for Adult School Golf Clinics

4. Run golf tournament for fund raiser.

(P-2)

Petitioner testified, among other things, that he could not arrange the "get together" with the golf team members during the summer months because he was not employed by the Board to

work in the summer. He asserted that he had made arrangements for golf team members to play at the Gambler's Ridge Golf Course at a reduced rate, however, there were problems with transporting the team members to and from the golf course.

Petitioner testified that he did not start any middle school golf clubs because there were no personnel available nor funds to support the "clubs." He asserted that the two middle schools did not have golf teams during the 1996-97 school year. He asserted that the availability of a golf course was a major problem.

With respect to the A.D.'s goal for petitioner to sign up students for the Adult School Golf Clinics, petitioner testified that there was no interest on the part of the students.

Petitioner testified that it was impossible to run a golf tournament at the Metedeconk Golf Course because it was too expensive and that the Metedeconk members run their own tournaments. He asserted that Metedeconk now limits the Ocean County tournaments to every other year where, in the past, it allowed the tournament to be played every year.

A.D. Carretta's evaluation of petitioner at the end of the 1996-97 school year shows satisfactory ratings in all of the areas of duties and responsibilities. A.D. Carretta stated on the Coach's Evaluation Report, dated June 11, 1997, that:

> B. Areas for improvement: Mr. Scelba has made very little progress in developing a golf program. To his credit he has attempted (through reduced rates) to have the students play in the summer, though at this point it seems that the players "lacked" the motivation. Mr. Scelba should, therefore, be more active in the summer. It also remains that developing younger players is a problem. Mr. Scelba, however, did not have a JV coach for assistance and had to recruit a volunteer. It remains that a Middle School tournament or Middle School recruitment trips would be beneficial. Mr. Scelba did little to reach his goals of last year and they, therefore, are repeated for the following season.

C. Goals for next season:

1. Mr. Scelba should have "get togethers" at least 1 or 2 nights a week during the summer.

2. Start Middle School Golf "Clubs."

3. Sign students up for Adult School Golf Clinics.

4. Run golf tournament for a fund raiser.
(P-3).

In response to this evaluation, petitioner stated:

> Fund raising tournament at Metedeconk is an impossibility, private country clubs do not operate like public ones. (P-3)

The A.D.'s evaluation of petitioner at the end of the 1997-98 school year, dated June 10, 1998, and signed by petitioner, was exactly the same as the evaluation at the end of 1995-96 school year (P-2) except that A.D. Carretta stated that: "Mr. Scelba reached none of his goals defined in 1996/97." (P-4)

On June 2, 1998, a conference was held between petitioner and A.D. Carretta. By way of memorandum, dated June 10, 1998, petitioner's requested written reasons for the A.D. not renewing petitioner's coaching position. On June 15, 1998, A.D. Corretta sent the following memorandum to petitioner, with copies to the Superintendent of Schools, the Board's Director of Personnel and, the Jackson High School principal, wherein Carretta stated:

> This is to summarize our conference of Tuesday, June 2, 1998. You have not been offered the Varsity Head Golf Coach for not reaching your goals of 1997. (See Attached) as set out in your 1997 evaluation. (P-6)

Subsequently, on July 17, 1998, Superintendent Edward Elms sent a letter to petitioner, which states as follows:

Dear Mr. Scelba:

Please be advised that under 18A:27-4.1, I am informing you that I am ***not*** recommending the renewal of your head golf coaching position at the high school for school year 1998/1999.

The reason for this non-renewal is your failure to achieve the goals set for you by Mr. Ralph Carretta, the Athletic Director, over the past three years. (P-7)

Petitioner requested and was granted an audience before the Board. The appearance before the Board occurred on July 28, 1998, where petitioner was represented by Dr. Charles Walker, New Jersey Education Association (NJEA). Petitioner asserts he was never in receipt of anything in writing subsequent to his appearance on July 28, 1998.

MOTION

At the close of petitioner's case in chief, the Board propounded on oral motion to dismiss petitioner's Petition of Appeal. Oral argument on the Board's Motion was heard and held in abeyance by the undersigned. The parties were required to submit their legal arguments by way of brief or memoranda. The motion and arguments are set forth herein below:

The Board's Motion

The Jackson Township Board has moved for dismissal of the petition in this matter. The Board argues that after presentation of the petitioner's case at the plenary hearing conducted by the court on June 10, 1999, and continued on June 28, 1999, the evidence presented fails to carry the petitioner's burden of proving that the Board's decision not to renew Scelba's contract as a coach constituted action that was arbitrary, capricious and unreasonable. *See, Barcalow v. Monmouth Regional High School District,* 96 *NJAR* 2*d.* (EDU) 193 at 194-195. (*The controlling legal standard in cases involving a school board's exercise of discretion and the petitioner's burden of proof in such cases is discussed at pp. 194-195*). In adopting the findings and conclusions of the AL J in the *Barcalow* case, the Commissioner reiterated the standard that in such cases a board's decision may not be upset unless it can be demonstrated to be patently

arbitrary, capricious or unreasonable, citing *Kopera v. West Orange Board of Education,* 60 *N.J. Super.* 288, 294 (*App. Div.* 1960).

At oral argument the Board cited paragraphs 9, 10 and 11 of the petition as stating the gravamen of the petitioner's case. The petition alleges the following:

> 9. Respondent had failed to provide written notification of nonrenewal by May 15, 1998, as required by *N.J.S.A.* 18A:27-10.
>
> 10. Respondent's action was arbitrary and capricious and in violation of *N.J.S.A.* 18A:27-4.1.
>
> 11. Respondent has failed to provide a written statement of the reasons for nonrenewal as required by those statutes and *N.J.A.C.* 6:3-4.2.

For the purposes of the Board's motion, it is submitted that even after presentation of the petitioner's case, there are no genuine issues of material fact in dispute. Pursuant to *N.J.A.C.* 1:1-2.1, the Board submits that there is no disputed fact that is legally consequential to a determination of an issue in the case, and that the Board is entitled to prevail as a matter of law. *See, Kufel v. Board of Education of Union County Vocational-Technical School District, Union County,* 96 *NJAR* 2*d.* (EDU) 14, at 17. In *Kufe,* the Commissioner reiterates the standard set forth in *Dore v. Bedminister Township Board of Education,* 185 *N.J. Super.* 447, 456 (*App. Div.* 1982). where he states:

> . . . absent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a teacher who has not tenure and is regarded as undesirable by the local board.

The court must examine representations of the petitioner in a light most favorable to the petitioner, including the above referenced assertions set forth in the petition of this case in paragraphs 9 and 11. Respondent's motion to dismiss is based on arguments that the violations of the three statutes claimed in paragraphs 9, 10 and 11, are not supported by the evidence, or

that they constituted minor procedural errors which, in view of facts testified to by the petitioner in this case, were "harmless error" and that the petitioner suffered no injury or damage as a result of any such procedural errors. Petitioner's own testimony reveals that his legal right to contest any decision of the Board was not affected by any alleged violations, or actual and admitted violations, of statutory or regulatory rights.

Legal Argument

Point I

Any violations of statutory or regulatory requirements constituted "harmless error" and are not grounds to invalidate the Board's decision not to renew the petitioner's coaching contract.

In his petition, Scelba asserts that the Board violated his rights by failing to comply with notice requirements as set forth in *N.J.S.A.* 18A:27-10, and, further, by failing to provide Scelba with a written statement of reasons for nonrenewal as required by "those statutes" and by *N.J.A.C.* 6:3-4.2.

Respondent submits that *N.J.S.A.* 18A:27-10 was never intended to apply to renewal of coaching contracts. This is particularly evident when the coaching duties of an athletic coach for a spring sport continue through the nonrenewal notice deadline of May 15, set forth in *N.J.S.A.* 18A:27-10. A similar issue was dealt with by the Commissioner in the case of *Schultz v. State Operated School District of the City of Jersey City, Hudson County,* 92 *NJAR* 2*d.* (EDU) 116, cited to the court at oral argument. In that case, the ALJ and the Commissioner determined that Schultz was not a "regular teacher" and he was not entitled to the benefits of the statutory notice requirements. Respondent submits that the statutes in question, *N.J.S.A.* 18A:27-10, *et seq.*, were intended to provide protection for "regular teachers" as the ALJ describes the situation in the *Schultz* case, at 92 *NJAR* 2*d.* (EDU) 116-117. As a matter of law, it is clear that this notice requirement was not intended to apply to positions that were not teaching positions. In the case at bar, Scelba was not contesting a nontenured position, but, rather, a *coaching* position.[1]

[1] Under *N.J.S.A.* 18A:1-1, "teaching staff member" is defined as "a member of the professional staff of any district . . . of such character that the qualifications, for such office, position or employment, require him to hold a valid

It is clear from testimony presented by witnesses for the petitioner that the competition season of the golf team is not over until the end of May. With such a short season, it would be stultifying to interpret *N.J.S.A.* 18A:27-10 as requiring notice to a spring-season coach by May 15 that his contract will be renewed for the next succeeding school year *even before the season is over.* Yet this is exactly the consequence called for by petitioner's arguments. Likewise, a decision on whether such employment will not be offered could not logically be required to be made before the end of the short spring varsity golfing season. Respondent submits that the terms of *N.J.S.A.* 18A:27-10 were never intended by the Legislature to apply to nontenured teaching staff members other than those employed in actual teaching positions as the statute clearly states:

> **18A:27-10 Nontenured teaching staff member, offer of employment for next succeeding year or notice of termination before May 15**
>
> On or before May 15 in each year, each nontenured *teaching staff member* continuously employed by a board of education since the preceding September 30 shall receive either
>
> a. A written offer of a contract for employment from the board of education for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or
>
> b. A written notice from the chief school administrator that such employment will not be offered. (Emphasis mine).

It is quite clear that the terms of this statute do not apply to contracts for part-time seasonal coaching positions, since coaches do not fit the definition of "teaching staff member" pursuant to *N.J.S.A.* 18A:1-1 set forth in footnote No. 1 of this brief. A coach is not required to hold a teaching certificate in all cases, and, therefore, a coach does not fit within the definition provided at *N.J.S.A.* 18A:1-1.

The Commissioner's opinion in the *Schultz* case, *supra.*, raises another issue cited to the court by respondent at oral argument. The issue is unaddressed by the brief submitted on behalf

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and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the State Board of Examiners . . . ."

of the petitioner, except where petitioner argues that the court should not hold the petitioner to be required to comply with the statutory requirement set forth in *N.J.S.A.* 18A:27-12. At footnote No. 2 of the ALJ's decision, appearing at 92 *NJAR* 2*d.* (EDU) 119, the ALJ raises the following legal issue:

> Indeed, petitioner never explained why, if the statutory scheme did apply to him, his failure to provide a written offer of acceptance as required by *N.J.S.A.* 18A:27-12 would not be fatal to his case.

This very same argument was made by respondent at oral argument since it is quite clear that petitioner offered no proofs of a written offer of acceptance, which is specifically required by *N.J.S.A.* 18A:27-12 as follows:

> ***N.J.S.A.* 18A:27-12 Notice of acceptance; deadline**
>
> If the teaching staff member desires to accept such employment he shall notify the board of education of such acceptance, in writing, on or before June 1 which event such employment shall continue as provided for herein. *In the absence of such notice of acceptance the provisions of this article shall no longer be applicable.* [Emphasis mine]

As suggested by Judge Weiss in his *Schultz* opinion, *supra.*, failure of the petitioner here to provide a written offer of acceptance pursuant to *N.J.S.A.* 18A:27-12 is fatal to his case. It is only fair and logical that if the School Board is going to be held to the notice requirement of *N.J.S.A.* 18A:27-10 (which respondent argues cannot logically apply here), the petitioner must comply with the procedure set forth in *N.J.S.A.* 18A:27-12 because "in the absence of such notice of acceptance the provisions of this article shall no longer be applicable." See last sentence of *N.J.S.A.* 18A:27-12.

In the 1995 case of *Gillison v. Board of Education of the City of Newark, Essex County,* 95 *NJAR* 2*d.* (EDU) 157, the Commissioner held that a board of education had "a virtually unfettered right not to renew the services of a nontenured employee." In the *Gillison* case, the petitioner takes issue with a procedural deficiency in the board's actions following its decision not to renew her employment. The deficiencies alleged by the petitioner and undenied by the board of education were primarily procedural including:

> the board's dilatoriness in replying to her [the teacher's] request for a detailed statement of reasons and, later, for an informal hearing. However, even if these allegations are true, which I note the board does not deny, they would still not result in a finding that petitioner's employment should have been continued; therefore, while I certainly do not condone the board's evident failure to abide by applicable statutory requirements, neither can I find that such failure is grounds to invalidate its decision not to renew petitioner's employment. *See, Gillison,* at 95 *NJAR* 2*d.* (EDU) 157.

Scelba argues that he is entitled to the Legislative protection of *N.J.S.A* 18A:27-10, *N.J.S.A.* 18A:27-11 and *N.J.S.A.* 18A:27-4.1. Respondent respectfully submits that *N.J.S.A.* 18A:27-10 and 18A:27-11 have no effect unless some type of notice is provided by the nontenured teacher pursuant to *N.J.S.A.* 18A:27-12. The petitioner's brief would have the court believe that *N.J.S.A.* 18A:27-4.1, a statute that was enacted in 1995 in response to the Appellate Division decision in the case of *Rotondo v. Board of Education of the Carlstadt-East Rutherford Regional High School District, Bergen County,* 276 *N.J. Super.* 36 (*App. Div.* 1944), is part of the overall legislative scheme governing nonrenewal of school district employees. Petitioner fails to recognize that the terms of *N.J.S.A.* 18A:27-4.1 are applicable to virtually all school district employees both "certificated or noncertificated." In contrast, the terms of *N.J.S.A.* 18A:27-10 as demonstrated *supra*, apply only to "nontenured teaching staff member[s]." The legislative scheme set forth in *N.J.S.A.* 18A:27-10 is set forth in Article 5 of Chapter 27 of Title 18A, which contains the following statutes: 18A:27-10, 18A:27-11, 18A:27-12, and 18A:27-13. Those statutes were enacted as Chapter 436 of the Laws of 1971 and became effective on September 1, 1972. These statutes were enacted together in order to provide for a process of notice regarding continuation of employment for nontenure teaching staff members.

In contrast to the legislative scheme evidenced by the enactment of Chapter 436 of the Laws of 1971, *N.J.S.A.* 18A:27-4.1 was enacted as Chapter 125 of the Laws of 1995. This court is quite familiar with the Legislative scheme behind the enactment of *N.J.S.A.* 18A:27-4.1, which overturned the effect of a decision by the *Appellate Division* in the case of *Rotondo v. Board of Education of Carlstadt-East Rutherford Regional High School District, Bergen County,* cited *supra.* The enactment of this statute on June 19, 1995, brought into effect a legislative requirement that virtually all employees can be appointed, transferred or removed only upon the recommendation of the Superintendent. This legislative policy established what this court has

acknowledged to be perhaps the most important function of a superintendent of schools in New Jersey. *See, In the Matter of the Tenure Hearing of Theresa Lucarelli,* 97 *NJAR* 2*d* (EDU) 537, at 541, where the court stated:

> Lucarelli, by employing coercion, attempted to substitute her personal judgment for that of the *Superintendent in what is perhaps the latter's most important statutory function -- the recommending of personnel for employment in the public schools* (Emphasis supplied).

The petition filed in this case also alleges that "respondent's action was arbitrary and capricious and in violation of *N.J.S.A.* 18A:27-4.1." [See paragraph 10 of petition.] Other than petitioner's claim that the action of the Board of Education in failing to reappoint Scelba as coach of the golf team was "for arbitrary and capricious reasons," it is clear that no evidence advanced by the petitioner provides any proof that the requirements of *N.J.S.A.* 18A:27-4.1 were not followed by the Board of Education. In the respondent's answer to the petition, it is specifically stated that the Board of Education followed the provisions of *N.J.S.A.* 18A:27-4.1b in its procedure for determination that the coaching contract of the petitioner would not be renewed. Moreover, the evidence contained in the testimony of petitioner's witnesses establishes that petitioner was provided with a statement of reasons for his nonrenewal were set forth on or about June 15, 1998, by the Athletic Director. These reasons for nonrenewal were set forth in writing from the Superintendent to the petitioner on July 17, 1998. [See Exhibit P-7 in evidence.] No written demand for a statement of reasons for nonrenewal, as prescribed in *N.J.S.A.* 18A:27-3.2 and as recited in *N.J.S.A.* 18A:27-4.1b, ever was made by petitioner after the notice that he received from the Superintendent dated July 17, 1998, ostensibly because the reasons were already stated in the Superintendent's letter.

At page four of petitioner's brief he argues, "When there was no notice to the contrary forthcoming throughout the month of May 1998, it was entirely reasonable for Mr. Scelba to assume that he was going to continue in his position." Petitioner argues that even though his golf season was not over until the end of the month of May, the decision to renew his contract had to be made by May 15, 1998. As respondent argues, *supra.*, the May 15 deadline does not apply to coaching contracts pursuant to the terms of *N.J.S.A.* 18A:27-10, nor by the application of logic.

Against this rationale, the petitioner advances the novel theory of "reasonable assumption." Such a theory has no legal nor logical merit.

Petitioner insinuates that no notice was given to Scelba regarding his nonrenewal until June 2, 1998, as part of a design by the Board to "ambush" Mr. Scelba. Actually, it is clear from the facts and the timeliness involved that the A.D. had a conversation with Scelba June 2, 1998, the earliest practical opportunity after the golf season had ended and after school resumed subsequent to the 1998 Memorial Day holiday. Only after the season concluded, could practical administrative recommendations be expected to be made concerning the coaching positions for the following spring season, *e.g.*, for the 1999 golf season.

Respondent asserts that there is no deadline for notice affecting coaching contracts. The protections afforded by *N.J.S.A.* 18A:27-4.1b allow an employee to request a statement of reasons and, thereafter, to request a *Donaldson* hearing. As petitioner himself testified, a *Donaldson* hearing was granted to him on July 28, 1998, and that he learned that the Board had decided not to renew his contract as golf coach, "a day or two after" that decision had been made. Petitioner also testified that he authorized the filing of a grievance to challenge the action of the Board. That grievance was filed by the Jackson Education Association shortly after the meeting that took place on July 28, 1998, as petitioner himself testified.

At page four of petitioner's brief, the petitioner argues with the Board's assertion that any procedural deficiencies, *e.g.*, "the failure of the Board of Education to provide a written statement of reasons pursuant to *N.J.S.A.* 6:3-4.2[sic] following the *Donaldson* hearing in this matter, is both a mistake in the actual citation applicable and a misreading of what the regulation set forth at *N.J.A.C.* 6:3-4.2(I) actually requires. That regulation states:

> Within three days following the informal appearance[2] the Board shall notify the affected teaching staff member, in writing, of its final determination. Such notification may be delegated by the board to its superintendent or board secretary.

[2] The so-called *Donaldson* hearing.

No statement of reasons is necessary or required by this regulation. The regulation requires mere notice of what the Board determined to do. The petitioner testified that he learned that the Board had appointed someone else as the golf coach on the day after the Board took such action, *i.e*, on July 29, 1998. The intent of this regulation is to prevent a board from taking action and not informing the person affected by the action. The intent of this regulation certainly was not subverted in this case.

The petitioner's actual knowledge of what took place makes any argument of injury an absolutely nonsensical one. Contrary to the arguments raised by the petitioner at page five of his brief, the reason for the notice provision set forth at *N.J.A.C.* 6:3-4.2(i.) has absolutely no application to the substantive issue, *i.e.*, dismissal for arbitrary and capricious reasons. The essential protection of notice to the employee has been acknowledged by the petitioner's own testimony. Actual notice defeats any claim of injury by the petitioner. This fact reduces the petitioner's argument to a classic but inane argument, elevating form over substance.

Point II

The Petitioner's Claim that Scelba's Contract was Nonrenewed for Arbitrary Reasons is Belied by Testimony Elicited from the Petitioner Himself and Witnesses Testifying on His Behalf.

Taking all evidence elicited from the petitioner and his witnesses in a light most favorable to the petitioner, it is clear that testimony of the petitioner and witnesses Riva and Davis acknowledged that there was a "difference of opinion" between what the A.D. believed that the golf coach should be attempting to accomplish, and what the golf coach believed to be practical or, in his words, "possible." Consideration of all testimony elicited thus far makes it quite clear that this case involves circumstances over which reasonable minds can disagree.

On the Board's side of the issue stand the A.D., the High School Principal, the Director of Personnel, the Superintendent of Schools and, ultimately, the Board. There is no significant dissent among the documented decisions of those persons. While the petitioner and his witnesses claimed that the goals set by the A.D. were plausible, achievable or even possible, the record

reveals that these goals existed for years and that the petitioner invariably espoused the position that they were not possible to achieve. Respondent submits that the intransigent posture adopted by the petitioner was contrary, capricious and unreasonable on its face. The legal authority cited by the petitioner to support his argument over the arbitrariness of the Board's action is totally inapplicable to the case at bar. In the case of *Winston v. Board of Education of the Borough of South Plainfield,* 125 *N.J. Super.* 131 (*App. Div.* 1973), the procedural errors committed by the Board resulted in a denial of a contract to a teaching staff member, ostensibly in retaliation for the teacher's exercise of constitutionally protected rights. No such allegation is made in the petition filed in this case and, as a consequence, no such application of the rule of the *Winston* case can be made here.

Petitioner's argument that a statement by the Superintendent that he had been "shocked and surprised" by the nonrenewal of Mr. Scelba's contract, reveals the absurdity of what the petitioner is attempting to make out of the conversation in question. The notes of counsel to the respondent indicate that the conversation that Mr. Riva testified about with the Superintendent took place in September 1998. This was after the Superintendent himself had recommended to the Board that Mr. Scelba should not be renewed as the golf coach. It is clear that the Superintendent may have been shocked and surprised that Scelba did not achieve any of the goals set for him by the A.D. The Superintendent's letter of July 17, 1998, states this as the reason why he would not be recommending Mr. Scelba for reappointment to the position of golf coach. [See P-7 in evidence.] In view of the documentary evidence submitted by the petitioner, the characterization of Mr. Riva's testimony misconstrues the process followed pursuant to *N.J.S.A.* 18A:27-4.1 and attempts to put a spin on Mr. Riva's testimony which falls somewhere between "inexplicable" and "absurd."

Since Scelba himself admitted that he had not achieved the goals set for him over a period of three years, he could not have been surprised that the school district administration posted the position of golf coach to determine who else might be interested in the position. Under the terms of the collective bargaining agreement [P-8 in evidence], Scelba himself had the right to apply for the position[3]

[3] Article IX, A.3 specifically states:

It is also evident from petitioner's brief that petitioner has distorted the circumstances surrounding the fact that the A.D. and other administrators were not going to recommend Scelba's reappointment to the Superintendent. These facts had no legal effect until the Superintendent decided to make that recommendation his own, pursuant to *N.J.S.A.* 18A:27-4.1b. The wording of petitioner's brief makes respondent's case that this controversy clearly involves a *difference of opinion.* In petitioner's brief he refers to "the impracticality of the stated goals for the golf team." This statement is in contrast to the petitioner's acknowledgment on the same page of his letter brief (p.7), that the goals were not "impractical" but, rather, "impossible." Also, it is important to remember that these goals were not goals for the golf team, but rather, goals for the golf coach.

What is clearly at issue in this case is Coach Scelba's consistent refusal to attempt to achieve goals set for him by the A.D. The administration and the Board had every right to determine that the petitioner's lack of effort toward achievement of these goals justified the decision that they had to try to find someone else who would at least try to achieve these goals which the A.D. believed would help to improve the golf team.

A determination that the petitioner is correct in his assumption that his disagreement with the A.D. over the goals that were set for him to achieve, could not justify replacing him with another coach, would turn the system of governance of public schools on its head. Even though the golf team at Jackson Memorial High School proved to be more competitive in the 1998 season than it had been in previous years the A.D.'s issue remains: How much better could the golf team have been if the coach had even attempted to meet some of the goals set for him in the past three years?

The petitioner revealed an attitude during his testimony and in his arguments that tell this court all it needs to know about the crux of the issue here. The petitioner and the JEA would like to dictate who will coach students. Such a right rests with the Board by virtue of the public policy behind the pertinent statutes. The petitioner has the burden of showing that the Board's

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Extra and co-curricular positions will be posted district-wide, and all teachers shall be eligible to apply for said positions. [Emphasis mine].

action was unreasonable. If this were true, the proofs would have been rather simple. But no such proofs have been offered.

Toward the end of his brief the petitioner raises a fresh complaint that was never set forth in his pleadings. Petitioner's brief now alleges that Scelba had been discriminated against illegally by reason of his age. Since such an allegation was never made in the petition, it cannot be made now. The petitioner had every right to raise such a charge before the Division of Civil Rights, provided that it had been raised within 180 days of the act that the petitioner now suggests was illegally discriminatory. *See, N.J.S.A.* 10:5-13.

At the end of the brief, petitioner argues as follows: "At this point in the case, no valid, practical, justified or reasonable basis has been offered to support the decision not to renew Mr. Scelba." To the contrary, the evaluations of Scelba's performance introduced into evidence by the petitioner and relied upon by the Administration and the Board clearly support the respondent Board's action not to renew the petitioner's coaching contract. Furthermore, the Board's action not to renew Scelba's coaching contract has the legal presumption of being a valid governmental action. *See, Thomas v. Morris Twp. Board of Education,* 89 *N.J. Super.* 327 *(App. Div. 1965), aff'd.* on opinion below at 46 *N.J.* 581 (1966).

It is true that the Board has not yet presented any evidence but some of its evidence has been introduced by the petitioner. The petitioner has lost sight of the issue that is before the court, *i.e.*, has the petitioner met its burden of proving that the reasons relied upon by the Board for determining not to renew Scelba's coaching contract were arbitrary, capricious or unreasonable. The respondent submits that the rationale behind the Board's action is self-evident from the documentary exhibits submitted by the petitioner and from the testimony of the petitioner acknowledging the reasons for his less-than-satisfactory evaluation by the A.D. Such evidence is enough to disprove the petitioner's case. This has clearly been accomplished.

For the reasons set forth hereinabove, as further stated in respondent's answer, and as stated at oral argument made by respondent's counsel on June 28, 1999, the motion of the Jackson Township Board of Education to dismiss the petition in this case should be granted.

Petitioner's Position

Argument

I, James Scelba is entitled to the Legislative protection of *N.J.S.A.* 18A:27-4.1, 18A:27-10 and 18A:27-11.

Mr. Scelba has alleged in his petition that the Jackson Township Board has failed to comply with *N.J.S.A.* 18A:27-10 in that neither the Board nor the Superintendent supplied him with written notice of nonrenewal of his employment contract prior to May 15, 1998. The evidence in this case is clear that Mr. Scelba did not receive any written notice from any school employees prior to June 15, 1998, when he received a memorandum from Ralph Carretta, the A.D. (Exhibit P-6). This memorandum was prompted by Mr. Scelba's request for written reasons for the nonrenewal of his coaching contract after he learned through a posting on a bulletin board that the position of head golf coach was available to interested parties. (Exhibit P-5). The evidence is also clear that no written statement was ever provided to Mr. Scelba from either the Board or the Superintendent as required by *N.J.S.A.* 18A:27-10 until July 14, 1998, when Superintendent Elms sent a letter to Mr. Scelba. (Exhibit P-7). It is clear that the Board failed to comply with its notice obligations. Pursuant to *N.J.S.A.* 18A:27-11, the failure to provide notice prior to May 15, 1998, constitutes an offer of reemployment.

In making its Motion to Dismiss, the Board has argued that the case of *Schultz v. State Operated School District of the City of Jersey City,* 92 *NJAR* 2*d.*, 116 (*N.J. Admn.* 1992), stands for the proposition that the notice statutes cited above do not apply to school employees other than teachers. A review of the statutory scheme as well as the *Schultz* case itself reveals that this is not correct. *N.J.S.A.* 18A:27-10 is part of an overall Legislative scheme governing the appointment, transfer, removal, renewal or nonrenewal of school officers and employees. As the Board has acknowledged throughout this case as well as in the letter sent to Mr. Scelba by Superintendent Elms (Exhibit P-5), *N.J.S.A.* 18A:27-4.1 is applicable to this case. That statute by its very terms does not simply apply to teachers, but rather applies to all certified and/or non-certified officers or employees of the Board. More specifically, the *Shultz,* the question before the

ALJ was whether a "pool substitute" was entitled to the procedural protections of the Legislative scheme. The petitioner in that case was a substitute teacher. The substitute teacher was specifically not covered by any collective bargaining agreement between the School Education Association and the State Operating School District of Jersey City. In holding that the petitioner was not within the class of personnel entitled to the statutory protections, the ALJ replied the fact that a substitute teacher is not a regular teacher, but is rather one who is utilized to fill in for absent teachers. The ALJ further relied upon the fact that there was no employment contract between the substitute teacher and the Board. Therefore, the substitute teacher could have had no reasonable expectation of re-employment and was, therefore, an individual not within the class of persons who may invoke the provisions of *N.J.S.A.* 18A:27-10. The instant case is simply a far cry from the facts of *Schultz.* Mr. Scelba is a tenured school teacher who has taught in the Jackson Township school system for nearly 25 years. His position as the head golf coach is one that he had held for close to twenty of those years. There is an employment contract between Mr. Scelba and the Board (Exhibit P-1). Additionally, coaching contracts are expressly covered in the General Collective Bargaining Agreement between the Jackson Township Board and the Jackson Education Association (Exhibit P-8). These facts clearly distinguish Mr. Scelba's situation from that of the substitute teacher in *Schultz.* Therefore, the Legislative protections of *N.J.S.A.* 18A:27-10 are applicable to Mr. Scelba.

The Jackson Township Board further argues that applying this Legislative scheme to Mr. Scelba's situation, the failure of Mr. Scelba to formally accept in writing reemployment prior to June 1, enables the Board to terminate his employment after that date, relying upon *N.J.S.A.* 18A:27-12. The petitioner asserts that the Board, having repeatedly violated the procedural protections of State statutes and regulations, should not be permitted to rely upon this provision to save itself from its errors. Mr. Scelba had been renewed year after year for nineteen years will the Jackson Township High School in his position as head golf coach. When there was no notice to the contrary forthcoming throughout the month of May, 1998, it was entirely reasonable for Mr. Scelba to assume that he was going to continue in his position. Petitioner asserts that it is particularly significant that on cross examination by Mr. Campbell of the petitioner's witnesses, it has been alleged that Mr. Carretta engaged in a conversation with Mr. Scelba regarding his nonrenewal on June 2, 1998. Giving petitioner all favorable inferences at this point in the case, it

appears that the Board and its employees violated their own obligations under the statutes and then waited until the deadline for Mr. Scelba to assert his rights prior to notifying him that he was not going to be renewed. Apparently, the decision to replace and terminate Mr. Scelba had been made in advance of the deadline for Mr. Scelba to assert his rights, yet he was not informed until after that deadline. This type of termination by ambush simply should not be countenanced.

It is further submitted by the Board that these procedural deficiencies on the part of the Board including the failure of the Board to provide a written statement of reasons pursuant to *N.J.S.A.* 6:3-4.2 following the *Donaldson* hearing this matter simply constitutes harmless error. It is submitted that there are reasons why the Legislature has adopted a statutory scheme and has further authorized the Commissioner to promulgate regulations in this area, not the least of which is to insure that the activities of Chief School Administrators and Boards of Education remain above board and are not conducted for arbitrary or capricious reasons. Violations of these statutes and regulations strike at the very heart of the long-held understanding that public school employment is a public service subject to Legislative direction in the public interest. *See, Redcay v. State Board of Education,* 130 *N.J.L.* 369, affirmed 131 *N.J.L.* 326 (1943). Such violations should never be considered harmless error.

2. The Nonrenewal of Mr. Scelba's Employment Contract was Predicated upon Arbitrary Reasons

In making its motion, the Board has relied upon cases which set forth the discretionary powers of boards of education. Although boards of education may be vested with a certain amount of discretion, it is nonetheless clear that the theory that public employment which may be denied altogether may be subjected to any conditions regardless of how unreasonable has been uniformly rejected by the courts. *See, Winston v. Board of Education of the Borough of South Plainfield,* 125 *N.J. Super.* 131, (*App. Div.* 1973), citing, *Pickering vs. Board of Education,* 391 *U.S.* 563, 568, 88 *S. Ct.*, 1731, 1734 (1968). Although the Board has characterized this dispute as constituting a mere difference of opinion regarding the manner in which the golf team in Jackson Township should be coached, petitioner submits that the evidence in this case, which at this point is uncontroverted, establishes that the reasons which have been articulated in support of the termination of Mr. Scelba are manifestly unreasonable.

Perhaps the first instance which highlights the arbitrary nature of the decision of both the Superintendent and the Board, is the fact that there is no evidence of any involvement by the Superintendent in the decision making process until July 14, 1998. (Exhibit P-7). The realization by Mr. Scelba in June of 1998 that his position was not renewed was at best derived from the revelations of the A.D., Ralph Carretta. The statutory scheme governing this dispute clearly disputes that the decision whether to recommend renewal or nonrenewal is to be made by the chief school administrator, in this case, Superintendent Edward Elms. There is testimony in this case by William Riva, the boys track coach at Jackson High School, that he confronted Superintendent Elms regarding the Scelba situation. Mr. Riva testified that the Superintendent indicated that he had been "shocked and surprised" by the nonrenewal of James Scelba's position. The inference to be drawn is that the decision not to renew Mr. Scelba was simply not made by the one with the statutory authority and responsibility to do so. This is perhaps highlighted by the fact that on June 10, 1998, the date on which Mr. Scelba submitted a written request to the A.D. for a written statement of reasons for his nonrenewal, the Superintendent had obviously not even had an opportunity to review Mr. Scelba's 1998 evaluation. That evaluation, dated June 10, 1998, is in evidence as Exhibit P-4 and is signed by Ralph Carretta. It is therefore clear that by June 10, 1998, the availability of the position of head coach had been posted in the school and that Mr. Carretta had made his determination, before Superintendent Elms would have even had an opportunity to have reviewed the 1998 evaluation of Mr. Scelba. It is submitted that the abdication of any decision making authority by the Superintendent constitutes in and of itself, arbitrary action by the Superintendent, who apparently acceded to the actions of his underlings only after they had made the decision not to bring Mr. Scelba back as head golf coach for the upcoming year.

The arbitrary nature of the decision of both the Superintendent and the Board is further highlighted by a review of the purported reasons which have been provided and the factual circumstances presented in this case which demonstrate the impracticality of the stated goals for the golf team. The Board and the Superintendent had based their decision in part upon the fact that Mr. Scelba was unable to provide extensive summer programs for the players on the golf team. It should be noted that Mr. Scelba did obtain a reduced rate for his players to play golf at a

golf course during the summer. Further, Mr. Scelba did have a custom of holding a get together at his home including a barbecue for the players on the golf team at the end of each golf season. The goal which was presented to Mr. Scelba in previous evaluations of increased summer involvement for the members of the golf team, which was only presented as a request and not as a demand, would simply have required Mr. Scelba to engage in activities and duties which were clearly beyond the scope of his contract, which ran from September to June of each year. Furthermore, as the contract between the Jackson Education Association and Board reveals, teachers receive additional compensation for summertime work. Mr. Carretta's suggestions would have required Mr. Scelba to take on an additional job without compensation. Mr. Carretta's recommendation for summertime programs further ignores reality. Golf is simply not the same as other school sports where athletes can engage in activities on the school grounds using school equipment. Golf is a rather expensive sport which requires players to pay for green fees and equipment. There has been testimony in this case that availability of a golf course for practices for the entire team during the summer would not have been possible due to the expense involved. Although Mr. Carretta has set this forth as a goal for the golf team, he apparently has done nothing to facilitate or to assist Mr. Scelba in implementing this specific goal. It is also significant that Mr. Carretta expected Mr. Scelba to perform these extra duties without the benefit of any assistance. A further concern is the fact that the purported insistence to engage in summertime programs is not uniformly enforced. Alton Johnson, the girls track coach who testified in this matter has indicated that two years ago, he too was told to begin summer programs beyond the scope of his contract and that he has clearly told Mr. Carretta that he will not do so. It is submitted that the rationale for Mr. Scelba's nonrenewal centering upon his failure to engage in summertime programs which would have been difficult if not impossible, and which were clearly beyond the scope of his contract does not constitute a valid reason for his nonrenewal.

A second reason urged by the Board is that Mr. Scelba should have engaged in activities at the Middle School level. There are no existing Middle School golf programs. Once again, the contract between the Jackson Township Education Association and the Board reveals that Middle School coaches in other sports are compensated for their services. Nonetheless, Mr. Carretta set a goal for Mr. Scelba to develop talent in the Middle Schools without the existence of any

"feeder" programs. This would have necessarily entailed Mr. Scelba having to initiate programs of his own. Mr. Scelba was in effect being asked to become a Middle School coach without either compensation or a contract. When coupled with other factors which have been presented in this case, including the lack of an assistant, and the practical aspects of engaging Middle School children in sport they may not have the ability or equipment to participate in, the failure to meet the goal of developing talent in the Middle School is simply not a valid basis for nonrenewal.

Finally, the Board alleges Mr. Scelba's failure to reach the goal of having a golf tournament fund raiser at the Metedeconk Golf and Country Club, as a reason for nonrenewal. The testimony is clear that Mr. Carretta requested a fund raiser to be held at that particular golf course. Mr. Scelba has testified that Metedeconk is one of the most exclusive private golf courses in the State of New Jersey. In fact, members pay $100,000 to join the Metedeconk Golf and Country Club. To demand that Mr. Scelba somehow convince those in charge of the Country Club to permit the school system to hold a golf tournament is simply outrageous and cannot possibly be deemed a valid reason for nonrenewal. One cannot be asked to do the impossible.

Such purported reasons for the nonrenewal of Mr. Scelba's contract seem particularly arbitrary when one considers all of the positive qualities which Mr. Scelba has brought to the golf program in Jackson. Although the Board is currently choosing to rely upon suggestions for improvement contained in Mr. Scelba's evaluation as outlined above, the Board has apparently completely ignored the many positive comments which have been made in those evaluations. These include the comments in Mr. Scelba's 1996 evaluation (Exhibit P-2) stating that "Mr. Scelba is a fine person who does most of the leg work to be sure the students have a fine place to play" and that Mr. Scelba is a "knowledgeable coach with many years experience." In fact, Mr. Scelba not only insured that these students had a fine place to play but he obtained the privilege for the students to play at one of the most exclusive golf courses in the State of New Jersey. In Mr. Scelba's 1997 evaluation, it was noted that he had two players who could compete with the County's best players. The evaluation further indicates that there was improvement in the team's competitive nature. In fact, in the 1997 evaluation, although there is mention of summertime and Middle School involvement, it is specifically acknowledged by Mr. Carretta that Mr. Scelba did not have an assistant to work with him. The evaluation notes that Mr. Scelba had obtained a

volunteer on his own to assist with the regular duties that he was asked to perform as head golf coach. Perhaps most ironic of all in the history of this case is the fact that Mr. Scelba's 1998 evaluation specifically indicates that Mr. Scelba's team was the most competitive that it had been in years.

The testimony in this case reveals that Mr. Scelba is a knowledgeable coach who is very interested in helping the members of the golf team. Mr. Scelba recognizes that being coach is more than just about winning and losing, it is about teaching young students the gentlemanly arts of the game, so that they may enjoy the game throughout their lives. Mr. Scelba is patient with and dedicated to these students and brings a wisdom to them that can only be brought from learned life experience. During the season, Mr. Scelba works five nights a week with both the varsity and junior varsity golf teams. On days when there are practices, he works until 6:00 p.m. and on days where there are matches, he works much later. Mr. Scelba has gone above and beyond his duties in that he has on his own procured a volunteer to act as an assistant. This provision of a volunteer enables the students who are not actually participating in matches to continue to be members of the golf team and to play at an alternative course during the matches played by the starting varsity and junior varsity players. If Mr. Scelba had not done this on his own, the golf team simply would not be what it is today. The evidence in this case further suggests that Mr. Scelba has saved the school costs in transportation in that both he and his volunteer assistant, Glen Davis, provided transportation for the members of the golf team. The evidence also shows that Mr. Scelba has engaged in his own fund raising activities to offset costs. It is submitted that many of these responsibilities which Mr. Scelba has taken upon himself rightly belong with the Athletic Department of Jackson Township High School. Nonetheless, in an effort to increase the quality of the golf program, Mr. Scelba has taken these responsibilities upon himself.

When one wonders as to the true reasons why Mr. Scelba was not offered his position for the 1999 to 2000 school year, it cannot be forgotten that Mr. Scelba has testified in this matter that he had a conversation with Mr. Carretta in which the latter suggested that he was perhaps too old to do all of the running around associated with the head golf coach position. It is also insignificant that Mr. Scelba's replacement is approximately thirty years old while Mr. Scelba is in

fifties. The new coach simply does not have any coaching experience to compare with that of Mr. Scelba. At this point in this case, there is at least an inference to be drawn that perhaps Mr. Scelba's age had something to do with the decision to terminate his involvement as head coach and to hire a much younger yet much more inexperienced replacement.

It is respectfully submitted that a review of the evidence in this case suggests that the articulated reasons by the Board for the nonrenewal of Mr. Scelba's contract are simply illogical in the face of the facts, nor are they consistently applied to coaches of other sports at Jackson Township High School. The reasons provided are unreasonable and it is highly suspect whether the Superintendent even participated in the decision as he is required to do by statute. At this point in the case, no valid, practical, justified or reasonable basis has been offered to support the decision not to renew Mr. Scelba. Without valid reasons being offered, especially in light of the Superintendent's and the Board's failure to abide by statutory and regulatory procedures, Mr. Scelba cannot legally be removed from his position as head golf coach. To permit the removal of any school employee under the circumstances and in the manner involved here, is to open the door to the baseless removal of coaches and other school employees as well as such accompanying evils as cronyism, nepotism and discrimination.

For all of the above stated reasons, it is respectfully submitted that looking at all of the evidence that has been supplied, and providing the petitioner with all the favorable inferences which are to be drawn therefrom, the current motion by the Board should be denied.

CONCLUSIONS

The Commissioner has long held that coaching staff members do not achieve the status of tenure in their extra-curricular positions. In the matter of *Nello Dallolio v. Board of Education of the City of Vineland, Cumberland County,* 1965 *S.L.D.* 18, the Commissioner held that:

> . . . . . a board of education has the power to assign and reassign teachers to curricular duties in addition to their regularly scheduled classroom instruction assignment and to pay such additional remuneration as is reasonable and appropriate therefore: that absent a requirement for a certificate other than that of teacher, no tenure

> accrues to such assignments and they are renewed or discontinued at the discretion of the Board; and that when the extra work is no longer performed the extra compensation for that purpose can no longer be claimed.
>
> The Commissioner finds and determines that the Vineland Board of Education acted within its discretionary authority in relieving the petitioner of his extra duties and discontinuing his extra compensation as coach of football, and assigning that responsibility and extra remuneration to another staff member. Respondent's motion is granted and the petition is dismissed. *Id.* at 22.

Thus, not only does a teaching staff member not accrue tenure status as a coach but, moreover, the Board is authorized to discontinue a coaching assignment at its discretion. *See also, Joseph J. Dignon v. Board of Education of the Rumson-Fair Haven Regional High School, Monmouth County,* 1971 *S.L.D.* 336, aff'd. *State Board,* 1974 *S.L.D.* 1376. The Commissioner's holding in *Dallolio, supra.* and *Dignon, supra.* is reinforced by our Appellate Court in the matter of *Dore, supra.*, as quoted by the Board in its brief, which states, in part that:

> . . . absent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board.
>
> 185 *N.J. Super.* at 456

I **CONCLUDE**, therefore, that the Board exercised its authority to terminate petitioner's assignment as coach of the high school golf team at the conclusion of the 1997-98 school year. I **FIND and CONCLUDE** that the Board was in compliance with *N.J.S.A.* 18A:27-4.1, as evidenced by the Superintendent's letter, dated July 17, 1998, addressed to petitioner. Consequently, I **CONCLUDE**, the Board did not violate the statute as alleged by petitioner.

I **FINALLY CONCLUDE** the statue, at *N.J.S.A.* 18A:27-10 does not apply to petitioner in his position as coach of the high school golf team. Under the Commissioner's holdings in *Dallolio, supra.* and *Dignon, supra.* The herein Board used its discretion in not assigning petitioner to the coaching position for the 1998-99 school year. As the Appellate Court held in

I **CONCLUDE,** therefore, that there is no merit in petitioner's claims against the Board and his Petition of Appeal should be dismissed.

ORDER

Accordingly, for the reasons expressed above, it is **ORDERED** that the herein Petition of Appeal by James Scelba be and is hereby **DISMISSED and the Board's Motion is GRANTED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

22 October 1999
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

10-26-99
DATE

Debbie Antanaitis/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 27 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

For Petitioner:

James Scelba

William Riva

Glenn Davis

Alton Johnson

For Respondent:

None

DOCUMENTS IN EVIDENCE

For Petitioner:

P-1 Contract 1997-98 for Golf Coach

P-2 Evaluation 1996

P-3 Evaluation 1997

P-4 Evaluation 1998

P-5 Memo to Ralph Carretta from Scelba, dated 6/10/98

P-6 Memo to Scelba from Carretta, dated 6/15/98

P-7 Letter dated 7/17/98 to Scelba from Elms

P-8 Contract Agreement between Jackson Twp. BOE and Jackson Twp. Ed. Assoc.

P-9 Riva Evaluation dated 2/29/96

P-10 Riva Evaluation dated 12/9/96

P-11 Riva Evaluation dated 6/12/97

P-12 Riva Evaluation dated 1/98

For Respondent:

None

OAL DKT. NO. EDU 10340-98
AGENCY DKT. NO. 468-10/98

JAMES SCELBA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions.

Upon careful and independent review of the record, the Commissioner concurs with the ALJ that petitioner is not entitled to the relief he seeks. Like the ALJ, the Commissioner is not persuaded that *N.J.S.A.* 18A:27-10, 11 and 12 apply to the circumstances herein, inasmuch as these statutes, enacted as *P.L.* 1971 *c.* 436, appear to apply to *potentially tenurable* staff members serving a probationary period prior to the acquisition of tenure. As the Supreme Court noted in *Donaldson v. Bd. of Ed. of No. Wildwood*, 65 *N.J.* 236 (1974), a board's discretion not to renew a teaching staff member's employment contract pursuant to *N.J.S.A.*. 18A:27-10, and, consequently, *not to grant tenure* "need not be grounded on unsatisfactory classroom or professional performance for there are many unrelated but nonetheless equally valid reasons why a board, having had the benefits of observation during the probationary period, may conclude that tenure should not be granted." *Donaldson* at 241. As the

Court therein recognized, a newly hired teacher is fully aware that he/she serves in such a probationary period and that he/she may, ultimately, not acquire tenure. *Id.* at 245.

That there is an "inter-relationship" between 18A:27-10 and *N.J.S.A.* 18A:28-5, the statute defining the terms under which tenure is acquired, was also recognized by the Appellate Division when it examined a board's responsibility to timely notify a nontenured employee of the nonrenewal of her contract, *N.J.S.A.* 18A:27-10, while still allowing the employee to perform her duties until the expiration of her contract, *N.J.S.A.* 18A:27-9, *without* incurring the tenure implications of service under *N.J.S.A.* 18A:28-5. *Nissman v. Bd. of Ed. of Twp. of Long Beach Island, Ocean County*, 272 *N.J.* Super. 373, 379, 382 (App. Div. 1994). There, the Court read the Legislature's selection of the date identified in *N.J.S.A.* 18A:27-10 as providing local boards with sufficient time to fill a vacant position before the start of the next school year, *as well as* sufficient time for the terminated teaching staff member to secure other employment. *Id.* at 380.[1]

Here, as the ALJ noted, it is well-settled that "tenure does not attach to a coaching position." *Norcross v. Board of Education of the North Hunterdon Regional High School District, Hunterdon County*, 92 *N.J.A.R.* 2d (EDU) 176, 178, *aff'd* State Board at 181, *aff'd* App. Div. March 30, 1993, No. A-3533-91, *citing Furlong v. Kearny Bd. of Ed.*, 1980 *S.L.D.* 1420 and *Koslick v. Bd. of Ed. of the Twp. of Edison*, State Board April 3, 1987. Petitioner cannot assert, therefore, that the protections afforded by *N.J.S.A.* 18A:27-10 *et seq.* are

[1] In *Nissman*, the Court held that the petitioner's appeal was untimely filed since her cause of action arose at the time of the board's decision in April 1990 to terminate employment, rather than at the expiration of her contract in August 1990. *Nissman, supra*, at 382.

applicable to his coaching contract; neither can he credibly claim to be prejudiced by the Board's failure to notify him of the nonrenewal of his coaching contract by May 15, 1998.[2]

Moreover, the Commissioner cannot conclude that the Board violated *N.J.A.C.* 6:3-4.2, since that regulation, formerly found at *N.J.A.C.* 6:3-1.20, was specifically adopted to implement *Donaldson, supra,* pursuant to the Supreme Court's interpretation of *N.J.S.A.* 18A:27-10. *See* 8 *N.J.R.* 62(a); *Hicks v. Board of Education of the Township of Pemberton, Burlington County*, 1975 *S.L.D.* 332; *Jamison v. Morris Sch. Dist. Bd. of Educ.*, 198 *N.J. Super.* 411, 417 (App. Div. 1985); *Bd. of Ed., Tp. of Wyckoff v. Wyckoff Ed. Assoc.*, 168 *N.J. Super.* 497, 500, 501 (App. Div. 1979), *cert. denied*, 81 *N.J.* 349 (1979). Finally, the Commissioner determines that petitioner has failed to demonstrate any infirmity in the Board's application of *N.J.S.A.* 18A:27-4.1 to the nonrenewal of his coaching contract.

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein, and amplified above. The within Petition of Appeal is dismissed.[3]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 10, 1999
Mailing date: December 13, 1999

[2] The Commissioner also notes that petitioner's long-standing employment as a teacher in the District remains untouched by the Board's decision not to renew his coaching contract.

[3] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

409-99

EDU #7871-94
C # ~~149-97~~ 409-99
SB # ~~41-97~~

JOHN SCELBA,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, December 10, 1999

For the Petitioner-Appellant, Starkey, Kelly, Blaney & White (Brent D. Miller, Esq., of Counsel)

For the Respondent-Respondent, Kalac, Newman, Lavender & Campbell (Francis J. Campbell, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

April 5, 2000

APR 7 2000

Date of mailing _____

410-99

HARRY PARKER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MIDDLESEX COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

December 13, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 08349-98S

AGENCY DKT. NO. 368-8/98

HARRY PARKER,

Petitioner,

v.

BOARD OF EDUCATION OF THE MIDDLESEX COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, MIDDLESEX COUNTY,

Respondent.

David L. Rosenberg, Esq., for petitioner (Klausner and Hunter, attorneys)

Anthony B. Vignuolo, Esq., for respondent (Borrus, Goldin, Foley, Vignuolo, Hyman, Stahl & Clarkin, attorneys)

Record Closed: October 26, 1999 Decided: October 26, 1999

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from the filing of a Petition of Appeal by Harry Parker, ("petitioner") with the Commissioner of Education on August 5, 1998, alleging that the respondent board froze his salary and failed to pay him in accordance with the applicable salary guide therefore reducing his salary in violation of *N.J.S.A.* 18A:28-5. The matter was transmitted to the Office of

Administrative Law on September 18, 1998, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

A review of the terms of the settlement and the legal issues involved which have been extensively briefed by the parties and which have been the subject of a summary decision motion which was denied, indicate that the resolution reached between the parties is an appropriate settlement of the dispute which should be accepted as a reasonable conclusion of the matter. I further **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

October 26, 1999
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

10-28-99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 29 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm
Attachment

BORRUS, GOLDIN, FOLEY, VIGNUOLO, HYMAN, STAHL & CLARKIN
A Professional Corporation
2875 U.S. Highway #1
P.O. Box 7463
North Brunswick, New Jersey 08902
(732) 422-1000
Attorneys for Respondent

Petitioner HARRY PARKER vs. Respondent BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS IN THE COUNTY OF MIDDLESEX	BEFORE THE COMMISSIONER OF EDUCATION DOCKET NO. 368-8/98 Civil Action STIPULATION OF SETTLEMENT

This matter having been amicably adjusted by and between the parties, it is hereby stipulated and agreed as follows:

1. That the Petitioner shall receive the additional sum of $703.50 for the 1998/1999 school year which shall be added to the salary of $79,541.00 already paid to the Petitioner to form his corrected salary for that school year.

2. That the Petitioner shall receive the additional sum of $1,431.50 for the 1999/2000 school year which shall be added to the salary of $79,541.00 already paid to the Petitioner for such school year to form his corrected salary for that school year.

3. That the parties agree that the terms and conditions of Petitioner's employment as a Ford Asset Teaching Instructor, including salary and benefits, shall be subject to negotiation in any successor Collective Bargaining Agreement between the

Respondent and the Middlesex County Vocational Education Association.

4. That the amicable resolution of the within matter is not to be deemed an admission by either party as to any issue in dispute herein and that the contents of the settlement shall be deemed confidential between the parties.

5. That the settlement of the within matter shall not be evidentiary in any subsequent proceeding between the parties regarding the issues raised herein nor between the Respondent and the Middlesex County Vocational Education Association, it is the specific intention of the parties that the within settlement shall not constitute a past practice or cause to modify any future Collective Bargaining Agreement between the Respondent and the Middlesex County Vocational Education Association.

6. That except as provided herein the within matter is hereby dismissed with prejudice and without costs.

KLAUSNER & HUNTER, ESQS.
Attorneys for Petitioner

DAVID B. ROSENBERG, ESQ.

BORRUS, GOLDIN, FOLEY, VIGNUOLO, HYMAN, STAHL & CLARKIN, P.C.
Attorneys for Respondent

ANTHONY B. VIGNUOLO, ESQ.

P:\USERS\ABV\WP51\VOCBD\PARKER.STP

OAL DKT. NO. EDU 8349-98
AGENCY DKT. NO. 368-8/98

HARRY PARKER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MIDDLESEX COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 13, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

411-99

BEVERLY J. STURM,	:	
PETITIONER;	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOUNT ARLINGTON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

December 13, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO.: EDU 11249-97
AGENCY DKT. NO. 375-10/97

BEVERLY STURM,

Petitioner,

v.

MT. ARLINGTON BOARD OF EDUCATION OF THE

Respondent.

John J. Ross, Esq., represented petitioner
(Mehr & LaFrance, attorneys)

Vito A. Gagliardi, Jr., Esq., represented respondent
(Ravin Sarasohn, Cook, Baumgarten, Fisch & Rosen, attorneys)

Record Closed: October 14, 1999 Decided: October 24, 1999

BEFORE **JEFFREY A. GERSON**, ALJ

This matter was transmitted to the Office of Administrative Law (OAL) on November 18, 1997, for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Settlement Agreement and letter of October 11, 1999.

Having reviewed the contents of the attached Settlement Agreement, I **FIND**: (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, **I CONCLUDE** that the attached Settlement Agreement meet the requirements of *N.J.A.C. 1:1-19.1.1*, and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with their contents and that these proceedings be (and are hereby) **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

10-29-99
DATE

JEFFREY A. GERSON, ALJ

Receipt Acknowledged:

10-29-99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 1 1999
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

OCT 14 11 56 AM '99

RAVIN, SARASOHN, COOK,
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103 Eisenhower Parkway
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(973) 228-9600
Attorneys for Respondent
Mt. Arlington Board of Education

BEVERLY J. STURM, Petitioner, v. MT. ARLINGTON BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION Agency Docket No.: 375-10/97 OAL Docket No. EDUOR 11249-97N

BEVERLY J. STURM, Petitioner, v. MT. ARLINGTON BOARD OF EDUCATION, Respondent.	Agency Docket No.: 233-8/99 **SETTLEMENT AGREEMENT**

1. Beverly Sturm, employed by the Mt. Arlington Board of Educatio ("Board"), as its Board Secretary/School Business Administrator, hereb submits her resignation effective March 1, 2001 subject specifically to th following terms and conditions.

2. Ms. Sturm will dismiss, with prejudice, the two pending actior referenced above. The Board will resolve the issue of the allege

reduction in Ms. Sturm's compensation by retroactively increasing her salary by $4640.50 for the 1997-98 school year and by $4640.50 for the 1998-99 school year. This would result in the Board owing Ms. Sturm a total of $9,281.00. Payment of this salary due and owing will be made as follows: $4640.50 will be paid to Ms. Sturm between January 1, 2000 and January 15, 2000, and $4640.50 will be paid on or before July 31, 2000. This shall be the only payment beyond the existing salary obligations which the Board owes to Ms. Sturm.

3. Ms. Sturm will continue to be paid at the rate of her present salary through March 1, 2001. The parties have agreed that, due to certain recurring medical issues, Ms. Sturm will commence an extended sick leave on September 30, 1999 and will not return to work thereafter. Ms. Sturm will use all remaining sick days, vacation days, personal days and leave days to cover the period of this leave; to the extent that the days available to Ms. Sturm are insufficient, the Board will continue to maintain her at her current salary through the effective date of her resignation (approximately 34 days are expected to be left once her available days are exhausted).

4. Her resignation is effective March 1, 2001, after which she will no longer be an employee of the Board. However, prior to that time, she will be considered an employee for all purposes, including but not limited to salary and benefits. This includes the Board's obligation to make pension contributions and to pay her NJASBO dues.

5. For and in consideration of the mutual promises set forth herein, Ms. Sturm, for herself, and for her agents, heirs, executors, administrators and assigns, fully, irrevocably, and unconditionally releases and discharges the Board, its employees and its agents from any

and all claims, demands, causes of action and liabilities of any kind. This release specifically includes any claim of entitlement to a tenured position, or any other type of employment with the Board, after March 1, 2001.

6. After September 30, 1999, no further documentation will be added to Ms. Sturm's personnel file. Furthermore, the Board shall release copies of documents contained specifically therein only upon the written consent of Ms. Sturm or pursuant to Court Order.

7. The Board shall agree not to make any negative comments -- written or oral -- regarding Ms. Sturm including but not limited to her job performance or abilities. Ms. Sturm shall agree to the same regarding the Board. In the event the Board receives any inquiries from any individuals or entity, including but not limited to any prospective employers of Ms. Sturm, the Board shall advise that it is the policy of the Board to respond to such inquiries in writing whereupon the Board will provide a letter to which the parties shall agree in advance. The parties agree that they will not disclose the terms of this Agreement unless such disclosure is required by law or consented to by both parties. For purposes of this paragraph, the reference to the Board shall mean the Board, each of its members, officers, employees and professionals and the staffs of any of its professionals.

8. The parties recognize and agree that the making of this stipulation of settlement is not intended to and does not constitute or imply an admission of liability or any type of wrongdoing by any party, or of any violation of any federal, state or local statute, regulation or ordinance, or violation of any other right by any party, upon any legal or

equitable theory, whether contractual, common law, statutory or otherwise. The parties agree that this stipulation of settlement may not be used to establish precedent in any future proceeding of any type whatsoever, and that it shall be inadmissible in any such proceeding, other than a proceeding to enforce or prove the existence of same.

9. This agreement is specifically contingent upon approval by the Board by recorded roll call vote at a public meeting. In the event that it is not so approved, Ms. Sturm has the right to withdraw her offer of resignation and this agreement shall be null and void.

MT. ARLINGTON BOARD OF EDUCATION

Beverly Sturm

By: _____
J. Patrick Allen, President

By: _____
Thomas J. Ficarra, Superintendent of Schools/Board Secretary, Pro Tempre

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OAL DKT. NO. EDU 11003-99
AGENCY DKT. NO. 233-8/99

BEVERLY J. STURM,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOUNT ARLINGTON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, Settlement Agreement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. [1] The parties are reminded that the Board must fully comply with the requirements of Executive Order No. 11 (1974) in responding to any inquiries from prospective employers of respondent. The matter is hereby dismissed, subject to compliance with the terms of the settlement. [2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 13, 1999

[1] The record confirms that the within settlement agreement was approved by the Board at its October 5, 1999 public meeting.

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

412-99

LINDA ROSZKOWSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

December 13, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4796-98
AGENCY DKT. NO. 128-4/98

LINDA ROSZKOWSKI,
Petitioner,
v.
BOARD OF EDUCATION OF TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,
Respondent.

Michael B. Berman, Esq., for petitioner (Collins & Berman, attorneys)

James T. Hundley, Esq., for respondent (Hundley and Parry, attorneys)

Record Closed: October 20, 1999 Decided: October 27, 1999

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter was transmitted to the Office of Administrative Law on June 17, 1998, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a stipulation indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Oct 27, 1999
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

10-29-99
DATE

Debbie Antanaitis /kp
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 1 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cc

1999 OCT 20 A 10: 19

HUNDLEY & PARRY, P.C.
35 Pilgrim Pathway
P.O. Box 488
Ocean Grove, New Jersey 07756
(732) 775-3100
Attorneys for Respondent

LINDA ROSZKOWSKI,

Petitioner

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,

Respondent.

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY

OAL DKT. NO. EDU 4796-98

AGENCY DKT. NO. 128-4/98

STIPULATION OF SETTLEMENT

WHEREAS, on April 30, 1998, Petitioner filed a Petition of Appeal seeking a determination from the Commissioner of Education that Petitioner's absences from her post of duty on February 25 and February 26, 1998 were the result of a personal injury caused by a February 24, 1998 accident arising out of and in the course of her employment within the meaning of N.J.S.A. 18A:30-2.1; and

WHEREAS, Petitioner's Petition of Appeal alleges she received her full salary for her absences on February 25 and February 26, 1998, but said absences were charged against Petitioner's annual and accumulated sick leave bank; and

WHEREAS, Petitioner's Petition of Appeal seeks a determination that, pursuant to N.J.S.A. 18A:30-2.1, said absences were not chargeable to Petitioner's sick leave bank and further seeks an Order requiring Respondent to restore two days absences to Petitioner's annual and accumulated sick leave bank; and

WHEREAS, on June 4, 1998, Respondent filed an answer to the Petition of Appeal; and

WHEREAS, on June 11, 1998 the Commissioner transferred the matter to the Office of Administrative Law; and

WHEREAS, on July 19, 1999 a Prehearing Order was entered in this matter by the Honorable M. Kathleen Duncan, ALJ; and

WHEREAS, the matter is scheduled for a hearing on October 22, 1999 before the Office of Administrative Law; and

WHEREAS, the parties are desirous of settling the issues in dispute in this matter;

NOW THEREFORE it is agreed between Petitioner Linda Roszkowski and Respondent The Board of Education of the Township of Neptune, Monmouth County, as follows:

1. The Respondent will restore two (2) days, February 25 and February 26, 1998, to Petitioner's annual and accumulated sick leave bank in full settlement of all claims for sick leave benefits under N.J.S.A. 18A:30-2.1 arising from Petitioner's February 24, 1998 injury.

2. This settlement will not constitute a precedent or past practice in any other proceedings between the parties. This Settlement will not be introduced in evidence in any other proceedings between the parties.

3. This Settlement may be incorporated into an Initial Decision by the Administrative Law Judge for consideration by the Commissioner of Education.

FOR THE PETITIONER
LINDA ROSZKOWSKI

Michael B. Berman
MICHAEL B. BERMAN, ESQ.

Date: 10.14.99

FOR THE RESPONDENT
THE BOARD OF EDUCATION OF
THE TOWNSHIP OF NEPTUNE,
MONMOUTH COUNTY

James T. Hundley
JAMES T. HUNDLEY, ESQ.

Date: 10-13-99

OAL DKT. NO. EDU 4796-98
AGENCY DKT. NO. 128-4/98

LINDA ROSZKOWSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, Stipulation of Settlement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 13, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

413-99

IN THE MATTER OF THE TENURE	:	
HEARING OF THOMAS LYNCH,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF MANVILLE,	:	DECISION
SOMERSET COUNTY.	:	
	:	

December 13, 1999

AGENCY DKT. NO. 298-10/99

IN THE MATTER OF THE TENURE	:	
HEARING OF THOMAS LYNCH,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF MANVILLE,	:	DECISION
SOMERSET COUNTY.	:	
	:	

For the Board, Raymond R. Trombadore, Esq.

Thomas Lynch, *Pro Se*

This matter having been opened before the Commissioner of Education on October 1, 1999, through certification of tenure charges against Thomas Lynch, a tenured custodian (Supervisor of Buildings and Grounds), by the Board of Education of the Borough of Manville; and

The Commissioner having directed respondent on October 1, 1999, via both certified and regular mail, the certified copy having been signed for on October 6, 1999, to file an Answer to the tenure charges against him; and

Such directive clearly providing respondent notice that, pursuant to *P.L.* 1998, *c.* 42, effective July 1, 1998, an individual against whom tenure charges are certified "*shall have* **15 days** *to submit a written response to the charges to the commissioner*," and that failure to answer within the prescribed period will result in the charges being deemed admitted and the Commissioner deciding the matter on a summary basis pursuant to *N.J.A.C.* 6:24-1.4(e); and

Respondent having neither submitted a reply to the Board's charges against him, nor having at any time communicated with the Office of the Commissioner to request an extension of time within which to file a response, request assistance, or for any other reason, by operation of *N.J.A.C.* 6:24-5.3 and *N.J.A.C.* 6:24-1.4(e), each count of the charges against respondent is deemed admitted for purposes of the within proceeding; and

The Commissioner having reviewed the tenure charges certified against respondent by the Board, specifically:

1. Beginning approximately 7 years ago and continuing until 2 or 3 years ago, you accepted from Andrzej Zagaja, a subordinate employee, monies extorted by him from other employees of the school district, all of whom were under your direct supervision;

2. You failed to report to the Superintendent of Schools or to the Board of Education the conduct of your immediate subordinate in extorting monies from employees supervised by him;

3. You aided and abetted your immediate subordinate in his plan and scheme of extorting monies from Board of Education employees;

4. Your conduct in this matter was both illegal and in contravention of your contract of employment; and

Having deemed such charges to be admitted by operation of rule, the Commissioner has determined, pursuant to *N.J.S.A.* 18A:6-16, that these charges, taken together, constitute unbecoming conduct[1] and are sufficient to warrant respondent's dismissal from his tenured position; and

Notwithstanding this determination, the Commissioner notes from the record that the Board's suspension of the within respondent without pay on August 12, 1999, was in

[1]While respondent may have been inartfully charged with what may be viewed as criminal charges, the Commissioner notes that this is not the forum where criminal charges are to be adjudicated. Rather, the within charges manifest an intention of the Board to administratively charge respondent with conduct unbecoming an employee.

contravention of *N.J.S.A.* 18A:6-8.3 and *N.J.S.A.* 18A:6-14, in that respondent was neither under indictment nor had tenure charges been certified against him as of that date; now, therefore

IT IS ORDERED this _____ day of December 1999, that summary judgment shall be granted to the District, and Thomas Lynch shall be dismissed from his tenured position as a custodian (Supervisor of Buildings and Grounds) in the Board's employ as of the date of this order; and

IT IS FURTHER ORDERED that the Board pay respondent his full salary and emoluments for the period from August 12, 1999 up to September 29, 1999, the date of its certification of tenure charges against him.[2]

COMMISSIONER OF EDUCATION

December 13, 1999

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

414-99

IN THE MATTER OF THE TENURE HEARING OF CHRISTOPHER WANNEMACHER, MANCHESTER REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY.

CHRISTOPHER WANNEMACHER,

PETITIONER,

V.

BOARD OF EDUCATION OF THE MANCHESTER REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT

IN THE MATTER OF THE TENURE HEARING OF CHRISTOPHER WANNEMACHER, PASSAIC COUNTY MANCHESTER REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION.

OAL DKT. NO. EDU 7096-99
AGENCY DKT. NO. 134-6/99

CHRISTOPHER WANNEMACHER,

Petitioner,

v.

MANCHESTER REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION,

Respondent.

OAL DKT. NO. EDU 9126-99
AGENCY DKT. NO. 200-7/99

Rodney T. Hara, Esq., for the Passaic County Manchester Regional High School District Board of Education (Fogarty & Hara, attorneys)

Sheldon H. Pincus, Esq., for Christopher Wannemacher (Bucceri & Pincus, attorneys)

Record Closed: October 26, 1999 Decided: October 27, 1999

BEFORE **RICHARD McGILL**, ALJ:

The Passaic County Manchester Regional High School District Board of Education filed charges with the Commissioner of Education against Christopher Wannemacher, whom it employees as a tenured teacher. The matter was transferred to the Office of Administrative Law on June 18, 1999, for determination as a contested case.

Thereafter, Wannemacher filed a petition with the Commissioner of Education seeking a determination that the decision to withhold his increment for the 1999-2000 school year was arbitrary and capricious. This matter was transferred to the Office of Administrative Law on August 11, 1999, for determination as a contested case. The two matters were consolidated for hearing.

Prior to hearing, the parties agreed to a settlement which resolves the dispute with respect to the tenure charges and the withholding of the increment. Having reviewed the record and the settlement terms, I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Oct. 27, 1999
DATE

Richard McGill
RICHARD McGILL, ALJ

Receipt Acknowledged:

10-29-99
DATE

Debbie Catanzaro Hitt
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 1 1999
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

OCT 26 8 20 AM '99

FOGARTY & HARA, ESQS.
16-00 Route 208 South
Fair Lawn, New Jersey 07410
(201) 791-3340
Attorneys for Passaic County
Manchester Regional High School
District Board of Education

IN THE MATTER OF TENURE CHARGES AGAINST CHRISTOPHER WANNEMACHER, PASSAIC COUNTY MANCHESTER REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION.	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW Agency Ref. No. 134-6/99 OAL Dkt No. EDU 07096-99N
CHRISTOPHER WANNEMACHER, Petitioner, v. MANCHESTER REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW Agency Ref. No. 200-7/99 OAL Dkt No. EDU 9126-99

This AGREEMENT made this 21st day of October 1999 between the Passaic County Manchester Regional High School

District Board of Education, which has offices located at 70 Church Street, in the Borough of Haledon, County of Passaic and State of New Jersey (hereinafter referred to as the "Board"), and Christopher Wannemacher, who resides at 59 Quarry Road in the Township of Wantage, County of Sussex and State of New Jersey (hereinafter referred to as "Wannemacher").

WITNESSETH:

WHEREAS, Wannemacher has been employed by the Board as a science teacher at Manchester Regional High School since the 1989-1990 school year and has obtained tenure under his instructional certificate;

WHEREAS, on April 5, 1999, the Board served Wannemacher with fourteen (14) tenure charges of unprofessional and unbecoming conduct, together with supporting statement of evidence;

WHEREAS, the Board advised Wannemacher that he had fifteen (15) days in which to file with the Board a written response to the tenure charges;

WHEREAS, on April 19, 1999, Wannemacher notified the Board, without explanation, that he did not feel it was necessary for the Board to certify tenure charges against him but he did not respond to the factual allegations contained in the tenure charges at that time;

WHEREAS, on May 27, 1999, the Board passed a resolution to certify the tenure charges to the Commissioner of Education and suspend Wannemacher without pay, effective May 28, 1999;

WHEREAS, the tenure charges were filed with the Commissioner of Education on June 1, 1999;

WHEREAS, on June 24, 1999, the Board passed a resolution withholding Wannemacher's employment and adjustments increments for the 1999-2000 school year based on the facts contained in the tenure charges;

WHEREAS, Wannemacher filed a petition with the Commissioner of Education which challenged the Board's action to withhold Wannemacher's salary increments; said action contended that the alleged factual basis underlying the withholding and the tenure charges was false in fact, arbitrary and capricious;

WHEREAS, on June 14, 1999, Wannemacher filed an Answer denying, without explanation, the tenure charges filed against him;

WHEREAS, the tenure charges were transmitted to the Office of Administrative Law and assigned to the Honorable Richard McGill, A.L.J.;

WHEREAS, on August 18, 1999, Judge McGill granted Wannemacher's motion to consolidate the tenure charges and the withholding of increments petition;

WHEREAS, the parties propounded interrogatories and requests for production of documents upon each other;

WHEREAS, upon receipt of Wannemacher's answers to interrogatories and response to the request for production of documents, the Board for the first time discovered Wannemacher's explanation to the tenure charges and evidence in support of his position;

WHEREAS, the Board has conducted a thorough review of Wannemacher's response to the tenure charges as well as the discovery information that he submitted in support of his position, and as a result of such review, the Board has determined that there is a factual basis for the defenses asserted which makes it difficult to conclusively determine that the tenure charges will result in dismissal or remand of tenure, thus making it prudent for the Board to reassess its position on the tenure charges before proceeding with a lengthy and costly tenure proceeding;

WHEREAS, since the tenure charges have been filed, Wannemacher realizes that the reputational damages caused by the allegations of the charges, even though they are denied, may have compromised his ability to function as a teacher in the Manchester Regional High School District (hereinafter referred to as "District") and thus caused him to reassess his desire to continue his employment at Manchester Regional High School;

WHEREAS, the parties' position since the filing of the tenure charges can be addressed through a settlement agreement;

WHEREAS, the Board and the superintendent of schools of the District are not of the opinion that tenure charges might warrant revocation or suspension of Wannemacher's teaching certificate, regardless of whether the tenure charges are litigated or settled;

WHEREAS, the terms of the settlement take into account that the employment decisions for the 1999-2000 school year have already been made by school districts and that a time period for Wannemacher to secure alternative employment is needed;

WHEREAS, Wannemacher will continue to receive his salary until a decision is rendered by the Commissioner of Education;

WHEREAS, eight days of hearing were scheduled with the possibility of additional hearing dates being needed;

WHEREAS, litigation of the tenure charges would cause disruptions to the educational program in the District due to the absence of administrators, teachers and students who will have to testify at the hearing;

WHEREAS, since the Board will incur substantial financial costs to continue the litigation, it would be cost effective to negotiate a settlement which would also enable the parties to effectuate a mutually acceptable decision on Wannemacher's employment in the District;

WHEREAS, the parties agree that a settlement is consistent with the public interest and the best interest of the Manchester Regional High School District;

NOW, WHEREFORE, based on the foregoing premises and the mutual promises and covenants contained herein, the parties agree as follows:

1. Wannemacher hereby resigns from his position of teacher with the Board and relinquishes all tenure and seniority rights, effective November 1, 2000, subject only to the approval of this Agreement by the Board, the Office of Administrative Law and the Commissioner of Education, and the provisions of paragraph 16 of this Agreement. Wannemacher submits his resignation knowingly, voluntarily and irrevocably, free of coercion or duress, after consulting with counsel and receiving

advice as to its ramifications. Wannemacher will sign an irrevocable letter of resignation from all employment with the Board. The form of Wannemacher's irrevocable letter of resignation is attached hereto as Exhibit A.

2. The Board, by resolution, will publicly approve and accept the resignation of Wannemacher at its next regularly scheduled meeting, effective November 1, 2000. The form of the Board's resolution is attached hereto as Exhibit B.

3. Wannemacher hereby requests a leave of absence with pay commencing the date this Agreement is approved by the Commissioner of Education and ending on October 31, 2000. The form of Wannemacher's letter requesting a leave of absence with pay is attached hereto as Exhibit C. The Board shall provide Wannemacher with a mutually convenient time to obtain all of his personal belongings.

4. The Board, by resolution, will publicly approve and accept Wannemacher's requested leave of absence with pay commencing the date this Agreement is approved by the Commissioner of Education and ending October 31, 2000. The form of the Board's resolution is attached hereto as Exhibit B.

5. The Board agrees to withdraw, with prejudice, its tenure charges in the above-captioned matter bearing O.A.L. Docket No. EDU-7096-99 and Agency Ref. No. 134-6/99, subject to the approval of this Agreement by the Office of Administrative Law and the Commissioner of Education.

6. Wannemacher agrees to withdraw, with prejudice, the Verified Petition before the Commissioner of Education, bearing OAL Docket No. EDU 9126-99 and Agency Ref. No. 200-7/99,

which challenges the withholding of his increments, subject to the approval of this Agreement by the Office of Administrative Law and the Commissioner of Education.

7. In consideration for Wannemacher's resignation effective November 1, 2000, the Board agrees to pay Wannemacher the following compensation:

(a) Restore Wannamacher's salary, including advisor positions, during the period of suspension without pay from May 28, 1999 through June 30, 1999 -- $7,153.54 less applicable taxes and the usual and customary deductions.

(b) Payment of 1998-1999 attendance incentive in accordance with the provisions of the collective negotiations agreement between the Board and the Manchester Education Association -- $450.00.

(c) Restore Wannemacher's salary increments for the 1999-2000 school year and the salary, including advisors positions, during the period of suspension from September 1, 1999 through September 26, 1999, which will effectively result in the payment of salary for the 1999-2000 school year based on the appropriate level of the salary guide, including longevity and advisor positions - $70,414.00 less applicable taxes and the usual and customary deductions. All salary paid to Wannemacher during the 1999-2000 school year pursuant to N.J.S.A. 18A:6-14 shall be deducted from this amount.,

(d) Reimburse Wannemacher for insurance premiums purchased in accordance with the provisions of COBRA during the period of suspension without pay - $1,736.55 (lump sum payment without deductions). A signed voucher, together with proof of payment, shall be submitted to the Board.

(d) Payment of salary based on the level of the salary guide for the 1999-2000 school year, including longevity but exclusive of stipend positions, from September 1, 2000 through October 31, 2000 -- $13,620.00 less taxes and the usual and customary deductions.

All monies due to Wannemacher under this Agreement will be paid upon final approval of this Agreement by the Commissioner of Education.

8. The Board will continue to provide Wannemacher with health, medical, prescription and dental insurance in accordance with the collective negotiations agreement between the Board and Manchester Education Association through October 31, 2000, subject to the approval of the Office of Administrative Law and the Commissioner of Education. If, however, Wannemacher secures alternative employment prior to October 31, 2000 which provides insurance benefits, the Board will have no further obligation to provide health, medical, prescription and dental benefits to Wannemacher after the conclusion of any eligibility waiting period. In the event that Wannemacher's insurance coverage is terminated prior to November 1, 1999, Wannemacher can reenroll through the Board's insurance carrier, subject to the applicable rules and regulations, and if authorized by the Board's insurance carrier, insurance benefits will be reinstated through October 31, 2000. Upon his termination and consistent with his rights under the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA"), Wannemacher shall be able to purchase at his own cost and expense, the insurance coverages presently provided to other teaching staff members in the Manchester Regional High School District and set forth in the collective negotiations agreement aforesaid.

9. During Wannemacher's leave of absence with pay, no benefits (such as sick days, personal days, and bereavement

days) in accordance with the provisions of the collective negotiations agreement, other than those specifically addressed in paragraph 8 of this Agreement, shall accrue to Wannemacher or become an obligation of the Board.

10. Wannemacher will receive no compensation by the Board for any accumulated sick days earned during his period of employment with the Board.

11. Wannemacher shall be solely responsible for the reimbursement of any unemployment compensation or benefits he received while in the employ of the Board and for which he is required to repay.

12. All references and requests for letters of recommendation shall be given to and issued only by the Assistant Superintendent of Schools, who had evaluated Wannemacher during the course of his employment with the Board. The references and letter of recommendation shall be consistent with the Assistant Superintendent's evaluations. No other administrator employed or hereafter employed by the Board, or Board member, shall release any other information concerning Wannemacher except Wannemacher's name, title, position, salary, payroll record, length of service, date of separation and reason therefor (to wit: voluntary resignation) as authorized by Executive Order No. 11.

13. Neither Wannemacher nor the Board shall make any statements about the other which would tend to disparage or defame the other. Neither party shall undertake any act constituting a reprisal against the other for having instituted or defended the subject matter of these actions.

14. The compensation and benefits specified in paragraphs 7 and 8 above of this Agreement are to be provided in consideration for Wannemacher waiving any and all claims he has, or could have, against the Board, its agents, officers, employees, servants, representatives and attorneys, or any one of them, and any student who made an oral or written statement about Wannemacher to the District in connection with the tenure charges, including, but not limited to, claims for discrimination, contract, tort or constitutional violations, or attorney's fees. Wannemacher shall execute a General Release in favor of the Board releasing the Board, its officers, agents, servants, attorneys or employees, or any one of them, and any students who made an oral or written statement about Wannemacher to the District from all claims, liabilities or expenses to which it may be subject, arising from any claims or rights of Wannemacher. The form of the General Release is attached hereto as Exhibit D. Notwithstanding the signing of the release, the Board remains obligated to indemnify Wannemacher against claims by students and their parents which pertain to the tenure charges in accordance with the provisions of N.J.S.A. 18A:16-6 and 6.1. Nothing in this Agreement or the documents referenced herein shall preclude either party from bringing an action to enforce performance of any term of this Agreement should there be a default in performance.

15. The Board, John Petrelli, Superintendent of Schools of the Manchester Regional High School District, and Hank Sinatra, Principal of Manchester Regional High School, shall execute a General Release in favor of Wannemacher

releasing him from all claims, liabilities, or expenses to which he may be subject to, arising from any claims or rights of any of them. The form of General Release is attached hereto as Exhibit E.

16. The parties acknowledge that this Agreement shall be submitted to the Office of Administrative Law and the Commissioner of Education for review and approval, and that the terms of this Agreement are expressly made subject to and contingent upon such review and approval and the matter not being referred to the State Board of Examiners for possible revocation of Wannemacher's teaching certificate. In the event that the Commissioner of Education disapproves and/or rejects any of the terms contained herein or the Commissioner of Education refers the matter to the State Board of Examiners, this Agreement shall be null and void and shall not be evidential or used by either party in any proceeding involving any party to this Agreement. In addition, the parties shall return to the same positions which they held prior to this Agreement.

17. The signing of this Agreement does not constitute nor should it be interpreted as an admission of wrongdoing or guilt on the part of Wannemacher or that the Board had acted improperly in preferring the tenure charges.

18. The parties acknowledge that each has consulted with an attorney or a representative of their own choosing prior to signing this Agreement and that each sign this Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein.

19. This Agreement shall be subject to the laws of the State of New Jersey.

20. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Agreement and bind the Board to its terms.

21. Wannemacher hereby declares that he is of sufficient physical, mental and emotional capacities to understand and agree to all of the terms and conditions of this Agreement and agrees that he is and will continue to be bound by these terms and conditions in the future.

22. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

IN WITNESS, WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

WITNESS:

Dale Currey

~~Paul Stabile~~, Board Secretary/~~School Business Administrator~~

ACTING DALE CURREY

Dated: October 21, 1999

MANCHESTER REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION

By: Anthony Griffo
Board President

Dated:

WITNESS:

Sheldon H. Pincus, Esq.

Dated: 10/28/99

Christopher Wannemacher

Dated: 10/20/99

CHRISTOPHER WANNEMACHER
59 Quarry Road
Wantage, New Jersey 07461

October 21, 1999

Mr. Anthony Griffo, Board President
Manchester Regional High School
District Board of Education
70 Church Street
Haledon, New Jersey 07508

Re: Letter of Resignation

Dear Mr. Griffo:

Pursuant to the terms of the Agreement between the Manchester Regional High School District Board of Education and myself, I hereby submit my irrevocable resignation from the position of teacher, effective November 1, 2000. This resignation is expressly conditioned upon the Board's compliance with the terms of the parties' Agreement and the general release and is of no force or effect, even if accepted, unless said Agreement and the general release which I have executed are fully performed by the Board.

Sincerely,

Christopher Wannemacher

RESOLUTION

BE IT RESOLVED by the Passaic County Manchester Regional High School District Board of Education as follows:

1. The request of Christopher Wannemacher to resign his employment by the Board, effective November 1, 2000, is hereby granted and accepted.

2. The request by Christopher Wannemacher for a leave of absence for personal reasons through October 31, 2000 is hereby granted and approved pursuant to N.J.S.A. 18A:30-7.

3. The terms, stipulations and conditions as established in an Agreement, annexed to this Resolution, dated October 21, 1999 are hereby adopted and approved by the Board of Education. The President and Secretary of the Board of Education are hereby authorized and directed to execute the attached Agreement and any other documents necessary to effect this Agreement.

ROLL CALL VOTE:

AYES: BERRY, DEMAREST, FISCHER, GRIFFO, STOLL, VANDER MOLEN

NAYS: FELICE

ABSTENTIONS: ESPOSITO

CERTIFICATION

I hereby certify that the foregoing Resolution is a true copy of the Resolution which the Passaic County Manchester Regional High School District Board of Education adopted by a majority vote at its duly authorized meeting on October 21, 1999.

Dale Currey

~~Paul J. Stabile~~, ~~School Business Administrator~~/Board Secretary
ACTING DALE CURREY

Dated: October 21, 1999

CHRISTOPHER WANNEMACHER
59 Quarry Road
Wantage, New Jersey 07461

Mr. Anthony Griffo, Board President
Manchester Regional High School
District Board of Education
70 Church Street
Haledon, New Jersey 07508

Re: Letter Requesting Leave of Absence

Dear Mr. Griffo:

I hereby request of the Board that I be granted a leave of absence with pay according to the terms of the Agreement, dated October 21, 1999. I request that this leave begin effective the date the Agreement is approved by the Commissioner of Education and end on October 31, 2000.

Thank you for your consideration of my request.

Sincerely,

Christopher Wannemacher

RELEASE

This Release, dated October 20, 1999, is given BY the Releasor(s) Christopher Wannemacher, referred to as "I",

TO Manchester Regional High School District Board of Education, its officers, agents, servants, attorneys or employees, or any one of them, and any student who made an oral and/or written statement to the Manchester Regional High School District in connection with the tenure charges, referred to as "You". If more than one person signs this Release, "I" shall mean each person who signs this Release.

1. **Release.** I release and give up any and all claims and rights which I may have against you. This releases all claims, including those of which I am not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now. I specifically release the following claims:

More particularly any and all claims arising out of the employment relationship between Christopher Wannemacher and the Manchester Regional High School Board of Education, including but not limited to, any cause of action pursuable before any state or federal court or agency, any pension claim(s) arising with the New Jersey Division of Pensions and Teachers' Pension and Annuity Fund, or grievance through a collective negotiations agreement which allege a violation of any other federal or state statutory provision, administrative regulation or other act that has the force and effect of law.

This Release does not apply to any rights which Christopher Wannemacher may have under the terms of the Settlement Agreement between Christopher Wannemacher and the Manchester Regional High School District Board of Education.

2. **Payment.** I have been paid a total of $1.00, and other good and valuable consideration as set forth more specifically in the Agreement, dated October 21, 1999, in full payment for making this Release. I agree that I will not seek anything further including any other payment from you.

3. **Who is Bound.** I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities, such as your heirs or the executor of your estate.

4. **Signatures.** I understand and agree to the terms of this Release. If this Release is made by a corporation its proper corporate officers sign and its corporate seal is affixed.

Witnessed or Attested by:

Christopher Wannemacher (Seal)

STATE OF NEW JERSEY)
SS:
COUNTY OF PASSAIC)

BE IT REMEMBERED that on this 20th day of October, 1999, before me personally appeared Christopher Wannemacher, who I am satisfied is the person mentioned in and who executed the within Agreement and who knows the contents thereof and thereupon I acknowledge that she signed, sealed and delivered the same as his/her voluntary act and deed for the uses and purposes therein expressed.

(Print name and title below signature
Sheldon H. Pincus, Esq.
Attorney-at-Law
State of New Jersey

RELEASE

This Release, dated October , 1999 , is given

BY the Releasor(s) John Petrelli, Superintendent of Schools for the Manchester Regional High School District, Hank Sinatra, Principal of Manchester High School, and the Manchester Regional High School District Board of Education, its officers, agents, servants, attorneys or employees or any one of them,

referred to as "I". If more than one person signs this Release, "i" shall mean each person who signs this Release.

TO Christopher Wannemacher, referred to as "You".

1. Release. I release and give up any and all claims and rights which I may have against you. This releases all claims, including those of which I am not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now. I specifically release the following claims:

More particularly any and all claims arising out of the employment relationship between Christopher Wannemacher and the Manchester Regional High School Board of Education, including but not limited to, any cause of action pursuable before any state or federal court or agency, or any other federal or state statutory provision, administrative regulation or other act that has the force and effect of law.

This Release does not apply to any rights which Christopher Wannemacher may have under the terms of the Settlement Agreement between Christopher Wannemacher and the Manchester Regional High School District Board of Education.

2. Payment. I have been paid a total of $1.00, and other good and valuable consideration as set forth more specifically in the Agreement, dated October 21, 1999, in full payment for making this Release. I agree that I will not seek anything further including any other payment from you.

3. Who is Bound. I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities, such as your heirs or the executor of your estate.

4. Signatures. I understand and agree to the terms of this Release. If

this Release is made by a corporation its proper corporate officers sign and its corporate seal is affixed.

MANCHESTER REGIONAL HIGH SCHOOL
DISTRICT BOARD OF EDUCATION

By: _____
Anthony Griffo
Board President

_____
John Petrelli,
Superintendent of Schools

_____
Hank Sinatra, Principal
Manchester Regional High School

(Seal)

School

Witnessed or Attested by:

_____
~~Paul J. Stabile, School Business Administrator/~~
ACTING Board Secretary
DALE CURREY

STATE OF NEW JERSEY)
SS:
COUNTY OF PASSAIC)

BE IT REMEMBERED that on this day of , 1999, before me personally appeared Anthony Griffo, John Petrelli Hank Sinatra and Paul Stabile, who I am satisfied is the person mentioned in and who executed the within Agreement and who knows the contents thereof and thereupon I acknowledge that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

_____
Rodney T. Hara, Esq.
Attorney-at-Law
State of New Jesey

OAL DKT. NOS. EDU 7096-99 AND EDU 9126-99 (CONSOLIDATED)
AGENCY DKT. NOS. 134-6/99 AND NO. 200-7/99

IN THE MATTER OF THE TENURE HEARING OF CHRISTOPHER WANNEMACHER, MANCHESTER REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY.	
CHRISTOPHER WANNEMACHER, PETITIONER, V. BOARD OF EDUCATION OF THE MANCHESTER REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY, RESPONDENT.	COMMISSIONER OF EDUCATION DECISION

The record, settlement agreement and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, in this consolidated matter has been reviewed.

Upon careful and independent review of the full record of this matter and the terms of the proposed settlement agreement, the Commissioner is compelled to reject such agreement as it is currently structured since he cannot be satisfied by the present record that the proposed settlement meets the *Cardonick* standards for settlement of tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, affirmed State Board of Education April 6, 1983, 1990 *S.L.D.* 842, 846.

It is well-established that, having once taken up the burden of tenure charges, the Board may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges can no longer be pursued *or* why it is now in the public interest not to pursue them. *In the Matter of the Tenure Hearing of Kenneth Smith, School District of the City of Orange*, Essex County, decided by the Commissioner March 22, 1982, decision on remand June 16, 1983, *aff'd with modification* by the State Board of Education November 2, 1983, *aff'd* New Jersey Superior Court January 30, 1986. The present record contains no such explanation, notwithstanding that the agreement indicates that "the Board has determined that there is a factual basis for the defenses asserted [by Wannemacher] which makes it difficult to conclusively determine that the tenure charges will result in dismissal or remand of tenure***." (Stipulation of Settlement at p. 4)

The Commissioner notes that his determination in this regard was highly influenced by the serious nature of the charges, and the dearth of information on the record providing a "factual basis for the defenses asserted" by Wannemacher. Although the parties reference interrogatories which, apparently, offer a basis for Wannemacher's defense, no such interrogatories are included in the record for the Commissioner's review; and, indeed, *no defenses* have been advanced on the record, outside of Wannemacher's general denial of all charges.[1] Additionally, in this connection, the Commissioner cannot sanction a settlement which fails to explain *why*, where the Board has brought serious charges against a teacher, it is now *in the public's interest* to continue to pay this teacher for almost one full year as a condition of

[1] The Commissioner notes that Wannemacher did not, prior to the certification of the within charges, meaningfully deny the charges. To the contrary, he merely stated, in pertinent part, "Other than to say that I do not feel it is necessary for the Board of Education to certify tenure charges against me, I have nothing further to say at this time. My position and evidence will be made known at the hearings to be scheduled in this matter." (Statement of Charges at Exhibit 4, Wannemacher's Answer to Charges, dated April 16, 1999) After the charges were certified to the Commissioner, Wannemacher's Answer consisted primarily of a series of denials, without explanation.

settlement, and to offer him multiple reimbursements, which payments amount to the outlay of considerable public funds.

Further, it is noted that settlement term number 12 provides, *inter alia*, that, with respect to references and requests for letters of recommendation, the Board shall act as authorized by Executive Order No. 11,[2] and the Assistant Superintendent of Schools shall, upon such request, indicate that the reason for Wannemacher's separation was "voluntary resignation." (Stipulation of Settlement at p. 9) However, based on the record before him, and recognizing that this agreement contemplates Wannemacher's return to teaching, the Commissioner cannot approve the characterization of Wannemacher's resignation that the parties so propose, as such terms do not "adequately protect the public interest and *** the interests of New Jersey's public school districts ***." *Barbara Holder v. Board of Education if the Township of Piscataway, Middlesex County*, State Board of Education decision April 7, 1993.[3] The Commissioner cannot consent to terms in a settlement that would infringe in any way on the right, or indeed, the obligation, of the Board to be more forthcoming in responding to inquiries that might arise concerning Wannemacher's employment with the Board. *See, e.g., John Salsberg v. Board of Education of the Town of Boonton, Morris County*, decided by the Commissioner May 11, 1989.

---

[2] Executive Order No. 11 (1974) states, in pertinent part, that the following information must be public:

> a. An individual's name, title, position, salary, payroll record, length of service in the instrumentality of government and in the government, *date of separation from government service and the reason therefor*; and the amount and type of pension he is receiving;
>
> b. Data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but in no event shall detailed medical or psychological information be released. *** (emphasis added)

[3] *Distinguish, Barbara Holder v. Board of Education of the Township of Piscataway, Middlesex County,* State Board of Education decision April 7, 1993, where, in a dispute which did not involve tenure charges brought against a teacher, and where allegations as to the teacher's underlying conduct were not as serious as those in the instant matter, the terms of the settlement agreement were found to be consistent with law, and the parties' agreement to alter petitioner's evaluation documents, upon her resignation, were nevertheless found to adequately protect the public interest.

Additionally, contrary to the requirements of *Cardonick, supra*, the parties have expressly indicated that the within agreement is made subject to, and contingent upon, this matter *not* being referred to the State Board of Examiners, notwithstanding that it is the Commissioner's duty pursuant to *N.J.A.C.* 6:11-3.6, to refer tenure determinations for possible revocation of certificate. (Stipulating of Settlement at p. 11) On its face, this term cannot stand.

While the Commissioner does not preclude the possibility of settlement in this matter, he stresses that in order for him to meet his own obligation to the schools and children of this state, he must be assured that any settlement is consistent with appropriate standards for setting aside tenure matters as expressed in *Cardonick, supra.*

Accordingly, the proposed settlement is rejected for the reasons expressed herein. The Commissioner hereby remands this matter to the OAL for revision of the settlement agreement and expansion of the record, consistent with the concerns set forth above. In the alternative, if the parties are unwilling or unable to settle consistent with the Commissioner's decision herein, this matter may move to plenary hearing on the merits to allow Wannemacher to defend himself against the Board's charges, thereby also providing him the opportunity to exonerate himself and restore his reputation. (Stipulation of Settlement at p. 4)[4]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[4] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

December 13, 1999
Date of mailing, December 14,1999

415-99

BEVERLY J. STURM,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOUNT ARLINGTON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

Decmeber 13, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11003-99
AGENCY DKT. NO. 233-8/99

BEVERLY J. STURM,
Petitioner,
v.
MOUNT ARLINGTON
BOARD OF EDUCATION,
Respondent.

John J. Ross, Esq., for petitioner

Vito A. Gagliardi Jr., Esq., for respondent
(Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen, attorneys)

Record Closed: November 18, 1999 Decided: November 18, 1999

BEFORE: **KEN R. SPRINGER**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 28, 1999, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.*. 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Nov. 18, 1999
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

11/24/99
DATE

Debbie Antamatteo/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 29 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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OFFICE OF ADMIN. LAW

Oct 14 11 56 AM '99

RAVIN, SARASOHN, COOK,
BAUMGARTEN, FISCH & ROSEN,
A Professional Corporation
103 Eisenhower Parkway
Roseland, New Jersey 07068-1072
(973) 228-9600
Attorneys for Respondent
Mt. Arlington Board of Education

BEVERLY J. STURM, Petitioner, v. MT. ARLINGTON BOARD OF EDUCATION, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION Agency Docket No.: 375-10/97 OAL Docket No. EDUOR 11249-97N

BEVERLY J. STURM, Petitioner, v. MT. ARLINGTON BOARD OF EDUCATION, Respondent.	:	Agency Docket No.: 233-8/99 **SETTLEMENT AGREEMENT**

1. Beverly Sturm, employed by the Mt. Arlington Board of Educatior ("Board"), as its Board Secretary/School Business Administrator, hereby submits her resignation effective March 1, 2001 subject specifically to the following terms and conditions.

2. Ms. Sturm will dismiss, with prejudice, the two pending actions referenced above. The Board will resolve the issue of the allege

reduction in Ms. Sturm's compensation by retroactively increasing her salary by $4640.50 for the 1997-98 school year and by $4640.50 for the 1998-99 school year. This would result in the Board owing Ms. Sturm a total of $9,281.00. Payment of this salary due and owing will be made as follows: $4640.50 will be paid to Ms. Sturm between January 1, 2000 and January 15, 2000, and $4640.50 will be paid on or before July 31, 2000. This shall be the only payment beyond the existing salary obligations which the Board owes to Ms. Sturm.

3. Ms. Sturm will continue to be paid at the rate of her present salary through March 1, 2001. The parties have agreed that, due to certain recurring medical issues, Ms. Sturm will commence an extended sick leave on September 30, 1999 and will not return to work thereafter. Ms. Sturm will use all remaining sick days, vacation days, personal days and leave days to cover the period of this leave; to the extent that the days available to Ms. Sturm are insufficient, the Board will continue to maintain her at her current salary through the effective date of her resignation (approximately 34 days are expected to be left once her available days are exhausted).

4. Her resignation is effective March 1, 2001, after which she will no longer be an employee of the Board. However, prior to that time, she will be considered an employee for all purposes, including but not limited to salary and benefits. This includes the Board's obligation to make pension contributions and to pay her NJASBO dues.

5. For and in consideration of the mutual promises set forth herein, Ms. Sturm, for herself, and for her agents, heirs, executors, administrators and assigns, fully, irrevocably, and unconditionally releases and discharges the Board, its employees and its agents from any

and all claims, demands, causes of action and liabilities of any kind. This release specifically includes any claim of entitlement to a tenured position, or any other type of employment with the Board, after March 1, 2001.

6. After September 30, 1999, no further documentation will be added to Ms. Sturm's personnel file. Furthermore, the Board shall release copies of documents contained specifically therein only upon the written consent of Ms. Sturm or pursuant to Court Order.

7. The Board shall agree not to make any negative comments -- written or oral -- regarding Ms. Sturm including but not limited to her job performance or abilities. Ms. Sturm shall agree to the same regarding the Board. In the event the Board receives any inquiries from any individuals or entity, including but not limited to any prospective employers of Ms. Sturm, the Board shall advise that it is the policy of the Board to respond to such inquiries in writing whereupon the Board will provide a letter to which the parties shall agree in advance. The parties agree that they will not disclose the terms of this Agreement unless such disclosure is required by law or consented to by both parties. For purposes of this paragraph, the reference to the Board shall mean the Board, each of its members, officers, employees and professionals and the staffs of any of its professionals.

8. The parties recognize and agree that the making of this stipulation of settlement is not intended to and does not constitute or imply an admission of liability or any type of wrongdoing by any party, or of any violation of any federal, state or local statute, regulation or ordinance, or violation of any other right by any party, upon any legal or

equitable theory, whether contractual, common law, statutory or otherwise. The parties agree that this stipulation of settlement may not be used to establish precedent in any future proceeding of any type whatsoever, and that it shall be inadmissible in any such proceeding, other than a proceeding to enforce or prove the existence of same.

9. This agreement is specifically contingent upon approval by the Board by recorded roll call vote at a public meeting. In the event that it is not so approved, Ms. Sturm has the right to withdraw her offer of resignation and this agreement shall be null and void.

MT. ARLINGTON BOARD OF EDUCATION

Beverly Sturm

By: _____
J. Patrick Allen, President

By: _____
Thomas J. Ficarra, Superintendent of Schools/Board Secretary, Pro Tempre

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OAL DKT. NO. EDU 11003-99
AGENCY DKT. NO. 233-8/99

BEVERLY J. STURM,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOUNT ARLINGTON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, Settlement Agreement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. [1] The parties are reminded that the Board must fully comply with the requirements of Executive Order No. 11 (1974) in responding to any inquires from prospective employers of respondent. The matter is hereby dismissed, subject to compliance with the terms of the settlement. [2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] The record confirms that the within settlement agreement was approved by the Board at its October 5, 1999 public meeting.

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

December 13, 1999
Date of Mailing: December 14,1999

416-99

BOARD OF EDUCATION OF THE GLOUCESTER COUNTY INSTITUTE OF TECHNOLOGY, GLOUCESTER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, Gloucester County Institute of Technology (GCIT), alleged respondent Lenape owed tuition for nine Lenape students in attendance at GCIT's Southern N.J. Academy for the Performing Arts (Academy) for the 1997-98, 1998-99, 1999-2000 school years and beyond. GCIT contended that the performing arts program at the Academy is approved vocational education, that Lenape concedes having no comparable program, that the students attended, and that tuition was due under *N.J.S.A.* 18A:54-20.1. Lenape contended the petition was untimely filed. Moreover, Lenape alleged the Academy was not approved to provide vocational education, that dance and theater programs do not qualify as vocational education under *N.J.A.C.* 6:43-1.1 to –8.2, and that the Academy's recruitment policies make it resemble a private institution. Lenape did pay transportation costs for those students.

Citing *Kaprow,* the ALJ agreed with GCIT that the matter was not untimely filed since there was no indication in the record through a resolution, minutes, or otherwise that the Lenape Board ever formally passed on the GCIT demand for tuition. The letters from Lenape to GCIT might have served as notice of official action, had there been one, but no notice came from the Board as the ALJ found is required, pursuant to *Kaprow*. Also, in light of an exhibit from the Department of Education, the ALJ found that the Academy's performing arts program is approved occupational education. Thus, Lenape was obligated to pay for the students in attendance in the approved program. The ALJ noted that if the Academy violated conditions of its approval, then that is a separate matter to be brought before the Commissioner as a licensing question. The ALJ denied Lenape's motion for partial summary decision and granted GCIT's motion for summary decision.

The Commissioner concurred with the ultimate conclusion of the ALJ that GCIT was entitled to summary decision in this matter, but he so found based upon a different analysis from that proffered in the Initial Decision. Commissioner found that the actions of the Lenape Board clearly satisfy the requirements envisioned by *Kaprow* sufficient to trigger the running of the 90-day timeline for filing of a petition by GCIT. Thus, the Commissioner found that GCIT's petition was untimely filed. The Commissioner, however, was persuaded that this matter presents a compelling public interest sufficient to warrant relaxation of the 90-day rule. The Commissioner determined that although Lenape honored its obligation with respect to the transportation of these students, it refused to similarly honor its legal responsibility for tuition. The Commissioner found that Lenape's defenses to its withholding of payment were without substance and irrelevant to its responsibility. The Commissioner cannot and will not countenance a local board's refusal to honor its obligations to vocational students because the board does not agree with prevailing decisional interpretations. The Commissioner affirmed Initial Decision with modification. The Commissioner granted summary decision to GCIT and directed Lenape to remit the tuition owed GCIT for the attendance of its resident students at the Academy for the 1997-98, 1998-99, 1999-2000 school years and thereafter, pursuant to a mutually acceptable payment schedule. The Commissioner directed Gloucester County Superintendent of Schools to review GCIT's student acceptance practices.

December 16, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10120-98

AGENCY DKT. NO. 444-9/98

BOARD OF EDUCATION OF THE GLOUCESTER COUNTY INSTITUTE OF TECHNOLOGY, GLOUCESTER COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,

Respondent.

Raymond J. Zane, Esq., and **Donna Sigel Platt,** Esq., for petitioner (Zane & Lozuke, attorneys)

Louis L. Chodoff, Esq., and **John C. Barnoski,** Esq., for respondent (Archer & Greiner, attorneys)

Record Closed: October 4, 1999 Decided: October 28, 1999

BEFORE **SOLOMON A. METZGER,** ALJ:

This matter arises out of a claim by the Board of Education of the Gloucester County Institute of Technology (GCIT) that the Board of Education of the Lenape Regional High School District (Lenape) is obliged to pay for Lenape students in attendance at GCIT's Southern New

Jersey Academy for the Performing Arts (Academy) for the 1997/98 school year and beyond.[1] The matter falls under the jurisdiction of the Department of Education, *N.J.S.A.* 18A:6-9, and was transmitted to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13. The parties have filed cross-motions for summary decision pursuant to *N.J.A.C.* 1:1-12.5; *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520 (1995).

The facts for purposes of the cross-motions are undisputed. On May 9, 1997, Victor C. Morella, GCIT's superintendent, wrote to Dr. Daniel Hicks, the Lenape superintendent, informing him that students from the Lenape district had been admitted to the Academy. The letter reflects GCIT's expectation that Lenape will pay transportation costs, and after an exchange of correspondence over the summer, Lenape assented. On September 26, 1997, Daniel T. Greene, GCIT's business administrator/board secretary, addressed a letter to Lenape indicating that nine Lenape students had actually enrolled and noted for the first time a tuition cost of $7,600 per pupil, or a total cost of $68,400. Payment could be made monthly over the course of the school year, or in full on July 1, 1998.

On February 2, 1998, Arthur F. Risden, Esq., wrote to Mr. Greene indicating that Lenape had reviewed the September 1997 request for tuition and was "not in a position to enter into the Education Tuition Contract Agreement inasmuch as there [was] no sending-receiving relationship between Lenape and [GCIT]." GCIT's former counsel, Joseph F. Betley, Esq., responded to Mr. Risden on February 4, and 5, 1998, seeking to further explain GCIT's position. On February 6, 1998, Thomas S. Rende, Lenape assistant superintendent, wrote to Mr. Greene indicating that Lenape would not pay tuition for the reasons expressed in Mr. Risden's earlier correspondence. On February 12, 1998, Mr. Risden responded to Mr. Betley's letters, further explaining his legal stance and again expressing Lenape's unwillingness to pay.

On July 6, 1998, Mr. Morella wrote to Dr. Hicks advising him of the Lenape students who would be attending GCIT in the 1998/99 school year. Mr. Greene wrote to Lenape on July 10, 1998, indicating that tuition for the 1997/98 school year, which had been due by July 1, 1998, had not been received and that GCIT would seek legal recourse if payment were not forthcoming.

[1] GCIT's motion to amend its petition to add school years 1998/99, 1999/00 and beyond was granted pursuant to *N.J.A.C.* 1:1-6.2, in the interest of efficiency and to avoid future litigation.

Mr. Risden replied by letter of July 22, 1998, indicating that Lenape stood by the position it took in February 1998. Mr. Greene wrote to Lenape on August 31, 1998, to indicate that eleven of its students would be attending the Academy for the 1998/99 school year and again requested tuition. On September 22, 1998, Mr. Risden forwarded what had now become his standard reply. On September 24, 1998, GCIT filed a petition with the Commissioner claiming tuition for the 1997/98 school year. GCIT's amended petition seeks $83,600 as tuition for eleven students in attendance at the Academy in 1998/99, $85,000 for ten students in attendance during this school year, and, all things being equal, an order requiring Lenape to pay for such students in future years.

Dr. Hicks submitted an affidavit stating that when GCIT's demand for tuition was first received in September 1997, he took the matter up with the Board of Education and was authorized to contact Mr. Risden for an opinion. Based on that opinion, the Board felt no responsibility to pay and Mr. Risden and Mr. Rende were directed to so inform GCIT. This is the substance of the record for purposes of the cross-motions.

Lenape argues that GCIT's petition is untimely and must be dismissed as a matter of law. *N.J.A.C.* 6:24-1.2(c) provides:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

This regulation was most recently examined by the New Jersey Supreme Court in *Kaprow v. Board of Education of Berkeley Township*, 131 *N.J.* 572 (1993), and both parties draw support from different aspects of the opinion. In June 1981, Maurice Kaprow's employment as a tenured assistant superintendent was terminated by the Berkeley Township Board of Education in a reduction in force (RIF). In 1986 and 1987, the board made two appointments to which Kaprow might have asserted post-RIF claims, but he was given no notice of these actions. On February 23, 1988, Kaprow asked the board secretary about any such positions and she wrote back the same day mentioning these two appointments. By letter of February 28, 1988, to the board,

Kaprow maintained a right to these posts. The board did not answer. Kaprow sent a second letter on April 25, 1988, stating that he wished to resolve the matter amicably and would appreciate a response by May 16, 1988. The board's attorney responded on June 14, 1988, rejecting Kaprow's suggestion of entitlement. On August 1, 1988, Kaprow filed a petition with the Commissioner, and the board argued, *inter alia,* that he was barred by the 90-day rule.

The Court found that the board's appointments in 1986 and 1987 constituted final action as contemplated by the regulation. Notice may have lagged these events, but the board secretary's letter of February 23, 1988, though "unofficial and informal," 131 *N.J.* at 588, was sufficient to trigger the 90-day limitations period. Kaprow's August 1988 petition was thus out of time. The Court went on to say, however, that "[i]n the future, it would be better if such information and notice is officially authorized and communicated by the Local Board." 131 *N.J.* at 588.

Lenape argues from this that if notice from the board secretary was adequate to trigger the regulation in *Kaprow*, then the letters of counsel and an assistant superintendent in February 1998 must activate the limitations period here. Thus, GCIT was required to file its petition with the Commissioner in May, not September, 1998. GCIT understands *Kaprow* differently and I am inclined to this view. The regulation states that the 90-day period begins to run from the date that notice is received of a final order, ruling or other action by the board. There are two elements here; the board must act and notice must be transmitted. The *Kaprow* Court was careful to note that the board had acted when non-tenured personnel were appointed to positions that Kaprow might claim. While notice trailed this event by some time, it nevertheless effectuated the goal of the regulation by letting Kaprow know that the Board had taken adverse action.

There is no indication in this record either through a resolution, minutes, or otherwise that the Lenape Board ever formally passed on the GCIT demand for tuition. Dr. Hicks states that the matter came before the Board and that he was directed to contact counsel and act upon counsel's recommendations. However, the limitations period is initiated with a "final order, ruling, or other action by the district board of education." Final orders and rulings must of necessity come from the Board, and under the maxim *ejusdem generis* the term "other action" ought to be construed as a catchall for the remaining spectrum of Board decisionmaking. The regulation would not run

upon the actions of staff and counsel. Though no reported case that I have seen treats this point directly, they all appear to begin with board action. *See North Plainfield Educ. Ass'n v. North Plainfield Bd. of Educ.*, 96 *N.J.* 587 (1984); *Nissman v. Long Beach Island Bd. of Educ.*, 272 *N.J. Super.* 373 (App. Div. 1993); *Polaha v. Buena Regional Sch. Dist.*, 212 *N.J. Super.* 628 (App. Div. 1986); *Riely v. Hunterdon Central High Sch. Bd. of Educ.*, 173 *N.J. Super.* 109 (App. Div. 1980). The letters from Lenape to GCIT in February 1998 might have served as notice of an official action, had there been one, but even here the *Kaprow* Court preferred that such notice come from the Board.

GCIT's motion for summary decision argues that the performing arts program at the Academy is approved vocational education, that Lenape concedes having no comparable program [GCIT Br., Ex. P], that the students attended, and that tuition is therefore due under *N.J.S.A.* 18A:54-20.1. Lenape takes the position that the Academy is not approved to provide vocational education, that dance and theater programs do not qualify as vocational education under *N.J.A.C.* 6:43-1.1 to -8.2, and that Academy recruitment policies make it resemble a private institution, which would violate any authorization that it may have. These defenses are without substance. GCIT has produced an exhibit from the Department of Education indicating that the Academy's performing arts program is approved occupational education [GCIT Supp. Br., Ex. B]. There is no reason to look behind this approval. Moreover, in *K.B. & GCIT v. Rancocas Valley Regional High School District Board of Education*, EDU 6974-97, Initial Decision (Nov. 12, 1997), *adopted*, Comm'r (Dec. 29, 1997) <http://lawlibrary.rutgers.edu/>, a case awarding transportation costs for travel to the Academy, the Commissioner observed that the District was also responsible to pay tuition. Finally, if the Academy is violating conditions of its approval then this is a separate matter to be brought before the Commissioner as a licensing question. It has nothing to do with Lenape's present obligation to pay for students in attendance at an approved program. The same defense against a summary decision motion was rejected in *D.F. v. Roselle Park Board of Education*, EDU 5903-98, Initial Decision (May 24, 1999), *adopted*, Comm'r (July 9, 1999) <http://lawlibrary.rutgers.edu/>.

Based on the foregoing, Lenape's motion for partial summary decision is denied; GCIT's motion for summary decision is granted.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10/28/99
DATE

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

11/1/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 2 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

/cc

OAL DKT. NO. EDU 10120-98
AGENCY DKT. NO. 444-9/98

BOARD OF EDUCATION OF THE GLOUCESTER COUNTY INSTITUTE OF TECHNOLOGY, GLOUCESTER COUNTY, PETITIONER, V. BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of the respondent Board of Education of the Lenape Regional High School District (hereinafter "Lenape") and the reply thereto from petitioner Gloucester County Institute of Technology (hereinafter "GCIT") were filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4.

Lenape's exceptions initially urge that the Administrative Law Judge (ALJ) should have dismissed the within petition and amended petition as untimely as they were clearly filed outside of the 90-day timeframe for such filings. In this regard, Lenape proffers that GCIT had "adequate notice," no later than February 12, 1998, that the Lenape Board had decided that it would not pay tuition for residents of the Lenape District to attend CGIT. Notwithstanding this notice, GCIT's Petition of Appeal was not filed until September 24, 1998, and its Amended Petition on October 20, 1999. (Lenape's Exceptions at p. 5) In finding GCIT's petition timely, Lenape argues, the ALJ erred in three ways. First, it advances, he misconstrued *Kaprow, supra,*

"as requiring notice of 'formal' board action, in the form of a 'resolution, minutes, or otherwise.'" *Kaprow*, it advances, makes no such requirement. (*Id.* at p. 7) Rather, Lenape asserts, *Kaprow* stands for the proposition that

> [u]nder *N.J.A.C.* 6:24-1.2(c), the limitations period begins to run when a party has "adequate notice" of a final order, ruling or other action by a board of education. The Court has observed that notice is "adequate" where it is "sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate." *Kaprow*, 131 *NJ* at 587 (citation omitted). Adequate notice should also stimulate litigants to pursue a right of action within a reasonable time so the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims...[while also] "penaliz[ing] dilatoriness and serv[ing] as a measure of repose" by giving security and stability to human affairs. *Id.* at 587. Where the notice satisfies these goals, the formality or informality of the notice is irrelevant. *Id.* at 588. And, where such notice is provided, failure to initiate a contested case within the 90-day period, warrants dismissal of the Petition. (Lenape's Exceptions at p. 6)

Consequently, Lenape attests, "*Kaprow* did not, [as concluded by the ALJ], require the Lenape Board to give notice of any direct or formal action, ***on the GCIT demand for tuition, either through a 'resolution, minutes, or otherwise'; *Kaprow* merely required that the Lenape Board inform GCIT of its decision on the tuition issue, which it did on three separate occasions during February, 1998, through its board secretary and solicitor." (Lenape's Exceptions at pp. 9-10)

Even assuming, *arguendo*, that *Kaprow* requires notice of "formal" or direct board action, the ALJ's second error in finding GCIT's petition timely, Lenape argues, was his failure to recognize that the Lenape Board took such action with regard to GCIT's tuition demand. As recognized by the ALJ in his factual findings, the undisputed affidavit of Dr. Hicks stated:

> [W]hen GCIT's demand for tuition was first received in September 1997, [Dr. Hicks} took the matter up with the Board of Education and was authorized to contact Mr. Risden for an opinion. Based on that opinion, the Board felt no responsibility to

> pay and Mr. Risden and Mr. Rende were directed to so inform GCIT. Opinion, at 3***. (Lenape's Exceptions at p. 10)

As such, the ALJ's own factual findings clearly belie his conclusion that the Board failed to take action on GCIT's demand in that such findings establish "not only was the Lenape Board advised of GCIT's demand for tuition, but it determined that it would deny that demand, and through Dr. Hicks, directed Mr. Risden and Mr. Rende to inform GCIT of same, which they did in writing on February 2, February 6, and February 12, 1998." *(Id.)*

Finally, although recognizing that the February 1998 letters provided GCIT with adequate notice of the Board's decision regarding its tuition demand, (see Initial Decision at p. 5), the third error committed by the ALJ in finding the within petition timely, Lenape asserts, was when he concluded "that the notice of board action [must] actually come from the board, as opposed to staff or counsel. Opinion, at 4-5." (Lenape's Exceptions at p. 11) Lenape proffers that, not only did the court in *Kaprow* never indicate that counsel for a board of education, acting under board authority, cannot provide adequate notice of a board's decision, but, herein, GCIT also received notice of the Board's decision from the Board Secretary, the very individual deemed sufficient, pursuant to *Kaprow*, to trigger the 90-day limitation period. (*Id.* at p. 12)

Lenape's next exception objects to the ALJ's October 20, 1999 order permitting GCIT to file an amended Petition of Appeal in this matter to include claims for tuition for the 1998-99, 1999-2000, and future school years, claiming such order was "improvidently granted" in that the claims for these additional school years are, similarly to GCIT's original petition, time-barred by the 90-day limitations period. (Lenape's Exceptions at p. 12) It further proffers that the ALJ should have denied GCIT's Motion to Amend its petition to include these time-barred claims pursuant to the rationale of *Halpern v. Board of Education of the Township of Delran, Burlington County,* 94 *N.J.A.R.* 2d (EDU) 22. *(Id.)*

Finally, Lenape excepts to the ALJ's "erroneously" concluding that GCIT's Performing Arts Program is approved vocational education based exclusively on a letter from the Department of Education that the program is so approved. It proffers that such letter was insufficient to support GCIT's Motion for Summary Decision because it constituted hearsay, *i.e.*, it was offered for the truth of its contents, and it does not fall under any exception to the hearsay rule which might permit its admissibility. Further, Lenape maintains, the Department concedes that many of the files relating to the approval process for this institution are no longer available, thus making it impossible for either the DOE or GCIT to positively confirm that GCIT properly complied with the approval process. Lenape takes issue with the ALJ's determination that whether or not GCIT is violating the conditions of its approval is irrelevant to Lenape's obligation to pay for its students attending an approved program. (Initial Decision at p. 5) To the contrary, it asserts, if the program is not an "approved vocational program," Lenape has no obligation to pay tuition at all. (Lenape's Exceptions at pp. 13-14) The ALJ's sole reliance on the DOE letter to confirm that the Academy is vocational education was also incorrect because the court failed to consider and address one of Lenape's major arguments, that the Academy is "private" rather than a county vocational education. In this regard, Lenape advances that the particular characteristics of this program "strongly suggest" that it is a private vocational school, *i.e.*, it solicits out-of-county pupils through advertisements; Academy representatives go to out-of-county schools to recruit the most talented students; and rather than limiting acceptance of out-of-county students to spaces available after all in-county students have been accepted as required by regulation, the Academy uses an audition process to "test in" students to the program. This has the effect of rejecting in-county students in favor of "more talented" out-of-county students; and, finally, the tuition charged for the Academy program, $8,500 for the 1999-2000 school year, far exceeds the tuition at a typical "vocational" school. (*Id.* at pp. 13-14)

Lenape asserts that the ALJ's failure to consider whether GCIT was private vocational education is a significant error, which, at a minimum, requires the Commissioner to remand this matter for consideration of this issue, as a board of education's responsibilities vis-a-vis private vocational education institutions are appreciably different from those for county institutions. (*Id.* at p. 14)

In reply, GCIT states that the ALJ properly "interpreted and applied the holding of *Kaprow,*" when he concluded that, because there was no "final action" of the Lenape Board in this matter with respect to GCIT's tuition payment demand, the within Petition of Appeal was timely filed. It urges the Commissioner to adopt the ALJ's decision for the reasons set forth therein.

Upon careful and independent review, the Commissioner concurs with the ultimate conclusion of the ALJ that petitioner GCIT is entitled to summary decision in this matter, but he so finds based upon the analysis outlined below rather than that proffered in the Initial Decision. Initially, the Commissioner rejects the ALJ's interpretation of *Kaprow, supra,* as requiring formal board action by way of "a resolution, minutes, or otherwise" (Initial Decision at p. 4) and direct notice by the board, as opposed to actions of its designated representatives taken at its behest, as absolute prerequisites to the triggering of the 90-day limitations period of *N.J.A.C.* 6:24-1.2. Such a rigid interpretation does not comport with that Court's articulation of the underlying purpose of both the limitations period and "adequate notice." Essentially, the *Kaprow* Court found the limitations period begins to run when a party has adequate notice of a final order, ruling or action by a board of education, adequate notice being defined as one which is "sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate." *Kaprow at 587.* Moreover, it found that notice is "adequate" where it furthers the purpose of the 90-day limitations period,

> [t]hat is, the notice requirement should effectuate concerns for individual justice by not triggering the limitations period until the

> [affected persons] have been alerted to the existence of facts that may equate in law with [their] cause of action.*** At the same time, [the notice] should further considerations of repose by establishing an objective event to trigger the limitations period in order "to enable the proper and efficient administration of the affairs of government." *Id.*

The *Kaprow* Court further opined that where the notice provided to an individual satisfies these underlying goals, the formality or informality of the notice is irrelevant. *Id.*

Here, as was recognized by the ALJ, the uncontroverted affidavit of Dr. Hicks, Lenape Superintendent of Schools, confirms that the Board was advised when GCIT's tuition demand was received, it sought a legal opinion on the issue, and, based upon that opinion, it directed both its Board Secretary and its counsel to communicate to GCIT that Lenape would not accept responsibility for the payment of the requested tuition. The record confirms that such directed communications were transmitted to GCIT by Board counsel on February 2, 1998 and February 12, 1998 and by the Board Secretary on February 6, 1998. The Commissioner finds and determines that these actions clearly satisfy the requirements envisioned by *Kaprow* sufficient to trigger the running of the 90-day timeline in *N.J.A.C.* 6:24-1.2(c) for the filing of a petition of appeal. Consequently, having been adequately placed on notice as of mid-February 1998 that Lenape had no intention of paying the tuition of its resident students attending GCIT's Academy, the within Petition of Appeal, filed on September 24, 1998 for students enrolled for the 1997-98 school year, must be deemed untimely.[1]

Notwithstanding the well-established maxim that the limitations rule of *N.J.A.C.* 6:24-1.2(c) is to be strictly applied, the Commissioner is cognizant that he may, pursuant to his authority under *N.J.A.C.* 6:24-1.15, relax this rule under exceptional

[1]Based on the tenor and tone of the communications it received from Lenape, the Commissioner cannot accept, as was argued below, that GCIT could reasonably harbor a belief at this time that the within matter was not ripe for appeal in that the parties were moving cooperatively towards resolution of their differences and that, therefore, tuition payment from Lenape might be forthcoming by the July 1, 1998 final due date.

circumstances or if there is a compelling reason to do so. (*See Kaprow, supra,* at 590; *also see DeMaio v. New Providence Board of Education*, 96 *N.J.A.R.* 2d (EDU 449, 453.) Such authority, the Commissioner observes, is rarely invoked unless strict adherence thereto would be inappropriate, unnecessary or where injustice would occur, *DeMaio* at 453, or where he finds the presence of a substantial constitutional issue or other issue of fundamental public interest beyond that of concern only to the parties themselves. *Pacio v. Lakeland Regional High School District*, 1989 *S.L.D.* 2060, 2064. The Commissioner's reasoned review of the within matter persuades him that it presents a compelling public interest sufficient to warrant relaxation of the 90-day rule.

There is no question that Lenape was fully aware that, under *N.J.S.A.* 18A:54-20.1 and *N.J.A.C.* 6:43-3.11, as interpreted by the Commissioner of Education, *M.R. by his guardian ad litem, J.N. and K.K. by his guardian ad litem, F.K. v. Board of Education of the Borough of Pompton Lakes, Passaic County*, decided by the Commissioner July 29, 1997, *remanded* State Board of Education December 3, 1997, and *K.B., on behalf of minor child, H.B. and Gloucester County Institute of Technology v. Board of Education of the Rancocas Valley Regional High School District, Burlington County*, decided by the Commissioner December 29, 1997[2], it was obligated to pay the tuition and transportation costs for resident students attending the Academy at GCIT. The within record reflects that although Lenape honored its obligation with respect to the transportation of these students, it steadfastly refused to similarly honor its responsibility for tuition. Like the ALJ, the Commissioner finds and determines that Lenape's "defenses" to its withholding of payment are without substance and irrelevant to its responsibility.[3] The

[2]*See also D.F., on behalf of minor child, E.F. v. Board of Education of the Borough of Roselle Park, Union County, et al.*, decided by the Commissioner July 9, 1999.

[3]To the extent that Lenape attempts to argue that GCIT's Academy for the Performing Arts is not a DOE approved program, such issue was previously resolved in *K.B., supra,* where the Commissioner found that such program falls within the scope of vocational education as contemplated by *N.J.S.A.* 18A:54-1, having taken judicial notice of the program's inclusion in the Department of Education's Directory of Verified Occupational Programs (DOE

Commissioner cannot and will not countenance a local board's refusal to honor its legal obligations to vocational students because the board does not agree with prevailing decisional interpretations.

Accordingly, the Initial Decision of the OAL is affirmed as modified, and summary decision is hereby granted to GCIT. Lenape is directed to remit the tuition owed GCIT for the attendance of its resident students at the Academy for the 1997-98, 1998-99, 1999-2000 school years and thereafter, pursuant to a mutually acceptable payment schedule to be arranged by the parties.

Notwithstanding the result herein, the Commissioner takes note of Lenape's allegations with regard to GCIT's failure to limit acceptance of out-of-county students consistent with rule. By copy of this decision, the Gloucester County Superintendent of Schools is directed to review GCIT's student acceptance practices and take such action, if any, as may be necessary as a result of her findings.[4]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Publication PTM No. 1123.00, Revised 1995), reflecting its status as a DOE approved trade and instructional program.

[4] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

December 16, 1999
Date of Mailing, December 17, 1999

416-99

EDU #10120-98
C # 416-99
SB # 6-00

GLOUCESTER COUNTY INSTITUTE OF TECHNOLOGY, GLOUCESTER COUNTY,

PETITIONER-CROSS APPELLANT,

V.

BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, December 16, 1999

For the Petitioner-Cross/Appellant, Zane & Lozuke (Raymond J. Zane, Esq., of Counsel)

For the Respondent-Appellant, Archer & Greiner (Louis L. Chodoff, Esq., of Counsel)

This matter involves a claim by the Gloucester County Institute of Technology (hereinafter "GCIT") that the Board of Education of the Lenape Regional High School District (hereinafter "Board" or "Lenape Board") is obligated to pay tuition for its resident students attending GCIT's Southern New Jersey Academy for the Performing Arts for the 1997-98 school year and thereafter.

In an initial decision issued on October 28, 1999, an administrative law judge ("ALJ") rejected the Lenape Board's contention that GCIT's claim had been filed in an untimely manner, and he recommended granting GCIT's motion for summary decision.

JUNE 7, 2000

In so doing, the ALJ relied on the decision of the Commissioner of Education in K.B., on behalf of minor child, H.B., and Gloucester County Institute of Technology v. Board of Education of the Rancocas Valley Regional High School District, decided by the Commissioner of Education, September 25 and December 29, 1997, rev'd by the State Board of Education, March 1, 2000.[1]

On December 16, 1999, the Commissioner adopted with modification the ALJ's decision in this matter and granted summary decision to GCIT. Although the Commissioner concluded that GCIT's petition was time-barred under N.J.A.C. 6:24-1.2(c), he found that the case presented a compelling public interest sufficient to warrant relaxation of that rule. Turning to the merits of GCIT's claim, the Commissioner agreed with the ALJ that the Lenape Board was obligated to pay the tuition costs of its resident students attending GCIT's Academy for the Performing Arts. In so doing, he rejected the Board's argument that the GCIT program at issue was not an approved vocational program, citing his decision in K.B.

On March 1, 2000, we set aside the Commissioner's decision in K.B., rejecting the Commissioner's assertion that inclusion of the GCIT performing arts program in the Department of Education's Directory of Verified Occupational Education Programs conclusively established that such program was within the purview of the statutory provisions relating to vocational schools. We remanded the case to the Commissioner with the directive that he transmit it to the Office of Administrative Law for such

[1] In K.B., the Commissioner determined that the Rancocas Valley Regional High School District was responsible for the cost of transporting the petitioner's daughter, who resided within the district, to the GCIT Academy for the Performing Arts. The Commissioner noted that the district was also responsible for the petitioner's tuition costs. The Commissioner asserted that inclusion of the GCIT performing arts program in the Department of Education's Directory of Verified Occupational Programs conclusively established that such program was "clearly within the purview of the cited statutory provisions...."

proceedings as were necessary to determine whether the GCIT program at issue was vocational within the intendment of N.J.S.A. 18A:54-1 et seq. during the relevant period and for a resultant determination on the merits of the petitioner's claim for transportation.

Given our determination in K.B., we set aside the Commissioner's decision in this matter and remand the case to him for such proceedings as are necessary to determine the merits of GCIT's claim for tuition consistent with our decision in K.B.

Samuel J. Podietz recused himself.

June 7, 2000

Date of mailing JUN 09 2000

416-99

EDU #10120-98
C # 416-99
SB # 6-00

GLOUCESTER COUNTY INSTITUTE OF TECHNOLOGY, GLOUCESTER COUNTY,	
PETITIONER-CROSS APPELLANT,	STATE BOARD OF EDUCATION
V.	DECISION ON MOTION
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	
RESPONDENT-APPELLANT.	

Decided by the Commissioner of Education, December 16, 1999

Remanded by the State Board of Education, June 7, 2000

For the Petitioner-Cross/Appellant, Zane & Lozuke (Raymond J. Zane, Esq., of Counsel)

For the Respondent-Appellant, Archer & Greiner (Louis L. Chodoff, Esq., of Counsel)

This matter involved a claim by the Gloucester County Institute of Technology ("GCIT") that the Board of Education of the Lenape Regional High School District ("Lenape Board") was obligated to pay tuition for its resident students attending GCIT's Southern New Jersey Academy for the Performing Arts for the 1997-98 school year and thereafter. On December 16, 1999, the Commissioner granted summary decision to GCIT. Although the Commissioner found that GCIT's petition had not been filed in a timely manner, N.J.A.C. 6:24-1.2(c) [now codified at N.J.A.C. 6A:3-1.3(d)], he concluded

Aug. 2, 2000

that this matter presented a compelling public interest sufficient to warrant relaxation of the 90-day rule. N.J.A.C. 6:24-1.15 [now codified at N.J.A.C. 6A:3-1.16]. In turning to the merits of the case, the Commissioner determined that the Lenape Board was obligated to pay the tuition costs of its resident students attending GCIT's Academy for the Performing Arts.

The Lenape Board filed an appeal to the State Board of Education, and the GCIT cross-appealed.

On June 7, 2000, we rendered our decision, in which we set aside the Commissioner's decision and remanded the case to him for such proceedings as were necessary to determine the merits of GCIT's claim for tuition consistent with our decision in K.B., on behalf of minor child, H.B., and Gloucester County Institute of Technology v. Board of Education of the Rancocas Valley Regional High School District, decided by the Commissioner of Education, September 25 and December 29, 1997, rev'd by the State Board of Education, March 1, 2000.

The Lenape Board filed the instant motion for clarification of our June 7, 2000 decision. In so doing, it has taken the position that since we did not expressly address the timeliness of GCIT's petition to the Commissioner, we should now "clarify" that decision by determining that relaxation of the 90-day rule was inappropriate in this case.

As previously stated, our remand in this matter was limited to such proceedings as are necessary to determine the merits of GCIT's claim for tuition consistent with our decision in K.B. Based on our review of the papers filed by the parties, we clarify that, although our decision of June 7 did not expressly address the timeliness issue, in

remanding this matter for further proceedings on the merits of GCIT's claim, we were affirming the Commissioner's resolution of that issue.

Samuel J. Podietz abstained.

August 2, 2000

Date of mailing AUG 04 2000

417-99

PATRICIA OSMAN, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY, :

RESPONDENT. :

:

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, teaching staff member who possessed a standard NJ Instructional Certificate with two endorsements: Elementary School Teacher and Teacher of Reading, alleged that the Board improperly terminated her employment. Board contended petition was filed untimely.

The ALJ concluded that petitioner did obtain tenure in the District in the position title "teacher" at the commencement of the 1998-99 school year. The ALJ noted, however, when the Board discovered that petitioner did not possess a valid endorsement for her then current assignment, notwithstanding that she possessed other endorsements, it summarily dismissed her and waited to see whether the N.J. State Board of Examiners would take action against her valid instructional certificate/endorsements. The ALJ found that when the Board terminated petitioner's employment without complying with the requirements of the tenure law, petitioner had 90 days within which to challenge the Board's action. Thus, the ALJ concluded that the petition of appeal was time-barred. The ALJ ordered both the petition and the counterclaim dismissed with prejudice.

The Commissioner adopted findings and determination in Initial Decision as his own.

December 20, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 428-99
AGENCY DKT. NO. 556-12/98

PATRICIA OSMAN,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY,

Respondent and Counter-claimant.

Arnold M. Mellk, Esq., for petitioner (Wills, O'Neill & Mellk, attorneys)

John T. Barbour, Esq., for respondent-counterclaimant

Record Closed: September 15, 1999 Decided: October 29, 1999

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter commenced on December 18, 1998, when the Patricia Osman (hereinafter petitioner) filed a verified petition seeking an order from the Commissioner of Education that the Board of Education of the Township of Delran (hereinafter respondent) had improperly terminated her employment. An answer to the petition of appeal and a counterclaim on behalf of

respondent were filed on January 14, 1999. On January 22, 1999, petitioner filed an answer to the counterclaim and on February 3, 1999, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 to -13.

A prehearing conference was conducted on April 29, 1999, at which time it was determined that petitioner would file a motion for summary decision. Petitioner's motion and supporting papers were received on May 17, 1999. Respondent's reply dated June 20, 1999, and a cross-motion to dismiss the petition, together with a certification of Carl Johnson were received on June 28, 1999. Petitioner filed a reply letter memorandum and her own certification, dated June 24, 1999, which were also received on June 28, 1999. Respondent's response to petitioner's summary decision reply brief was received on July 1, 1999, and a rejoinder on behalf of petitioner was received on July 2, 1999. Oral argument on the cross-motions was conducted by telephone conference call on July 26, 1999. Thereafter, petitioner filed an additional letter memorandum dated August 5, 1999, and respondent filed an additional letter memorandum and supplemental certification of Dr. Carl Johnson by facsimile transmittal on September 8, 1999. The exhibits which were referenced in the supplemental certification were received on September 15, 1999, whereupon the record closed.

FINDINGS OF FACT

The facts relevant to a disposition of the motions are not in dispute and accordingly, I **FIND** the following as uncontested facts.

Petitioner commenced employment with respondent as a teaching staff member at the beginning of the 1985-86 school year. At that time she possessed a standard New Jersey Instructional Certificate with two endorsements: Elementary School Teacher and Teacher of Reading. During the 1985-86, 1986-87 and 1987-88 school years, petitioner was assigned to teach basic skills courses. During the 1987-88 school year, at the request of her supervisors, petitioner completed an application for the endorsement Teacher of English, which application was forwarded to the New Jersey State Board of Examiners. No teacher of English endorsement

was ever issued to petitioner pursuant to that application, however. Nevertheless, commencing in September 1988, respondent assigned petitioner to teach one class of English-non elementary level and the rest of her classes were designated as either "writing" or "basic writing" or "comp-ed writing."

At the conclusion of the 1988-89 school year, petitioner received the following letter, dated July 17, 1989 on the official letterhead of the Delran Township Board of Education, signed by Bonnie J. Weiskittel, Basic Skills Coordinator:

> We put the finishing pages into the Basic Skills application on Thursday. Friday, George, our mail carrier delivered two copies to the County Office. It seems as if the entire county was struggling with the augmented version of the application. I realized this on my 5th telephone call to Darlene Mincy.
>
> This letter is to heartily thank you for your contribution to the application. It took another two weeks to complete the 131 page document. I sincerely appreciate your efforts and I am certain, we would not have met the deadline without your assistance.
>
> The 1988-89 Summary Evaluation for the Basic Skills program at each level recorded in the NCE's was positive. You are commended for the high quality instruction and effective teaching you offered to Delran students which was reflected in the CAT results.
>
> I anticipate a more supportive role for myself to assist you beginning in September. Have a pleasant and restful summer.

In subsequent school years petitioner was assigned to teach additional classes in secondary English. Commencing in approximately 1991, all of the classes petitioner taught were secondary English courses for which she was not properly certified. Petitioner was suspended from her teaching position by respondent on December 10, 1996, after the Burlington County Superintendent of Schools advised respondent that the certificate bearing an English endorsement for petitioner which had been faxed to the County Superintendent's offices by one of respondent's employees on December 10, 1996, was fraudulent. Although respondent received a copy of a

letter dated January 9, 1997, written by the Director of the New Jersey State Board of Examiners to the County Superintendent of Schools advising, inter alia, that petitioner was "permitted to continue teaching under her two legitimate certificates (sic-really endorsements) until such time as the Board of Examiners takes action against those certificates," nevertheless respondent terminated petitioner's employment at its regularly scheduled board meeting on January 13, 1997.

Petitioner's lack of an English endorsement became the subject matter of an order to show cause issued by the New Jersey State Board of Examiners on January 23, 1997. The order to show cause charged petitioner with dishonest misrepresentation of the status of her licensure and ordered her to show cause why her Teacher of Elementary School and Teacher of Reading endorsements on her instructional certificate should not be revoked or suspended. Respondent did not participate in the case which proceeded against petitioner's two valid endorsements before the New Jersey State Board of Examiners. On or about August 19, 1998, respondent's superintendent of schools received a copy of the initial decision which had been entered by the undersigned on June 1, 1998 in the matter of the Suspension or Revocation of the Teaching Certificates of Patricia Osman, EDE 7164-97. That initial decision is attached hereto for the Commissioner's easy reference. At its meeting on September 24, 1998, the State Board of Examiners adopted the initial decision without modification. The written decision of the State Board of Examiners was mailed to the parties in the case on October 13, 1998.

On December 18, 1998, the petitioner filed the verified petition which commenced the within matter, asking the Commissioner to enter an order declaring that she is a tenured employee of the respondent Board of Education and reinstating her to a teaching position consistent with her endorsements, along with back pay, benefits, etc. In the counterclaim which respondent filed with its answer on January 14, 1999, respondent claims entitlement to reimbursement from petitioner for all salary and the cost of all emoluments petitioner received while she was assigned to teach English. This concludes the recitation of uncontested facts.

APPLICABLE LAW AND DISCUSSION

The once classic statement of the standard for granting or denying summary judgment set forth in Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954), was modified in Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995). Therein the Court held that the standard to be applied is now the same as the standard for determining motions for involuntary dismissal under R. 4:37-2(b) and for determining motions for judgment under R. 4:40-1 and R. 4:40-2. Trial courts considering motions for summary judgment are now required to engage in the same type of evaluation, analysis or sifting of evidential materials in light of the burden of persuasion that applies if the matter goes to trial. The Court explained:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.". . . Credibility determinations will continue to be made by a jury and not a judge. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2. . . . The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law, . . ., the trial court should not hesitate to grant summary judgment. (citations omitted) Id. at 540.

The Court noted that to send a case to trial knowing that a rational decision-maker could reach but one conclusion was indeed "worthless" and would "serve no useful purpose." The purpose of this new standard, the decision explained, was to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves.

In the present matter, each party has made a dispositive motion and each asserts that the facts material to decision of the motion are not in dispute. I agree, and accordingly, this matter is ripe for summary decision.

N.J.A.C. 6:24-1.2(c), the regulation relevant to a determination of the cross-motions, states:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

In its motion to dismiss the petition of appeal, respondent argues that petitioner was required to file her claim with the Commissioner within the 90-day period following January 13, 1997, the date her employment with respondent was terminated and that her failure to do so bars the within litigation. Petitioner responds that she could only assert her claim that she was entitled to reinstatement in her tenured position with respondent after the New Jersey Board of Examiners issued its decision declining to suspend or revoke her legitimate endorsements, Teacher of Elementary School and Teacher of Reading. The basis for petitioner's claim herein, however, is her assertion that she acquired tenure in respondent's district and therefore could not be removed except pursuant to the process set forth in N.J.S.A. 18A:6-10. That claim was not in any way affected by the September 24, 1998 determination of the Board of Examiners. If petitioner was a tenured teacher in respondent's district in January 1997 when it purported to terminate her employment, it was because she had taught for the requisite period of time pursuant to one of her valid endorsements. Since she never possessed a valid teacher of English endorsement, it is obvious that she could not have obtained tenure on the first day of the 1988-89 school year by teaching English. Petitioner taught four other courses during that school year, however, which were designated as "writing," "basic writing," or or "comp-ed writing." It is apparent from the letter quoted hereinabove which was written to petitioner by the Basic Skills Coordinator in respondent's district on July 17, 1989, that the district regarded those other four courses as part of the Basic Skills Program. Furthermore, N.J.A.C. 6:11-6.1(b) and N.J.A.C. 6:11-6.2(a)6, both

specifically provide that teachers with elementary education endorsements are authorized to teach the common branch subjects such as reading, writing, arithmetic and spelling in the secondary schools from grade 7 through 12. Since petitioner had at all times since her initial employment with respondent been the holder of a valid New Jersey Instructional Certificate with two endorsements, Elementary Education and Reading, during the 1988-89 school year, she held a valid endorsement for teaching the four writing classes she taught.* Accordingly, I **CONCLUDE** that petitioner obtained tenure in the district in the position title "teacher" at the commencement of 1988-89 school year. If she had not been entitled to the protections of tenure in January 1997 (or if she held no valid instructional certificate at all), then upon notification from the County Superintendent of Schools that she was not the holder of an appropriate certificate/endorsement for her employment, pursuant to N.J.S.A. 18A:27-2 her employment would have ceased by operation of law. That statute provides:

> Any contract or engagement of any teaching staff member, shall cease and determine whenever the employing board of education shall ascertain by written notice received from the county or city superintendent of schools, or in any other manner, that such person is not, or has ceased to be, the holder of an appropriate certificate required by this title for such employment, notwithstanding that the term of such employment shall not then have expired.

Because petitioner was a tenured teacher with two valid endorsements, however, when respondent discovered that she did not possess a valid endorsement for her then current assignment, it had two choices: 1) it could have reassigned her to another assignment within the scope of her Elementary Education endorsement or her Reading endorsement, or 2) it could have filed tenure charges to remove her pursuant to N.J.S.A. 18A:6-10. For whatever reason, perhaps merely strategic reasons, respondent chose to do neither. Instead, it summarily "dismissed" her and waited to see whether the New Jersey State Board of Examiners would take action against her valid instructional certificate/endorsements. None of that, however, changed what petitioner

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* Respondent correctly notes that petitioner could not have obtained tenure during the 1988-89 school year under her Teacher of Reading license as the petition alleges, since the Teacher of Reading endorsement authorizes the holder only to teach reading. Tenure is a statutory status, however, and its acquisition is not dependent upon the precision of the pleadings in litigation.

knew in January 1997, i.e., that she was a tenured employee holding a valid instructional certificate with two valid endorsements which entitled her to continued employment in the district. When respondent purported to terminate her employment without complying with the requirements of the tenure law, petitioner had 90 days within which to challenge the board's action before the Commissioner of Education by filing a petition of appeal. For whatever reason petitioner chose not to do that, perhaps also for strategic legal reasons. She too waited to see whether the New Jersey State Board of Examiners would take action against her legitimate instructional certificate/endorsements. There is no question that the 90-day period mandated by N.J.A.C. 6:24-1.2(c) applies to an alleged violation of statutory tenure rights. Like the teaching staff member in Nissman v. Board of Educ., 272 N.J. Super. 373 (App. Div. 1994), petitioner herein could have presented the same substantive argument in January 1997 as she did when she filed her petition in December 1998, well beyond the 90-day period which commenced with her termination of employment in January 1997. As in Nissman, the respondent herein had a right to know within 90 days of January 13, 1997 whether its action was going to be challenged. As our Supreme Court noted in Kaprow v. Berkeley Tp. Bd. of Educ., 131 N.J. 572 (1993):

> [T]he limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days. Moreover, because local school boards operate on a cash basis, claims must be filed promptly so that the local board can anticipate any back-pay requirements.

For these reasons, I **CONCLUDE** that the petition of appeal is time-barred and must be **DISMISSED**. The regulatory period of limitations set forth in N.J.A.C. 6:24-1.2(c), is a double-edged sword, however, and it applies equally to the counterclaim respondent filed in the within matter asserting for the first time on January 14, 1999, that it was entitled to the return of all salary and the costs of all emoluments wrongfully received by petitioner for teaching English without a valid endorsement. If the Commissioner of Education has jurisdiction at all over respondent's claim that petitioner owes it money, respondent was required to file that claim within 90 days of learning that petitioner had for many years been teaching only English courses without a valid endorsement to teach English. The latest date respondent could assert in this regard is

December 10, 1996. Respondent failed to file within the 90-day period of time and accordingly, the counterclaim must also be **DISMISSED WITH PREJUDICE**.*

Because both the petition and the counterclaim must be dismissed as untimely, it is not necessary to reach the various claims of the parties concerning the entire controversy doctrine and the estoppel effects of the Board of Examiners' decision in EDE 7164-97. In this regard I note, however, that respondent's papers acknowledge that it received a copy of my initial decision in that case on or about August 19, 1998 (see September 7, 1999, supplemental certification of Carl Johnson, Superintendent of Schools) more than one month before any final decision was rendered by the Board of Examiners. Respondent had ample time to alert the Board of Examiners that it wished to participate in that case and to ask the Board to remand the matter to the Office of Administrative Law for additional evidence, something for which there is clear and long-standing precedent. See In re Kallen, 92 N.J. 14 (1983).

For all the foregoing reasons, it is hereby **ORDERED** that both the petition of appeal and the counterclaim are dismissed with prejudice and these proceedings are concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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* If the counterclaim had not been barred by the regulatory period of limitations as of the time when the petition of appeal was commenced, it would not be considered as untimely even though filed in said action at a time when if it were the subject of an independent action, it could not be maintained. See Atlantic City Hospital v. Finkle, 110 N.J. Super. 435, 440 (Cty. Ct. 1970). The claims in the counterclaim were required to be filed by March 10, 1997, however, and since the petition herein was not filed until December 1998, even with relation back to the date of the petition, it is untimely.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P. O. Box 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Oct. 29, 1999
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

11/3/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 5 1999
DATE

Barbara A Hermel
OFFICE OF ADMINISTRATIVE LAW

cc

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDE 7164-97

AGENCY DKT. NO. 435-01/97

IN THE MATTER OF THE SUSPENSION OR REVOCATION OF THE TEACHING CERTIFICATES OF PATRICIA OSMAN

Mylan K. Alexander, Deputy Attorney General, for the New Jersey State Board of Examiners (Peter Verniero, Attorney General of New Jersey, attorney)

Arnold M. Mellk, Esq., for respondent (Wills, O'Neill & Mellk, attorneys)

Record Closed: March 2, 1998 Decided: June 1, 1998*

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter commenced on January 23, 1997, when the New Jersey Department of Education State Board of Examiners (hereinafter petitioner) issued to Patricia Osman (hereinafter respondent) an order to show cause why her Teacher of Elementary School and Teacher of Reading endorsements on her Instructional Certificate should not be revoked or suspended. The order to show cause charged respondent with "dishonest misrepresentation of the status of her licensure." On March 3, 1997 respondent filed an answer to the order to show cause wherein she denied the allegations. On July 14, 1997, the State Board of Examiners transmitted the matter to

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* An extension of time for issuing the initial decision was requested and granted pursuant to N.J.S.A. 52:14B-10(c).

the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F- 1 to -13.

A prehearing conference was conducted on October 16, 1997 at which time the following were identified as the issues for determination at hearing:

1. Are the allegations in the order to show cause, or any of them, in fact true?

2. If the answer to the previous question is yes, what are the appropriate sanctions/remedies?

The hearing commenced as scheduled on February 10, 1998 and concluded on that date. At the close of petitioner's proofs, respondent moved for involuntary dismissal pursuant to R. 4:37-2(b). That motion was granted with respect to all allegations in the order to show cause except to the extent that the allegations in paragraph 6 could be interpreted to allege that respondent, by teaching high school English knowing that she lacked the appropriate Teacher of English endorsement and that she was ineligible for that endorsement, was misrepresenting her licensure status to the public. Following the presentation of respondent's case, the record remained open for the receipt of written submissions. A letter memorandum on behalf of petitioner in response to respondent's oral summation was received on February 24, 1998. A reply on behalf of respondent was received on March 2, 1998, whereupon the record closed.

FINDINGS OF FACT

Some of the facts relevant to a determination of this matter are not in dispute, and I therefore **FIND** the following as uncontested facts.

In December 1980 petitioner issued to respondent (whose name at the time was Patricia McCarron) a New Jersey Instructional Certificate with the following endorsements; Elementary School Teacher and Teacher of Reading. Respondent's applications for each of these

endorsements was submitted for processing to the Office of the Burlington County Superintendent by respondent's then employer, the Bordentown City Board of Education. In January 1987, respondent placed a telephone call to the Office of the Burlington County Superintendent of Schools and spoke with Sharon Lovenduski, Supervisor of Teacher Certification. Respondent requested the necessary forms and information to apply for an endorsement as Teacher of English. Ms. Lovenduski forwarded to respondent the requested packet of information with forms. When Ms. Lovenduski received the completed application for certification as a Teacher of English bearing respondent's signature and the date August 15, 1988, she called respondent on the telephone. When respondent returned the call on September 13, 1988, Ms. Lovenduski advised her that an additional $10 fee would be necessary because the State had raised the fee and she also advised respondent that additional transcripts were necessary. The county superintendent's office thereafter did not forward the application to the New Jersey State Board of Examiners because the additional necessary documentation was not forthcoming. On June 12, 1989, Ms. Lovenduski sent the following memorandum to respondent, in care of Delran High School:

> On several occasions we have written or telephoned you regarding your application for Teacher of English. As of this writing, we have not received a reply. Therefore, we are returning your application, $30.00 money order, sealed NTE score for English Language, and your official transcript from Temple University.
>
> If in the future you decide that you would like to apply for this certificate, you will need to forward everything to our office again along with the correct fee of $40.00. We would also need the transcript from Penn State.
>
> If you have any questions regarding this certification, please call our office at 265-5003 and ask for Mrs. Moseley or Mrs. Lovenduski.

Thereafter on September 11, 1990, when the completed application was resubmitted to the Burlington County Superintendent of Schools' office with the $40 fee and the required transcripts, Ms. Lovenduski prepared a form memorandum to respondent. The address on the

face of the form memorandum is respondent's home address. The form requests an additional $10 money order payable to the Commissioner of Education and contains the following note:

> Please be advised, when we returned your records to you on 6/12/89, we indicated that the fee for certification was $40.00. On 7/1/89, the State raised the fee from $40.00 to $50.00. We are holding your money orders totaling $40.00 on file in our office with your official transcripts. Please send us an additional $10.00 money order. Also, we are returning your Application for Certification form which is dated 8/15/88. If all the information is correct on this application, please put today's date in Block 14 and return it to our office. If the information needs to be updated, we have enclosed a new application form for you to complete. As soon as these items are received, we will process your application records to the State Department for their review.

At the hearing in the within matter, Ms. Lovenduski testified that she mailed the September 11, 1990 memorandum to respondent at the home address indicated on the form. On February 5, 1992, Ms. Lovenduski received the same completed application for certification bearing respondent's signature; however, "8/15/88" had been crossed out and underneath "1-20-92" had been written. Ms. Lovenduski testified that the envelope in which she received the altered application had been sent from respondent's home address; however, she testified, "I don't have the envelope with me." The completed application, transcripts, etc. were forwarded to the Bureau of Licensing in the Department of Education. On April 9, 1992, Elizabeth A. Strother, (now Haywood) Supervisor of Examiners, issued her evaluation of respondent's credentials in which she concluded that respondent was not eligible for issuance of a Teacher of English endorsement. The evaluation provided in pertinent part: "The applicant has completed 9 credits in the subject field of English. 'English Education' courses are professional education courses and are not applicable. Of the 30 credits required at least 12 credits must be 300 and 400 level English courses." The Office of Teacher Certification and Academic Credentials sent the written evaluation of respondent's credentials to the Office of the Burlington County Superintendent where it was received on April 16, 1992. This form is a multi-copy form with the white copy intended for the applicant, the canary copy for the county, the pink copy for the district and the goldenrod copy maintained by the State. On April 22, 1992, Ms. Lovenduski sent a form

memorandum addressed to Patricia Osman enclosing the evaluation. Ms. Lovenduski testified that she mailed it to respondent's home address. When she was asked how she knew this, she said it was because it was the address which appears on the evaluation form.

During 1996, the Office of the Burlington County Superintendent conducted an audit of the Delran Township school district. This audit included review of the certificates and endorsements held by each teaching staff member, together with those courses taught by the teaching staff member in the district. Although computer print outs issued by the Bureau of Information Resources Management of the New Jersey Department of Education and sent to the county office each year commencing with 1990 disclosed that respondent was teaching both basic skills-remedial and English non-elementary, and also indicated "possible license errors," these forms were not reviewed by the county superintendent's office until 1996. In response to a request from Ms. Lovenduski, on December 10, 1996, the Delran Board of Education forwarded to the county superintendent's office by facsimile transmission a copy of a State Board of Examiners' certificate issued to Patricia Osman bearing the endorsement Teacher of English. The document indicates on its face that it was issued 12/80 and it bears the signatures of Saul Cooperman, Commissioner of Education, and Leo Klagholz, Secretary, State Board of Examiners. Ms. Lovenduski testified that Joan Iverson, an employee in the Delran district, told her that this copy, which was not an original, came from respondent's personnel file. Because the endorsement was an obvious forgery (it is dated 12/80 and Saul Cooperman did not become the Commissioner of Education until 1982) and because respondent did not possess a valid endorsement permitting her to teach English, after December 11, 1996, she was no longer permitted to teach English in the Delran High School.

MOTION TO DISMISS

The classic statement of the test for determining a motion for dismissal at the end of an opponent's case is articulated in Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969):

> In the case of motions for involuntary dismissal, the test is, as set forth in R.. 4:37-2(b) and equally applicable to motions for judgment, whether "the evidence, together with the legitimate inferences therefrom, could sustain a judgment in ****favor" of the party opposing the motion, i.e., if, accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied. . . . The point is that the judicial function here is quite a mechanical one. The trial court is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion. (Citations omitted)

The Rules Governing the Courts of the State of New Jersey, R. 4:37-2(b), provides:

> (b) At Trial - Generally. After having completed the presentation of the evidence on all matters other than the matter of damages (if that is an issue), the plaintiff shall so announce to the court, and thereupon the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal of the action or of any claim on the ground that upon the facts and upon the law the plaintiff has shown no right to relief. Whether the action is tried with or without a jury, such motion shall be denied if the evidence, together with the legitimate inferences therefrom, could sustain a judgment in plaintiff's favor.

Not all rules and legal concepts utilized in judicial tribunals are applicable in "quasi-judicial," administrative adjudications. See Hackensack v. Winner, 82 N.J. 1 (1980). Although there is no specific rule in the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, which addresses motions at the end of a petitioner's case, N.J.A.C. 1:1-1.3(a) provides:

> This chapter shall be construed to achieve just results, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. In the absence of rule, a judge may proceed in accordance with the New Jersey Court Rules, provided the rules are compatible with these purposes. Court rules regarding third party practice and class action designations may not be applied

> unless such procedures are specifically statutorily authorized in administrative proceedings.

In addition, motions for dismissal and judgment have been discussed by Judge Lefelt in his text on administrative law, in pertinent part as follows:

> The two most frequent motions made at administrative hearings are motions for judgment of involuntary dismissal at the end of petitioner's case and motion for judgment at the close of all the evidence. The technical, common law patterns of going forward, making the prima facie case, the shifting of the burden and resting a case are not binding on ALJs. If a judge requires the party without the burden of proof to proceed first, no motion for judgment of involuntary dismissal can be made. If the party with the burden proceeds first, the motion can be made. The test is identical to that applied in the judiciary. The judge considers whether all the evidence together with the legitimate inferences therefrom could sustain a judgment in favor of the party opposing the motion. The judge is not concerned with the weight, worth, nature or extent of the evidence. The judge must accept all the evidence supporting the party defending against the motion and accord that party the benefit of all inferences which can reasonably and legitimately be deduced therefrom. If reasonable minds could differ, the motion must be denied. . . . 37 N.J. Pract. (Lefelt) § 195

Therefore, the legal standard to be applied to the evidence presented by petitioner is the one articulated in Dolson v. Anastasia, supra, and reiterated in Judge Lefelt's text.

Petitioner offered no direct evidence that respondent was aware of the existence of the fraudulent certificate prior to December 11, 1996. The only evidence concerning the obviously fraudulent certificate* was that Ms. Lovenduski had received it by facsimile transmission from the Delran Board of Education on December 10, 1996. Ms. Lovenduski's testimony that Joan Iverson had told her on the telephone that the certificate had been obtained from respondent's

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* Counsel for petitioner, on more than one occasion in her argument in opposition to respondent's motion to dismiss, stated that there would have been no reason for the Delran Board of Education to question the authenticity of respondent's Teacher of English endorsement. Counsel's argument in that regard obviously lacks merit.

personnel file, is hearsay evidence concerning whether the certificate had actually been in the file. There is no evidence whatsoever, however, concerning how the Delran Board of Education came into possession of the fraudulent certificate. Petitioner offered no evidence whatsoever from which any reasonable person could conclude that it was more likely that respondent created the false certificate and provided it to the district rather than that employees in the district created it themselves because they knew they had assigned respondent to teach English when she did not possess the appropriate license. In fact, judging from the face of the certificate itself which bears the signature stamp of Commissioner Cooperman and now Commissioner Klagholz, who was then Secretary of the State Board of Examiners, respondent could not simply have altered her own valid teaching certificate which bears the endorsements Elementary School Teacher and Teacher of Reading, because that certificate was signed by Commissioner Burke and Secretary Fred A. Price. The order to show cause charges respondent with submitting to school officials in Delran a certificate bearing a Teacher of English endorsement which was not authentic. The burden of proving that charge by a preponderance of the competent and credible evidence is petitioner's. In re Polk License Revocation, 90 N.J. 550, 560 (1982).

As suggested in the Dolson v. Anastasia language set forth hereinabove, the mere "scintilla of evidence" rule does not prevail in New Jersey; to enter an order of involuntary dismissal, the judge need not be faced with an utter absence of all evidence of contradictory purport. Pabon v. Hackensack Auto Sales, Inc., 63 N.J. Super. 476, 488 (App. Div. 1960). To defeat a motion for dismissal, petitioner must establish a prima facie case by presenting sufficient proof from which the liability of respondent can be logically and reasonably inferred. In the present matter, however, the proofs offered by petitioner do not provide even a scintilla of evidence that respondent was aware of the existence of the fraudulent certificate, let alone that she prepared it or offered it to the Delran school district. The mere fact that the Delran Board of Education was in possession of this fraudulent certificate on December 10, 1996, does not lead to a logical or reasonable inference that respondent provided it to them. Since the district is responsible for assigning only properly certificated teachers to teach the pupils in their district. (see N.J.S.A. 18A:26-2 and 18A:27-2), the fraudulent certificate could have been created by district employees responsible for maintaining certification records. In fact, such employees would probably have

easier access to a certificate with Commissioner Cooperman's signature than respondent, whose own certificate bears the signature of Commissioner Burke. For the foregoing reasons, all allegations in the order to show cause that respondent provided a fraudulent certificate to the Delran Board of Education or made any misrepresentations to the Board of Education concerning the status of her certification are hereby **DISMISSED.**

Granting petitioner all of the legitimate inferences which could be drawn by a reasonable fact finder from its proofs, I **CONCLUDE** that the only allegation in the order to show cause upon which petitioner might prevail is the one which may be inferred from paragraph 6 of the order. That paragraph states: The "State Board of Examiners finds that the aforestated information regarding Ms. Osman's dishonest misrepresentation of the status of her licensure provides cause to consider the suspension or revocation of Patricia Osman's licenses as Teacher of Elementary School and Teacher of Reading." Accepting for purposes of the motion Ms. Lovenduski's testimony that she mailed certain documents to respondent at respondent's home, a reasonable fact finder could conclude that respondent was aware of the fact that no teacher of English endorsement had been issued to her; the fact that respondent continued to teach English in the high school, knowing that she lacked the appropriate certification, could be regarded as a dishonest misrepresentation. Accordingly, the hearing went forward with respect to this issue only.

RESPONDENT'S CASE

Respondent testified that during the 1987-88 school year while she was teaching basic skills in the Delran school district, her supervisor Lynn Basner and the Assistant Principal for Curriculum and Instruction, Bonnie Weiskittel, advised her that there would be a reduction in force affecting the basic skills teachers because many of the students were being transferred into a level one English class, that they wished for her to continue teaching those students in the level one English class and that in order for her to do so, she would have to obtain a teacher of English endorsement. The RIF would not have resulted in her loss of a position in the district, respondent testified, because she could have moved to the elementary school or the middle school.

Respondent further testified she advised Ms. Basner and Ms. Weiskittel that because she was the mother of young children she did not wish to go back to school to take additional courses. Ms. Basner assured her that because she had a master's degree in reading, her courses were probably sufficient to obtain an English endorsement even though she had not been an English major. Ms. Basner told her that she herself had obtained a social studies endorsement because she had enough courses, although she had not been a social studies major. Ms. Basner and Ms. Weiskittel took respondent's transcripts and compared her courses with the requirements in an administrative code book and indicated that they felt she would obtain an English endorsement. Ms. Basner advised her to take an overview course for literature prior to taking the National Teachers' Exam. Respondent gave to Ms. Basner her transcripts, the fees for the review process and the completed application which she dated August 15, 1988 at Ms. Basner's request although she actually completed it probably some time in April. Ms. Basner had indicated that the results of the National Teachers' Exam would not be available until early August and therefore she had asked respondent to post-date the application. Respondent testified that after she gave this application and materials to Ms. Basner, she never saw it again.

Respondent acknowledges that she received a telephone call from Ms. Lovenduski in September 1988 requesting additional money and advising her that not all of the transcripts had been received, although she does not specifically remember this conversation. Respondent took the National Teachers' Exam in the summer of 1988, and passed. Commencing in the 1988-89 school year, respondent taught one class of English-nonelementary level and the rest of her courses were basic skills. She continued to teach high school English until December 1996. Throughout this period of time up until and including December 10, 1996, respondent assumed that she had received an English endorsement on her Instructional Certificate. She assumed this because she had given all of the materials and information requested to Lynn Basner, who had indicated that she would expedite the certification process. Ms. Basner left Delran and went to another school district and Ms. Weiskittel went to another school building within the district and accordingly, respondent testified, she did not discuss the status of her certification with them. When she was assigned to teach English in the high school she simply concluded that she had received the Teacher of English endorsement.

Respondent indicated that once she gave the completed application to Lynn Basner in 1988, she never saw it again; she did not change the date on her signature, she testified, and further she did not receive any written communications from the Office of the Burlington County Superintendent. In response to questions from the undersigned, she testified that she had never seen Ms. Lovenduski's June 1989 letter, although it is addressed to her, until she saw it in her lawyer's office in preparation for the within proceedings. She further testified that she had not seen the memorandum which Ms. Lovenduski testified she had mailed to respondent's home on September 11, 1990, until she saw it in her lawyer's office and, she had not seen P-8 in evidence, the evaluation of the State Board of Examiners determining that she was ineligible for an English endorsement, until she saw it in the attorney's office in preparation for these proceedings. The very first time that she was aware that she did not have an English endorsement was December 11, 1996, when she was advised by her principal that she did not have one. That same day she was suspended with pay pending the next board of education meeting. She acknowledged that she had advised the principal on December 10, 1996, when she was asked for the original of her certificate bearing the English endorsement that she would look for it. She said she did not know where any of her certificates were and when she looked for them she discovered she did not have copies of any of her certificates, including the one bearing the Reading and Elementary Education endorsements. She further testified that no one in the Delran district had asked her to produce her English endorsement until December 10, 1996.

With respect to the disputed facts in this matter, I **FIND** that after respondent gave the completed application to Ms. Basner sometime between April and August 1988, and that she never saw it again. I further **FIND** that she did not receive any written communications from the Burlington County Superintendent's office either at her home address or at school between August 18, 1988 and December 10, 1996. Although Ms. Lovenduski testified that she mailed certain letters and memoranda, including the evaluation of credentials performed by the State Board of Examiners, to respondent at her home address, I am not persuaded that she did in fact mail the documents to respondent at home. She acknowledged that some of the correspondence had been sent to respondent in care of the school, and it was apparent from other answers which

she gave during her testimony that she was concluding (rather than remembering) that she had mailed certain things to respondent's home address simply because that address appeared on some of the documents. Likewise, although she testified that when P-5 in evidence, the application for certification, was returned to her office in 1992 it was in an envelope bearing respondent's home address, she did not have the envelope, and I find it incredible to believe that she could possibly remember the envelope for this one piece of correspondence out of the many thousands which are sent to her office by teachers and school districts.

APPLICABLE LAW AND DISCUSSION

N.J.S.A. 18A:26-2, one of the statutes relevant to a determination in this matter, provides in pertinent part:

> No teaching staff member shall be employed in the public schools by any board of education unless he is the holder of a valid certificate to teach, administer, direct or supervise the teaching, instruction, or educational guidance of, or to render or administer, direct or supervise the rendering of nursing service to, pupils in such public schools and of such other certificates, if any, as may be required by law.

. . .

Although the order to show cause issued in this matter by the New Jersey State Board of Examiners on January 23, 1997 charges respondent with dishonest misrepresentation of the status of her licensure both to her school board, the Board of Education of Delran, and to students and parents in her classes, petitioner has offered no evidence whatsoever of any dishonesty on respondent's part. I have found as a matter of fact hereinabove that respondent believed that she was properly certificated to teach English because she had provided her supervisors, Ms. Basner and Ms. Weiskittle, with all of the information they had requested; she had passed the National Teachers' Exam and she had been assigned by those supervisors to teach English in the high school. Was respondent negligent in failing to demand that she be provided with the original

certificate bearing the English endorsement (or even a copy thereof)? The answer is probably yes; however, negligence is not what has been charged here, nor would it provide a basis for revoking the endorsements which respondent does hold, Teacher of Elementary School and Teacher of Reading. Certainly respondent relied to her detriment upon representations made to her by Ms. Basner and Ms. Weiskittel that the courses she had already taken to obtain a Masters degree in reading would undoubtedly qualify her for the teacher of English endorsement and that Ms. Basner would expedite the certification process.* Although not entirely justified, such reliance by respondent is understandable in that when she was employed by the Bordentown schools, the entire certification process was handled for her by the district. Respondent's simple negligent failure to ensure that she had the teacher of English endorsement/certificate in her possession, absent anything further, may not serve as the basis for revoking her legitimate certificate/endorsements. The grounds for revocation and suspension of certification are specified in the administrative code at N.J.A.C. 6:11-3.4 and require some sort of finding of wrongdoing. That regulation provides:

> The State Board of Examiners may revoke or suspend the certification of any certificate holder on the basis of demonstrated inefficiency, incapacity, conduct unbecoming a teacher, or other just cause. Other just cause shall include, but not be limited to, offenses within the terms of the forfeiture (N.J.S.A. 2C:51-2) or disqualification statutes (N.J.S.A. 18A:6-7.1). The State Board of Examiners may revoke or suspend a certificate upon evidence that the applicant did not meet the qualifications for the certificate at the time of issuance. The Board may not revoke or suspend a certificate without providing the applicant an opportunity to be heard pursuant to N.J.A.C. 6:11-3.

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* In her post-hearing written submission, petitioner's counsel argues that respodnent's evidence concerning her supervisor's representations is hearsay. Respondent's testimony about what her supervisors said to her is not hearsay because it is not offered to prove the truth of the supervisor's statements, but only that it was said and that respodnent relied upon it. What is hearsay evidence, however, are the statements set forth in exhibit R-2 in evidence, respondent's answers to interrogatories because they were not uttered by the witness on the record during the hearing if they are offered to prove the truth of the matter asserted, i.e., that Ms. Basner told respondent she was "good to go" In fact, counsel for respondent stated that R-2 in evidence was being offered to show that petitioner had ample advance notice concerning respondent's defenses, including the names of the supervisors involved.

There is ample evidence in the within matter of wrongdoing; however, there is no evidence that respondent is the responsible party. The evidence presented by the petitioner was unfortunately brief and exiguous. Petitioner did not offer the testimony of any person from the Delran school district who might be able to explain how the obviously fraudulent certificate came into their possession. The names and titles of those individuals involved were provided by respondent in answers to interrogatories to petitioner. Whether petitioner failed to properly investigate to make a determination concerning who the wrongdoers were in this matter or whether for whatever reason it simply failed to present this information cannot be determined on the basis of the within record. What can be determined, however, is that the Delran Board of Education knew or should have known that respondent did not possess an endorsement as teacher of English. The document entitled "Certificate" which Delran officials faxed to the Burlington County Superintendent of schools on December 10, 1996 is an obvious forgery. The school district would have known this for two reasons: one, it indicates on its face that the certificate was issued to Ms. Osman in December 1980, obviously incorrect even if the certificate were genuine since in August 1988, the district forwarded respondent's application for such an endorsement to the Burlington County Superintendent of schools, and two, as previously noted, Saul Cooperman was not the Commissioner of Education in December of 1980, something which anyone involved in education in New Jersey would know. Further inquiry and investigation by the State Board of Examiners into this matter to determine the identity of the culpable party or parties is required. In the within matter, however, for all of the reasons set forth hereinabove, petitioner has failed to establish by a preponderance of the competent and credible evidence any of the allegations in the order to show cause. and accordingly the order to show cause is hereby **DISCHARGED** and the within matter is **DISMISSED WITH PREJUDICE.**

I hereby **FILE** my initial decision with the **STATE BOARD OF EXAMINERS** for consideration.

This recommended decision may be adopted, modified or rejected by the **STATE BOARD OF EXAMINERS**, which by law is authorized to make a final decision in this matter. If the State Board of Examiners does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **SECRETARY OF THE STATE BOARD OF EXAMINERS, Office of Licensing, 329 West State Street, PO Box 503, Trenton, New Jersey 08625-0503**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 1, 1998
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

11/3/99
DATE

Debbie Antanaitis
STATE BOARD OF EXAMINERS

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

cc

EXHIBITS IN EVIDENCE

For petitioner:

P-1 Respondent's application for Reading Specialist endorsement, dated February 17, 1981

P-2 Respondent's application for Elementary Teacher endorsement, dated August 14, 1980

P-3 Computer printout from Bureau of Information Resources Management, New Jersey Department of Education, showing respondent's listing of certifications and assignments from 1988/89 school year through 1996-97 (8 pages)

P-4 Photocopy of 1989-90 Fall Report, Manual for Coding Certificated Staff Status Report, page 7

P-5 Application for certification/English endorsement, signed by respondent and dated August 15, 1988

P-6 Memorandum from Burlington County Superintendent of Schools to respondent, dated June 12, 1989

P-7 Form letter from New Jersey Department of Education, Burlington County office, to respondent, dated September 11, 1990

P-8 Cover memorandum from New Jersey Department of Education, Burlington County office to respondent, dated April 22, 1992, enclosing evaluation of credentials for certification signed by Elizabeth A. Strother on April 9, 1992 (2 pages)

P-9 State Board of Examiners certificate purportedly issued to respondent on 12/80, bearing endorsement Teacher of English

P-10 Respondent's Instructional Certificate, bearing endorsements Elementary School Teacher and Teacher of Reading

For respondent:

R-2 Respondent's answers to interrogatories, questions 1, 2 and 3, signed November 6, 1997

For identification only:

R-1 Facsimile transmission cover sheet for P-9 from Joan Iverson, secretary to Delran Board of Education Superintendent

WITNESSES

For petitioner:

Sharon L. Lovenduski

Elizabeth Strother Haywood

For respondent:

Patricia Osman

OAL DKT. NO. EDU 428-99
AGENCY DKT. NO. 556-12/98

PATRICIA OSMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in rendering the within decision.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the ALJ that the within petition is time-barred, and rejects petitioner's contention that only "after she was cleared of any wrongdoing, could [she] assert her claim that she has the right of reinstatement in her tenured position with the Delran Board of Education ***." (Petitioner's Exceptions at p. 2) Rather, like the ALJ, the Commissioner determines that petitioner can fairly be charged, as of January 13, 1997, the date the Board terminated her employment as a tenured teacher (see Initial Decision at pp. 6, 7), absent the statutory protections afforded her by *N.J.S.A.* 18A:6-10, with knowledge of "the existence of facts that might equate in law with a cause of action ***," thereby triggering the 90-day filing period of *N.J.A.C.* 6:24-1.2(c). (at p. 4) *Susan Beshaw v. Board of Education of the Borough of Oakland, Bergen County,* State Board decision, February 4, 1998, *aff'd* Appellate Division

March 23, 1999, A-3985-97T5) Indeed, the within Petition of Appeal recognizes that "[o]n January 13, 1997, respondent terminated, unilaterally, petitioner's *tenured employm*ent purportedly pursuant to *N.J.S.A.* 18A:27-2***." (emphasis added) (Petition of Appeal at p. 2)

As the ALJ stated:

> The basis for petitioner's claim, herein *** is her assertion that she acquired tenure in respondent's district and therefore could not be removed except pursuant to *N.J.S.A.* 18A:6-10. That claim was not in any way affected by the September 24, 1998 determination of the Board of Examiners. If petitioner was a tenured teacher in respondent's district in January 1997 when it purported to terminate her employment, it was because she had taught for the requisite period of time pursuant to one of her valid endorsement. (Initial Decision at p. 6)

Even *if* the State Board of Examiners suspended or revoked petitioner's remaining endorsements on September 28, 1998, such action *could* not have affected petitioner's valid claim to employment in the District, based on her tenure rights, from January 13, 1997, until the date the State Board of Examiners took action.[1]

Accordingly, the Initial decision of the ALJ is adopted for the reasons expressed therein. The within Petition of Appeal and respondent's counterclaim are dismissed, pursuant to *N.J.A.C.* 6:24-1.2.(c)[2]

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

[1] Here, the Commissioner notes that the record demonstrates that the Board's receipt of a copy of correspondence dated January 9, 1997 from Ida B. Graham, Director of the Office of Licensing and Credentials, to the then Burlington County Superintendent of Schools indicated, in part, that "***Ms. Osman is permitted to continue teaching under her *two legitimate* certificates *until such time as the Board takes action against her certificates.****" (Supplemental Certification in Lieu of Affidavit of Dr. Carl Johnson, Superintendent of Schools, at p. 4 and Exhibit N) (emphasis added)

[2] Petitioner does not argue that this matter warrants the Commissioner's relaxation of the 90-day rule, pursuant to his authority under *N.J.A.C.* 6:24-1.15

[3] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* And N.J.A.C. 6:2-1.1 et seq., within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

December 20, 1999

Date of Mailing, December 20, 1999

4/17-99

EDU #428-99
C #417-99
SB # 7-00

PATRICIA OSMAN,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, December 20, 1999

For the Petitioner-Appellant, Wills, O'Neill & Mellk (Arnold M. Mellk, Esq., of Counsel)

For the Respondent-Respondent, John T. Barbour, Esq.

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

May 3, 2000

Date of mailing MAY 05 2000

417-99

EDU # 428-99
C # 417-99
SB # 7-00
App. Div. #A-5517-99T1

PATRICIA OSMAN,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY,	:	DECISION ON REMAND
RESPONDENT-RESPONDENT.	:	

Remanded by the Appellate Division, October 17, 2001

Decided by the State Board of Education, May 30, 2000

Decided by the Commissioner of Education, December 20, 1999

For the Petitioner-Appellant, Wills, O'Neill & Mellk (Arnold M. Mellk, Esq., of Counsel)

For the Respondent-Respondent, John T. Barbour, Esq.

This matter is before us pursuant to a remand by the Appellate Division. The underlying case arose when the Board of Education of the Township of Delran terminated petitioner's employment on January 13, 1997 following discovery of the fact that the English endorsement she possessed appeared to be fraudulent on its face. Petitioner's termination was contrary to the advice given to the County Superintendent by the State Board of Examiners that petitioner was permitted to continue teaching

under her other endorsements until such time as the Board of Examiners took action against them.

Subsequent to petitioner's termination, the Board of Examiners issued an order to show cause why her certification should not be revoked or suspended. Petitioner successfully contested the order to show cause and, on September 24, 1998, the State Board of Examiners dismissed the matter.

Petitioner did not challenge the district board's action at the time of her termination in 1997. However, petitioner did file a petition with the Commissioner of Education within ninety days of the Board of Examiner's determination to dismiss its action with respect to her certification. In her petition to the Commissioner, petitioner claimed tenure and sought reinstatement to a teaching position.

In the ensuing administrative appeals process, the Administrative Law Judge, the Commissioner and the State Board of Education all agreed that petitioner was tenured at the time of her termination. However, they all concurred that petitioner's claim was time-barred by the ninety day rule, under which any petition challenging her termination had to be filed within ninety days of that termination.

In dismissing the petition, the Commissioner indicated in a footnote that since petitioner had not argued the issue, he was not considering whether the circumstances of the matter warranted relaxation of the ninety-day time limit. In affirming the Commissioner's decision, the State Board made no comment concerning relaxation of the time limit.

The Appellate Division affirmed the State Board's determination that, although petitioner was tenured at the time of her termination, her petition was time-barred.

Nonetheless, given the informal nature of administrative proceedings and in the absence of a controlling rule, the Court found that no petitioner should be prejudiced by a failure to formally request relaxation of the ninety-day time limit. Because the Commissioner had not considered whether the circumstances warranted relaxation of the ninety-day time limitation in this case and because the State Board had not commented on the question, the Court determined that it was necessary to remand the matter to the State Board so that we could return it to the Commissioner for his findings and determination of whether the ninety-day rule should be relaxed. Therefore, pursuant to the Court's direction to us, we remand this matter to the Commissioner.

Like the Appellate Division, we do not retain jurisdiction.

December 5, 2001

Date of mailing DEC 07 2001

419-99

WILLIAM MARSH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, Coordinator of Adult Education and Community Use of Schools, alleged the Board took no action to abolish his position and, accordingly, sought an order to continue his employment. Board contended petitioner was not entitled to continued employment because the action of the City Council effectively eliminated petitioner's position by not restoring funding for it after the voters rejected the supplemental spending question.

ALJ concluded that there was no statutory provision for the abolishment of positions duly established by a board of education to take effect merely because the board's annual school budget was defeated at the polls by the electorate. ALJ concluded that the Board had to take affirmative action to abolish the position it created; therefore, by failing to abolish petitioner's position when it terminated him in July 1998, the Board's action to terminate petitioner's salary, benefits and other emoluments was *ultra vires*. ALJ concluded that petitioner's position remained in force until such time as the Board takes affirmative action to abolish it. ALJ ordered the Board to reinstate petitioner to his position as Coordinator of Adult Education and Community Use of Schools with mitigated compensation, retroactive to June 18, 1998.

Commissioner set aside the Initial Decision. Although concurring with ALJ's analysis, Commissioner will not grant a relief that compels a board to fill a position which, by law, it does not have the authority to fund. Such a result elevates form over substance, and is contrary to both logic and sound educational and fiscal policy. Moreover, petitioner was unequivocally on notice that his position would be eliminated if the underlying program were not restored following voter defeat, and the administration took subsequent actions that left no doubt as to the RIF to take effect as of June 30, 1998. Commissioner reminded respondent Board and all boards of their obligations with regard to abolishment of positions in the event of program elimination as a result of rejected excess expenditure questions. Additionally, in that the record indicates that the Board may have been aware of its responsibilities and failed to act nonetheless, the commissioner directed the Atlantic County Superintendent to inquire into the circumstances surrounding this matter and to report to him with findings and recommendations for action as appropriate.

December 21, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8582-98

AGENCY REF. NO. 385-8/98

WILLIAM MARSH,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,

Respondent.

Wayne J. Oppito, Esq., for petitioner (New Jersey Principals and Supervisors Association)

Michael Epps, Esq., (General Counsel) for respondent

Record Closed: August 23, 1999 Decided: October 20, 1999

BEFORE **LILLARD E. LAW,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, William Marsh, alleges that the Board of Education of the City of Atlantic City (Board) failed to abolish his employment position prior to his dismissal and, therefore, seeks an order from the Commissioner of Education (Commissioner) to continue all of his salary, benefits and emoluments, retroactive to July 1, 1998.

The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The hearing was held on April 20, 1999, at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City, New Jersey. The parties submitted post-hearing memoranda and the hearing record closed on August 23, 1999.

FINDING OF FACT

Based upon the testimony and other evidence adduced at the hearing and having determined there are no other facts in dispute, I hereby incorporate petitioner's Statement of Facts as my, I **FINDINGS OF FACTS** as set forth herein below:

Statement of Facts

The facts in this matter are essentially uncontroverted. Petitioner was employed by the Atlantic City Board of Education from on or about July 1, 1979 until on or about June 30, 1998. Initially, petitioner was employed as the Neighborhood Facilities Coordinator. In the 1997-98 school year, petitioner became the District Coordinator of Adult Education and Community Use of Schools. (P-1).

On or about April 15, 1998, the annual school election was held. Pursuant to *N.J.S.A.* 18A:7F-5, on the ballot was a CAP waiver question which had a number of items including continuation of the community schools program, of which petitioner's position was a part. The voters of Atlantic City defeated the budget and the CAP waiver question. Pursuant to *N.J.S.A.*

18A:7F-5 and *N.J.A.C.* 6:19-5.2, the defeated budget and separate question was referred to the municipal governing body, the Atlantic City Council.

At its meeting on May 13, 1998, respondent, the Board, acted to restore the CAP question in its entirety, which included the restoration of petitioner's position by using other available funds. (P-3). Subsequently, the Board and the City Council met to discuss the defeated budget and CAP waiver question. According to the testimony of petitioner, the sole witness, the City Council presented to the Board a budget amount which restored the money necessary to fund the CAP waiver with the exception of the community schools program. At its meeting on May 19, 1998, respondent acted "to direct the Business Administrator to submit, to the county superintendent, a *budget* reflecting the actions of City Council." (P-4) (emphasis supplied). The resolution expressly directed the Business Administrator to submit the budget to the county superintendent. The resolution did not abolish any positions.

At its meeting on May 26, 1998, a resolution was on respondent's agenda "to implement the policy imposed on the Board by City Council to notify Mr. Marsh, Mr. Langford and Mr. Allen of the abolishment of their positions." By recorded roll call vote, the resolution failed. (P-5) Respondent did not approve by roll call vote the resolution to abolish petitioner's position. Of note, in the next resolution that evening, respondent voted to abolish the position of a health benefits clerk and to notify the affected employee. Even though respondent did not act to abolish petitioner's position, petitioner was notified in a letter, dated June 22, 1998, from the Acting Superintendent that after 19 years of dedicated service, his last day of work would be June 30, 1998. (P-6) After June 30, 1998, the school district's central administration concluded that petitioner was no longer an employee, even though respondent's motion to abolish position did not pass.

At its meeting on August 18, 1998, respondent again addressed the resolution to abolish petitioner's position. Again respondent voted not to abolish the position. (P-7) To date, respondent has never voted in the affirmative to abolish petitioner's position. Respondent has had two resolutions to abolish the position, one on May 26, 1998, and the other on August 18, 1998. On each occasion, respondent did not pass the resolution to abolish petitioner's position.

Petitioner's Legal Argument

In the Absence of a Resolution to Abolish Petitioner's Position, Respondent is Required to Continue Petitioner's Employment

In the absence of a resolution to abolish petitioner's position, respondent is required to continue petitioner's employment. Respondent's resolution of May 19, 1999, directing "the Business Administrator to submit to the county superintendent, a budget reflecting the actions of City Council" (P-4) did not abolish the position. Although the Atlantic City Council determined that money in the budget could be cut from the community school programs, the City Council does not have the authority to determine how a board of education is to spend its money once the tax levy has been certified. The municipal resolution of the City Council only certifies the local tax levy required to support a thorough and efficient education plus any additional amounts approved by the voters or restored by the municipality after voter rejection of separate proposals. The certification of the tax levy by the municipality is not a resolution as to how a board of education is to expend its funds once the tax levy has been certified. The board of education is statutorily authorized to expend the funds to operate the school district and to determine the employment organization of the school district. *N.J.S.A.* 18A:11-1 *et seq.*

A case similar to this one is *Wollman v. Trenton Bd. of Ed.*, 96 *N.J.A.R.* 2*d.* 21, rev'd *State Bd.* January 7, 1998, aff'd *App. Div.* April 7, 1999 (attached as Appendix A). In *Wollman, supra.*, the Commissioner appointed a Fiscal Monitor "to oversee and control the fiscal operations" of the Board. The Fiscal Monitor had the authority, in consultation with the Department of Education to, among other things, terminate or promote employees without the approval of the Board, but in accordance with applicable contractual or statutory procedures.

On October 5, 1993, the Fiscal Monitor recommended to the Board that the Buildings and Grounds Department be reorganized and that the position of Assistant Director of Buildings and Grounds be abolished. The Board, however, did not move or adopt the recommendation, nor did it take independent action to abolish the position. Nevertheless, the position was eliminated by the Fiscal Monitor on October 15, 1993. On November 1, 1993, a public accounting firm

retained by the Fiscal Monitor issued a report proposing that the position be abolished. Subsequently, on November 18, 1993, the Board did adopt a resolution supporting the abolishment of the position.

Wollman filed a petition with the Commissioner alleging that the Board's failure to adopt a formal resolution abolishing his position rendered the recommendation of the Fiscal Monitor as *ultra vires*. The Administrative Law Judge (ALJ) determined that the Fiscal Monitor had broad authority to abolish the position and that the Board was not required to take independent action to do so. However, the ALJ noted that the Board subsequently adopted the accounting firm's recommendation. The Commissioner adopted the ALJ's recommended decision.

On appeal, the State Board reversed. The State Board determined that:

> Unlike the Commissioner, we conclude that the authority of the Fiscal Monitor to abolish positions without the approval of the Trenton Board cannot reasonably be inferred from the terms of the administrative order. (slip opinion at p.4).

Further, the State Board said:

> Our review of the petition and resultant order leads us to conclude that the authority to abolish positions without Board approval cannot reasonably be inferred from the scope of powers conferred on the Fiscal Monitor . . .
>
> Nor do we find that such authority can reasonably be inferred from the provision in the order authorizing the Fiscal Monitor to "terminate or promote any board of education employees under the supervision of the board secretary or school business administrator without approval of the board of education . . ." The authority to "terminate or promote" expressly involves individual employees under the Fiscal Monitor's supervision; the authority to abolish positions involves control of the district's organizational structure. This is not a distinction without a difference. The Fiscal Monitor's authority to terminate or promote individual employees under her supervision without the approval of the Board cannot, in itself, be read to abrogate the Board's jurisdiction over the district's general organization. Moreover, the use of the word "promote" in conjunction with "terminate" reinforces our belief that the intent of such provision was to permit the Fiscal Monitor to take appropriate

> personnel action with regard to those employees under her supervision without the necessity for seeking approval from the Board, rather than to eliminate entire positions without approval.
>
> Thus, while the Fiscal Monitor had express authority under the terms of the administrative order to terminate petitioner's employment without the approval of the Board, *we agree with petitioner that the Fiscal Monitor did not have authority, express or implied, to abolish his position without approval. As a result, such action was ultra vires.* (emphasis supplied.)

Unlike, the Trenton Board of Education in *Wollman, supra.*, which subsequently took action to abolish the position, the Atlantic City Board did not abolish petitioner's position. Respondent had the resolution to abolish petitioner's position before it on two separate occasions. At its meeting on May 26, 1998, respondent voted not to abolish petitioner's position. (P-5). Again at its meeting on August 18, 1998, the resolution was presented to abolish petitioner's position and again the resolution was defeated. (P-7). To date, the Atlantic City Board has not taken action to abolish petitioner's position.

It is convincingly clear under the school laws that the authority to abolish positions rests with the board of education. The municipality in a defeated school budget election establishes the tax levy. The municipality may recommend areas of the budget to cut, but once the tax levy is established, only the board of education may determine how to spend it. On May 19, 1998, "the Atlantic City Board of Education voted to direct the Business Administrator to submit, to the county superintendent, *a budget* reflecting the actions of City Council" (emphasis supplied). Once the budget was approved by the Department of Education, the Atlantic City Board had the authority to determine how to spend it. Only the Board had the authority to abolish petitioner's position and on two occasions, it failed to do so. Absent a resolution abolishing his position, petitioner is entitled to continued employment in the Atlantic City School District, retroactive to July 1, 1998.

For all the foregoing reasons, it is respectfully requested that the ALJ Find and Determine that respondent, Atlantic City Board, was required to abolish petitioner's position and that on two occasions, it voted not to do so. It is further requested that in the absence of a resolution

abolishing the position, the ALJ Order respondent to employ petitioner in his position with all salary, benefits and emoluments, retroactive to July 1, 1998, less mitigation.

The Board's Position

Respondent agrees with petitioner's statement that the facts of the instant matter are essentially uncontroverted. The respondent would make the following clarifications. The supplemental spending waiver question included the line item for salary and supplies for the community schools program. The petitioner's salary was included in this line item.

Respondent, Atlantic City Board did not act to restore the supplemental spending question at a May 13, 1998, meeting. This was not within the purview of the Board. The Board attempted to make recommendations to City Council of ways to free up funds in budget to support the supplemental spending question's funding. On the following day, May 14, 1998, City Council acted on the budget and supplemental spending waiver question. The budget was restored in total and the supplemental spending waiver was approved with the exception of the salary and supply line item for community schools. Thereafter, the Board passed a resolution directing the Business Administrator to submit to the county superintendent a budget conforming to the actions of City Council.

The health benefits clerk position was not a position eliminated by an act of City Council, but instead was a position not funded in the base budget based on a decision by the Board.

Legal Argument

In View of the Action of City Council the Atlantic City Board of Education was not Obligated to Take Any Further Action Regarding the Petitioner

The petitioner is not entitled to continued employment. The action of the City Council effectively eliminated petitioner's position. The petitioner's position was the subject of a supplemental spending question on the ballot during the general school election. The voters

rejected the supplemental spending question. The review process for an unsuccessful supplemental spending question is governed by *N.J.A.C.* 6:19-24. Subsection (e) of the foregoing regulation provides that:

> Pursuant to *N.J.S.A.* 18A:7F-5d(10), proposed expenditures which are rejected by the local voters and which are not restored by the local governing body or bodies, or rejections by a board of school estimate, are final and no application for restoration pursuant to *N.J.A.C.* 6:119-5 shall be permitted.

Therefore, the decision of City Council was final as there was not further review. The act of City Council eliminating the funding for petitioner's position essentially terminates the petitioner.

Petitioner argues that the board is authorized to expend funds to operate the district. However, pursuant to *N.J.A.C.* 6:19-24(f) the district is precluded from replacing the eliminated funds from any other source once eliminated pursuant to *N.J.A.C.* 6:19-24(e). Therefore, the board did not have the authority to otherwise fund the petitioner's position. The crux of this matter is that the board has discretion to function and spend within the line items in the budget approved by the voters as well as within those line items the voters approve to be added to the budget by way of a supplemental spending question. In the case of a defeated budget and supplemental spending question, the municipal governing body is brought into the situation to represent the voting public. The people did not fund the line item for petitioner's position. Any further action by the Board would be moot or at best superfluous.

The *Wollman* case cited by petitioner is factually distinguishable from the instant action. The cited case involves the action of a Fiscal Monitor appointed by the Department of Education and his act of eliminating a position. The matter at bar involves the annual budget process as set forth in the Administrative Code. In the instant action, the petitioner's position was not abolished by one individual but by the municipal governing body as part of the review process established by the Administrative Code.

Moreover, the State Board's decision in *Wollman* turned on the authority of the Fiscal Monitor to eliminate a position without board approval. Here the authority is set forth in the

regulations and further the regulations specifically provide that the board is precluded from taking any contrary action. Therefore the failure to pass a formal resolution terminating the petitioner is not relevant. Even if this failure was in error, it was a harmless error, not one giving rise to reinstatement.

While petitioner accurately states that the municipality determines the tax levy in a defeated budget and the board determines how it is spent, the same is not the case in the matter of a defeated supplemental spending question. In that case, the governing body determines the line items that will be added to the budget and the money appropriated for those line items may only be used in those line items.

For the foregoing reasons, it is respectfully requested that the petitioner's actions be dismissed.

CONCLUSIONS

The facts in this matter demonstrate that petitioner had been continuously employed by the Board since on or about July 1, 1997, in at least two positions. He is the holder of a Provisional Certificate as a Supervisor and Principal issued by the Department of Education Board of Examiners. The Board created the position of Coordinator of Adult Education and Community Use of the Schools to which it assigned petitioner in or about 1997, and, presumably, with the approval of the Atlantic County Superintendent of Schools. On April 30, 1998, petitioner was advised, by way of letter from Assistant Superintendent Melvin A. Clarke, that petitioner might be the subject of a reduction in force (RIF) as a consequence of the Board's 1998-99 budget. Assistant Superintendent Clarke also advised petitioner of petitioner's "property rights to other district positions [and which] will be protected and respected if you are entitled to such 'bumping rights.'" (P-2)

The powers and duties of the Board are set forth at *N.J.S.A.* 18A:11-1, which provides, in part, as follows:

> The board shall

• • • •

b. Enforce the rules of the state board;
c. Make, amend and repeal rules, not consistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title 11, Civil Service, of the Revised Statutes; and
d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district.

Pursuant thereto, under *N.J.S.A.* 18A:27-1, the Board is required, by law, to appoint teaching staff members as follows:

> No teaching staff member shall be appointed, except by a recorded roll call majority vote of the full membership of the board of education appointing him.

Thus, the Board is under the statutory constraint to employ and appoint teaching staff members by no less than a majority vote of its full membership and the appointment must be by a recorded vote.

Similarly, the Board is required to abolish positions under tenure protection when the position is subject to a RIF. The statute, *N.J.S.A.* 18A:29-9, provides that:

> Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, *in the judgment of the board, it is advisable to abolish any such positions for reasons of economy* or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article. (emphasis supplied).

Reading these two statutes together, *N.J.S.A.* 18A:27-1 and *N.J.S.A.* 18A:29-9, it can only lead to the logical conclusion that where a board of education is required to appoint a

teaching staff member by a recorded roll call vote of its full membership it, therefore, must vote to abolish a position before it may subject an employee to a RIF. It may not rely upon an outside party, who may or may not have eliminated a budgetary consideration, to effectuate the abolishing of the position duly established by the board of education. I **CONCLUDE**, therefore, there is no statutory provision for the abolishment of positions duly established by a board of education to take effect merely because the board's annual school budget was defeated at the polls by the electorate. I **CONCLUDE** that a board of education must take affirmative action to abolish the position it created.

Having reached these conclusions, I now **CONCLUDE** that the Atlantic City Board, by its own admission, failed to abolish petitioner's position of Coordinator of Adult Education and Community Use of Schools when it terminated him, effective July 1, 1998. I **CONCLUDE**, therefore, that petitioner's position remains in force and in effect until such time as the Board takes affirmative action to abolish the position. I **CONCLUDE** that the Board's action to terminate petitioner's salary, benefits and other emoluments was *ultra vires* and must be reversed.

ORDER

Accordingly, it is **ORDERED** that the Board reinstate petitioner to his position as Coordinator of Adult Education and Community Use of Schools with all salary, benefits and other emoluments, due to him, less mitigation, retroactive to June 18, 1998.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

20 October 1999
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

10-22-99
DATE

Debbie Antanaitis
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 25 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

For Petitioner:

William Marsh

For Respondent:

None

DOCUMENTS IN EVIDENCE

For Petitioner:

P-1 Position Title

P-2 Letter, dated 4/30/98 to William Marsh from Melvin Clarke

P-3 Atlantic City Board of Education Minutes dated 5/13/98

P-4 Resolution Fails

P-5 Buildings/Grounds

P-6 Letter, dated 6/22/98 to William Marsh from Delois Campbell

P-7 Atlantic City Board of Education Work Session dated 8/18/98

For Respondent:

None

OAL DKT. NO. EDU 8582-98
AGENCY DKT. NO. 385-8/98

WILLIAM MARSH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions were untimely filed pursuant to *N.J.A.C.* 1:1-18.4(a), in that the Initial Decision was mailed to the parties on October 25, 1999, and the exceptions were filed on November 18, 1999. Accordingly, the exceptions were not considered in the Commissioner's determination of this matter.

Upon careful and independent review of the record, the Commissioner is compelled to set aside the Initial Decision. Initially, the Commissioner finds that the Board is correct in noting that, where a district proposes additional general fund tax levies in excess of its maximum budget required to provide a thorough and efficient system of education, and where such proposed expenditures are rejected by the local voters and, subsequently, are *not* restored by the local governing body or bodies, or are rejected by the board of school estimate, such rejection *is final.* In such cases, no application for restoration by the Commissioner may ensue, and the

Board is thereafter prohibited from modifying its base budget in order to effectuate the purpose(s) of the proposed expenditure. *N.J.S.A.* 18A:7F-5d, *N.J.A.C.* 6:19-2.4(e), 6:19-2.4(f).

However, the Board's argument that, under such circumstances, "[a]ny further action by [it] would be moot or at best superfluous" (Initial Decision at p. 8), ignores a board's responsibilities as provided elsewhere in the State school laws and as summarized by the ALJ (*id.* at pp. 9-11), both to appoint teaching staff members *and* to abolish the positions of teaching staff members where necessary for reasons of economy. As the ALJ observes, "[The Board] may not rely upon an outside party, who may or may not have eliminated a budgetary consideration, to effectuate the abolishing of the position duly established by the board of education." (*Id.* at p. 11) In the instant matter, then, the Board did not fulfill its statutory obligation when it failed to pass a resolution abolishing petitioner's position. Additionally, it failed in this regard notwithstanding the scheduling of a resolution to abolish petitioner's position on two separate agendas, suggesting that arguments to the effect that the Board believed it did not need to act may not reflect the full circumstances surrounding the Board's determination in this matter.

In view of the Board's failure to take action under circumstances which suggest that the Board may, in fact, have been aware of its responsibilities notwithstanding its ultimate failure to fulfill them, the Commissioner directs the Atlantic County Superintendent of Schools to investigate such circumstances and report to the Commissioner with his findings and recommendations, so that action may be taken if warranted.

However, whatever the Board's understanding may actually have been at the time it failed to pass the scheduled resolutions, and notwithstanding that the Board did not act in accordance with its responsibilities, the Commissioner cannot in good conscience find that

petitioner is entitled to the relief he seeks as a result of the Board's failure to act. Here, the record is clear that, by letter dated April 30, 1998, petitioner was advised

> of a possible **Reduction in Force** effecting [sic] your position as Neighborhood Facilities Coordinator. If the budget for the 1998-98 [sic] school year is not certified at the level of finding being requested by the Board of Education[,] the Reduction in Force will be implemented.
>
> This letter will serve as the required thirty day notice and will also advise you that your property rights to other district positions will be protected and respected if you are entitled to such "bumping rights."
>
> Dr. H. Benjamin Williams, Superintendent of Schools, is expected to convene a meeting with you shortly to discuss this possible reduction and its impact on you. *** (Exhibit P-2, Letter from Assistant Superintendent Melvin A. Clarke to William Marsh) (emphasis in text)

Thereafter, by letter dated June 22, 1998, petitioner was informed that Acting Superintendent Delois Campbell would be available for an exit conference with him on his last day of work in the District, June 30, 1998. (Exhibit P-6) Petitioner himself alleges that "[o]n or about June 30, 1998, [he] met with the assistant superintendent who advised [him] that his position was abolished and that he should not report to work." (Petition of Appeal at p. 2) Under these circumstances, where petitioner was unequivocally on notice that his position in the District would be abolished if the underlying program were eliminated, and where the administration took subsequent actions that left no doubt as to the reduction in force to take effect as of June 30, 1998, petitioner cannot claim to have been prejudiced by the Board's failure to take the technical action necessary to formally effectuate the abolition of his position.

Moreover, the Commissioner cannot permit a relief that compels, as does the relief sought by petitioner and recommended by the ALJ herein, a board to fill a position which, *by law*, it does not have the authority to fund. Such a result is counter to sound educational and

fiscal policy, elevates form over substance and unjustly enriches petitioner at the expense of the district's students.

Accordingly, the Initial Decision of the ALJ is set aside for the reasons expressed herein, and the within petition is dismissed. *However, the Board herein and all other boards of education in this State are cautioned that, notwithstanding that the funding for a program is eliminated pursuant to voter rejection and subsequent governing body or board of school estimate review, a board must nonetheless take affirmative action to formally abolish any positions which may be impacted by such elimination.* Additionally, as set forth above, the Atlantic County Superintendent is directed to inquire into the circumstances surrounding this matter and to report to the Commissioner with his findings and recommendations.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

December 21,1999

Date of Mailing, December 21, 1999

421-99

BOARD OF EDUCATION OF THE BOROUGH OF HIGHLANDS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY AND THE STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning Highlands Board challenged the Department of Education's determination that the Board had the financial responsibility for the education, including special education services, during the 1997-98 school year, for M.M.C., a school-aged child classified for special education. The Department claimed that, by operation of law, the Board must be considered M.M.C.'s district of residence because M.M.C. lived with C.S., his mother, prior to placement and because C.S. resided in the Board's district. *N.J.S.A.* 18A:7B-12(b). The Board contended that given M.M.C.'s scrambled residential history (foster homes and institutions outside of the district served by the Board) and the absence of any real connection between the Board and M.M.C.'s education, the State must assume responsibility. *N.J.S.A.* 18A:7B-12(d) and 12(e). Moreover, the Board argued that because DYFS failed to comply with 6:28-7.4(b)(5), it should not be held responsible for M.M.C.'s tuition. *(Prospect Park)* The parties cross-moved for summary decision.

The ALJ found that the district of residence for M.M.C. pursuant to *N.J.S.A.* 18A:7B-12b was the Highlands. Citing *Riggs* ("time-of-decision" rule), the ALJ determined that the failure of DYFS to comply with the repealed *N.J.A.C.* 6:28-7.4(b)(5) did not negate the Board's responsibility for M.M.C.'s 1997-98 school year education costs. The ALJ ordered the Highlands Board to pay M.M.C.'s 1997-98 school year education.

The Commissioner agreed with and adopted as his own the findings and conclusions of the ALJ that, pursuant to *N.J.S.A.* 18A:7B-12(b), the Board was properly assigned by the Department as the district of residence for M.M.C. for the 1997-98 school year. That aspect of the petition was dismissed. The Commissioner, however, found that the parties did not present any legal arguments or engage in any legal analysis whatsoever relative to whether the general prospectivity rule or the "time-of-decision" doctrine should be applied, given the repeal of *N.J.A.C.* 6:28-7.4(b)5ii in July 1998, after the 1997-98 school year concluded. Consequently, the Commissioner remanded this matter to the OAL so that the parties have an opportunity to present legal arguments with respect to the impact of the repeal on the Board's financial responsibility and the ALJ may have full opportunity to consider in the first instance the legal arguments of the parties as to the applicability to the regulation in dispute of the "time-of-decision" doctrine and the prospectivity rule, in light of the facts of this matter and the Commissioner's decision in *Prospect Park.*

December 23, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 425-99

AGENCY DKT. NO. 347-11/98

BOARD OF EDUCATION
OF THE BOROUGH OF HIGHLANDS,

Petitioner,

v.

BOARD OF EDUCATION
OF THE TOWNSHIP OF MIDDLETOWN
AND THE STATE OF NEW JERSEY,
DEPARTMENT OF EDUCATION,
DIVISION OF FINANCE,

Respondents.

Joanne L. Butler, Esq., for petitioner Highlands Board of Education (Schenck, Price, Smith & King, attorneys)

Martin Barger, Esq., for respondent Middletown Township Board of Education (Reusille, Mausner, Carotenuto, Barger & Steel, attorneys)

Terri A. Cutrera, Deputy Attorney General, for respondent New Jersey Department of Education, Division of Finance (John Farmer, Jr., Attorney General of New Jersey)

Record Closed: September 27, 1999 Decided: November 3, 1999

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

M.M.C. is a school-age child classified for special education, whose living arrangements have been quite complicated and this case concerns financial responsibility for his education, including special education services, during the 1997-98 school year. The Division of Finance, part of the New Jersey Department of Education, claims that, by operation of law, the Highlands Board of Education (BOE) must be considered M.M.C.'s district of residence and that the BOE is financially responsible. The Highlands BOE submits that, given the unusual circumstances of this case, by operation of law, the State must assume financial responsibility.

The case is summarized as follows: Except for a few months in 1990 when M.M.C. resided with C.S., his mother, he has been placed in foster homes and institutions outside of the district served by the Highlands BOE. A 1993 court order placed custody and care of M.M.C. with M.G. and, thereafter, M.M.C. and M.G. resided in Middletown where M.M.C. attended schools operated by the Middletown BOE until 1997. In 1997, a court order placed custody and care of M.M.C. with the Division of Youth and Family Services (DYFS) and, thereafter, the DYFS placed M.M.C. in a series of foster homes and institutions. Contrary to N.J.A.C. 6:28-7.4(b)(5)(ii) (then in effect), the DYFS failed to notify the Highlands BOE of these placements, so the BOE was not afforded an opportunity to participate in decisions relative to placement, including placement for the 1997-98 school year. During that school year, M.M.C. did not reside and was not placed in the Highlands BOE district, but C.S. resided in the Highlands BOE district. Entities that have provided educational services to M.M.C. during that school year have demanded payment of tuition and the New Jersey Department of Education's Division of Finance, citing N.J.S.A. 18A:7B-12(b), determined that, because M.M.C. lived with C.S. prior to the subject placement and because C.S. reside in the Highlands BOE's district, the Highlands BOE is responsible for the tuition. The Highlands BOE contends that, given M.M.C.'s scrambled residential history and the absence of any real connection between the Highlands BOE and M.M.C.'s education, N.J.S.A. 18A:7B-12(d) and -12(e) require that the State (Department of Education) assume responsibility for M.M.C.'s tuition. Further, the Highlands BOE submits that, pursuant to N.J.A.C. 6:28-7.4(b)(5)(ii), because it was not afforded an opportunity to participate

in the placement decision, it may not be held responsible for the subject costs. However, the Division of Finance points out that N.J.A.C. 6A:14-1.1 et seq., which have replaced N.J.A.C. 6:28-1.1 et seq., do not require participation of the local board of education in placement, so, under current law, the DYFS's failure to notify the Highlands BOE, etc., should not negate the BOE's responsibility for the tuition.

The parties have cross-moved for summary decision.

PROCEDURAL HISTORY

By way of a letter dated January 23, 1998, the Division of School Finance notified the Highlands BOE of its determination that the Highlands BOE was financially responsible for the education of M.M.C. Thereafter, as detailed below in the "Findings of Fact," the parties corresponded. On July 23, 1998, the Highlands BOE's petition against the Middletown BOE and "ABC Board of Education 1-3" was filed with the Department of Education. N.J.S.A. 18A:6-9. On October 27, 1998, the Middletown BOE's answer was filed. On November 5, 1998, the Middletown BOE's amended answer was filed. On November 16, 1998, the Highlands BOE's first amended petition, which added the State of New Jersey, Department of Education, as a respondent, was filed. On November 24, 1998, the Department's papers in support of a motion to dismiss the amended petition (as untimely) were filed. On December 4, 1998, the Highlands BOE's papers in opposition to the motion to dismiss were filed. On December 7, 1998, the Department's reply to the Highlands BOE's papers was filed. By letter dated December 11, 1998, the Commissioner denied the motion to dismiss. On January 11, 1999, the Department's answers and defenses were filed. The Department then transmitted the matter to the Office of Administrative Law (OAL), where, on February 3, 1999, it was filed as a contested case. N.J.S.A. 52:14B-2(b).

On February 19, 1999, the case was assigned to me and I sent out a scheduling letter notifying the Highlands BOE that, by May 14, 1999, it should file and serve a motion for an order allowing amendment of its petition identifying any additional board of education and that, if such a motion were not filed, any claim against any additional board of education would be considered

waived and barred. On February 24, 1999, the Highlands BOE's present attorney's substitution of attorney form was filed. On June 24, 1999, a telephone conference was held and the attorneys represented that they expected to file cross-motions for summary decision. On June 10 and July 16, 1999, the Department's papers in support of its motion to dismiss and in response to the Highlands BOE's papers were filed. On July 12 and 22, 1999, the Highlands BOE's papers in support of its motion for summary decision and in opposition to the Department's motion were filed. The Board of Education of the Township of Middletown joins in the Division's motion and opposes the Highland BOE's motion. On September 27, 1999, the motions were the subject of an unrecorded conference.

FINDINGS OF FACT

C.S. and M.S. are, respectively, the mother and father of M.M.C., also known as M.S., whose date of birth is July 15, 1988. M.M.C. has been placed in foster homes and institutions outside of the district served by the Highlands BOE except for a brief period (about 1990) when he resided with C.S. M.M.C. has been classified for special education services. P-A; RNJ-J.

In a May 26, 1993, case captioned [M.G.] v. [C.S.] and [M.S.], In the Matter of: [M.M.C.], A Minor, No. FD-13-1525-93 (Ch. Div.), Mark Sullivan, Jr., J.S.C., entered an "Order of Custody." Legal custody of M.M.C. was ordered placed with M.G., then residing in Highlands, until further order of the court; visitation between the parents and M.M.C. was ordered suspended, pending the completion of M.M.C.'s pediatric-psychological evaluation; and M.S. was restrained from any and all contact with M.G. and M.M.C. P-A; RNJ-K.

Following entry of the May 1993 order, until May 1997 M.M.C. resided with M.G. In August 1993, M.G. moved to and resided in Middletown Township. In August 1995, M.G. moved to and resided in Shrewsbury Township. In October 1995, M.G. moved back to and again resided in Middletown Township and, until May 1997, M.M.C. attended the Middletown public schools. P-A.

On May 14, 1997, in a case captioned Division of Youth and Family Services and [M.S.], In the Matter of: [M.M.C.], No. FN-13-76-97-B (Ch. Div.), Eugene Iadanza, J.S.C., entered an "Order to Show Cause for Protective Services, With Removal and Custody." M.M.C. was thereby placed in the care and custody of the DYFS as provided by N.J.S.A. 30:4C-12, N.J.S.A. 9:6-8.21 et seq. M.M.C. was thereby made a ward of the court and custody was to be granted to or continued with the DYFS with authorization to the DYFS to consent to emergency medical treatment, etc. M.G. was ordered to show cause why an order should not be entered placing M.M.C. in the care and supervision of the DYFS. RNJ-L.

Thereafter, the DYFS placed M.M.C. with the following persons or entities:

May 15 to May 17, 1997	S.A.B. Bradley Beach, NJ	
May 17 to July 3, 1997	CCIS Unit Monmouth Medical Center Long Branch, NJ	
July 3 to September 18, 1997	D.T. (Mentoring Program) Merchantville, NJ	B.J. (Mentoring Program) Sicklerville, NJ
September 23 to October 1, 1997	Kennedy Health Care System (Hospital) 2201 Chapel Avenue Cherry Hill, NJ	
October 1 to October 6, 1997	J.M.M. (Mentoring Program) Willingboro, NJ	
October 6 to November 17, 1997	Kennedy Health Care System (Hospital) 2201 Chapel Avenue Cherry Hill, NJ	
November 17, 1997, to February 1998	Mount Saint Joseph's Children's Center (a State-approved, private residential educational program) 124 Shepherds Lane Totowa, NJ	

About December 1997, the Division of Finance was asked to determine whether the Highlands BOE was responsible for tuition for M.M.C.'s education. The DYFS reported to the Division that C.S. was residing in Highlands and M.S. was residing in Port Monmouth. RNJ-J.

By letter dated January 23, 1998, Melvin Wyns of the Department of Education's Office of School Finance wrote to the Highlands BOE as follows:

> The Department of Human Services has asked my office to determine the district of residence for [M.M.C.], a child who was placed by DYFS with the Mt. St. Joseph Children's Center, 124 Shepherds Lane, Totowa, New Jersey, on November 17, 1997.
>
> The specific facts in this case are as follows:
>
> 1. The address of parent [C.S.] as of the date of this placement (11/17/97) was 55 Waterwitch Avenue, Highlands, New Jersey.
>
> 2. Highlands Borough is responsible for the educational costs of the child for the 1997-98 school year.
>
> In accordance with N.J.S.A. 18A:7B-12, N.J.A.C. 6:20-5.3, N.J.A.C. 6:20-5.4 and based upon the information provided, it is determined that Highlands Borough is the responsible school district for [M.M.C.].
>
> If your [BOE] contests the determination of district of residence, a written notification should be submitted . . . .
>
> [RNJ-A.]

Thereafter, the DYFS placed M.M.C. with the following entity:

February to May 7, 1998	Monmouth Medical Center Long Branch, NJ

By letter dated February 23, 1998, the Highlands BOE responded to the Division of Finance as follows:

> An investigation into this case by a member of the Highlands [BOE] Child Study Team resulted in information indicating that [M.M.C.]

> had been in foster care since eighteen (18) months of age and that the following foster parent obtained legal custody of the child in 1993:
>
> [M.G.]
> 15 Bay Avenue
> Middletown, New Jersey 07748
>
> The child attended [the Middletown BOE's] Port Monmouth School, Main Street and Highway 36, Middletown, New Jersey until May 14, 1997. It is my understanding that [M.G.] now resides at 32 Bay Avenue, Keansburg, New Jersey 07734.
>
> Since this child was in foster care with legal custody, I do not believe that the Highlands [BOE] is responsible for the costs of educating the child. I would appreciate your further attention to this matter.
>
> [RNJ-B.]

By letter dated March 10, 1998, Karen Gagne, a school social worker in the Department of Human Service's Office of Education, wrote to the Office of School Finance expressing her opinion that, on November 17, 1997, C.S., who resided in Highlands, was M.M.C.'s "legal guardian." RNJ-M.

By letter dated March 20, 1998, the assistant commissioner for the Division of Finance responded to the Highlands BOE as follows:

> I have reviewed your letter of February 23, 1998 . . . . Additional information from the Department of Human Services has indicated that [C.S.] was a resident at 55 Waterwitch [Avenue], Highlands, New Jersey, as of the date of [M.M.C.'s] placement (11/17/97). [M.G.] was [M.M.C.'s] foster parent but had no legal guardianship. With regard to N.J.S.A. 18A:7B-12, "The district of residence for children in foster homes shall be the district in which the foster parents reside. If a child in a foster home is subsequently placed in a state facility or by a state agency, the district of residence of the child shall then be determined as if no such foster placement had occurred."
>
> Based on the address of parent as of the date of this placement, I must uphold Mr. Wyns' determination that Highlands

[BOE] is the responsible district for [M.M.C.] for the 1997-98 school year.

[RNJ-C.]

Thereafter, the DYFS placed M.M.C. with the following entity:

May 7, 1998, to present	Somerset Hills School Somerset, NJ

M.M.C. remains placed in the Somerset Hills School. Since November 1997, C.S. has resided in Highlands. M.G. resides in Middletown Township. P-A.

The Kennedy Health Care System, Mount Saint Joseph's Children's Center, Monmouth Medical Center and Somerset Hills School seek reimbursement for educational services provided to M.M.C. (First Amended Petition).

Contrary to N.J.A.C. 6:28-7.4(b)(5)(ii), the DYFS did not notify the Highlands BOE of the above-described placements, so the BOE was not afforded an opportunity to participate in any placement decision. Also, there is no allegation that from May 1997 through the 1997-98 school year an emergency existed that prevented the DYFS from notifying the BOE and affording it an opportunity to participate in decisions affecting placement.

CONCLUSIONS OF LAW

The Legislature is to "provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." N.J. Const. art. VIII, § 4, ¶ 1. And, generally, local boards of education provide and are financially responsible for the education of school-age children domiciled within their respective districts. N.J.S.A. 18A:38-1.

Criteria for determination of a school child's district of residence and for determination of responsibility for tuition for the child's educational services are provided in N.J.S.A. 18A:7B-12:

> For school funding purposes, the Commissioner of Education shall determine district of residence as follows:
>
> a. The district of residence for children in foster homes shall be the district in which the foster parents reside. If a child in a foster home is subsequently placed in a State facility or by a State agency, the district of residence of the child shall then be determined as if no such foster placement had occurred.
>
> b. The district of residence for children who are in residential State facilities, or who have been placed by State agencies in group homes, private schools or out-of-State facilities, shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency.
>
> If this cannot be determined, the district of residence shall be the district in which the child resided prior to such admission or placement.
>
> . . . .
>
> d. If the district of residence cannot be determined according to the criteria contained herein, or if the criteria contained herein identify a district of residence outside of the State, the State shall assume fiscal responsibility for the tuition of the child. The tuition shall equal the approved per pupil cost established pursuant to [N.J.S.A. 18A:7F-1 et seq.]. This amount shall be appropriated in the same manner as other State aid under this act. The Department of Education shall pay the amount to the Department of Human Services, the Department of Corrections or the Juvenile Justice Commission . . . or, in the case of a homeless child, the Department of Education shall pay the appropriate T & E amount and any appropriate additional cost factor for special education pursuant to [N.J.S.A. 18A:7F-19] to the school district in which the child is enrolled.
>
> e. If the State has assumed fiscal responsibility for the tuition of a child in a private educational facility approved by the Department of Education to serve children who are classified as needing special education services, the department shall pay to the Department of Human Services or the Juvenile Justice Commission, as appropriate, the aid specified in subsection d. of this section and

> in addition, such aid as required to make the total amount of aid equal to the actual cost of the tuition.
>
> [Emphasis added.]

Criteria for determination of a school child's district of residence are also provided in N.J.A.C. 6:20-5.3:

> (a) The district of residence for school funding purposes shall be determined according to the following criteria:
>
> 1. The "present district of residence" of a child in a residential State facility defined in N.J.S.A. 18A:7D-3 and referred to in paragraph one of N.J.S.A. 18A:7B-12(b) shall mean the New Jersey district of residence of the child's parent(s) or guardian(s) as of the last school day prior to October 16.
>
> 2. The "present district of residence" of a child placed by a State agency in a group home, private school or out-of-State facility also referred to in paragraph one of N.J.S.A. 18A:7B-12(b) shall mean the New Jersey district of residence of the child's parent(s) or guardian(s) as of the date of the child's initial placement by the State agency. In subsequent school years spent in the educational placement made by a State agency, the child's "present district of residence" shall be determined in the same manner as for a child in a residential State facility as set forth in (a)1.
>
> [Emphasis added.]

Relative to N.J.S.A. 18A:7B-12(a), "foster home" is defined in N.J.S.A. 30:4C-2(i):

> The term "foster home" means and includes private residences, group homes, residential facilities and institutions wherein any child in the care, custody or guardianship of the [DYFS] may be placed by the said division or with its approval for temporary or long-term care, and shall include any private residence maintained by persons with whom any such child is placed for adoption.

Until July 4, 1998, N.J.A.C. 6:28-7.4 governed responsibility for placement of an educationally disabled student and N.J.A.C. 6:28-7.4(b)(5) stated:

> Placement of a pupil with an educational disability in an approved residential private school by a public agency, other than the district board of education, shall be subject to the rules governing such agencies and to this chapter. The district board of education shall pay the nonresidential special education costs.
>
> i. When the pupil has been placed by a public agency empowered to make such placement, the placement shall meet the individualized education program requirements of the pupil.
>
> ii. The chief school administrator or his or her designee shall participate with the public agency in the placement decision if the district board of education is to be responsible for the special education costs.
>
> [Emphasis added.]

N.J.A.C. 6A:14-1.1 et seq., which replaced N.J.A.C. 6:28-1.1 et seq., do not require participation of the district of residence in the placement of a classified student.

In May 1997, M.M.C. was placed in the care and custody of DYFS, "a State agency," and the DYFS placed M.M.C. in a succession of foster homes and institutions, including those which provided services during the subject 1997-98 school year. Therefore, consistent with N.J.S.A. 18A:7B-12(a), the "district of residence of [M.M.C.] shall . . . be determined as if no such foster placement had occurred."

C.S. is the parent with whom M.M.C. lived "prior to his . . . most recent placement by a State agency [the DYFS]." N.J.S.A. 18A:7B-12(b) and, therefore, under N.J.S.A. 18A:7B-12(b), because C.S. resides in Highlands, the Highlands BOE would be responsible for M.M.C.'s tuition during the 1997-98 school year. (The 1993 order placed care and custody of M.M.C. with M.G., but did not name her as his guardian and, therefore, there is no "guardian" whose residence N.J.S.A. 18A:7B-12(b) would make the district of residence for M.M.C.)

Consistent with N.J.A.C. 6:28-7.4(b)(5), then in effect, in Board of Education of the Borough of Prospect Park v. New Jersey Department of Education, 97 N.J.A.R.2d (EDU) 134,

140, the Commissioner held that the DYFS "must consult with the school district prior to placement" absent some emergency excusing the state agency from that requirement. Here, the DYFS failed to notify the Highlands BOE or to otherwise afford it an opportunity to participate in any placement decision. And, in May 1997, i.e., months before the start of the 1997-98 school year, the custody and care of M.M.C. was placed with DYFS. So it appears highly unlikely that (and there is no allegation that) during these many months an emergency continued that prevented the DYFS from notifying the BOE and affording it an opportunity to participate in decisions affecting placement for the 1997-98 school year.

However, N.J.A.C. 6:28-1.1 et seq. have been repealed and replaced by N.J.A.C. 6A:14-1.1 et seq., effective July 4, 1998, which do not require notification of the district of residence before such placement of a classified student. And, consistent with the "time-of-decision" rule, current law - presumedly expressing public policy, is generally applicable in lieu of repealed law. Riggs v. Long Beach Tp., 109 N.J. 515, 521 (1986), on remand, 212 N.J. Super. 69, (App. Div. 1986), rev'd 109 N.J. 601 (1988). See also Juliano & Sons, v. Chevron, U.S.A., 250 N.J. Super. 148, 158 (App. Div. 1991). See also Department of Health v. Tegnazian, 205 N.J. Super. 160, 175 (App. Div. 1985), for the principle that, in construing and applying regulations, rules governing construction and application of statutes are generally applicable.

The Highlands BOE does not allege that M.M.C.'s 1997-98 placement was inappropriate or that there could have been other appropriate placement at a lesser cost and it does not allege that it relied on the old rule in obtaining some vested interest that would prevent application of the current law. Consequently, the DYFS failure to comply with the repealed N.J.A.C. 6:28-7.4(b)(5) does not negate the BOE's responsibility for M.M.C.'s 1997-98 school year education costs.

Given the above, the district of residence for M.M.C. can be determined according to N.J.S.A. 18A:7B-12b; that district is the Highlands BOE's; and the Highlands BOE is responsible for M.M.C.'s 1997-98 education costs.

ORDER

The Department's motion for summary decision granting its claim against the Highlands BOE for M.M.C.'s 1997-98 school year education costs is **GRANTED**.

The Highlands BOE's motion for summary decision dismissing the Department's claim for tuition is **DENIED.**

The Highlands BOE is **ORDERED** to pay M.M.C.'s 1997-98 school year education costs.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Nov. 3, 1999
DATE

John R Tassini
JOHN R. TASSINI, ALJ

Receipt Acknowledged:

11/8/99
DATE

Debbie Antonaitis/ca
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 10 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

Petitioner's Exhibits:

P-A	Affidavit of Dr. Barbara Resko
P-B	Responses to Supplemental Interrogatories, March 31, 1999

Respondent Division of School Finance's Exhibits:

RNJ-A	Letter from Department, January 23, 1998
RNJ-B	Letter from Highlands BOE, February 23, 1998
RNJ-C	Letter from Department, March 20, 1998
RNJ-D	Letter from Highlands BOE's attorney, March 30, 1998
RNJ-E	Letter from Department, April 27, 1998
RNJ-F	Letter from Department (acknowledgment of appeal, etc.), July 24, 1998; Letter from Department, October 30, 1998
RNJ-G	First Amended Petition, November 11, 1998, with exhibits
RNJ-H	Notice of Motion for Dismissal, November 23, 1998; letter-brief in support of motion, November 23, 1998
RNJ-I	Letter from Commissioner (denying motion to dismiss), December 11, 1998
RNJ-J	District of Residence Determination for a Child Placed by a State Agency in a Group Home, Private School or an Out-of-State Facility, form completed by DYFS, January 14-15, 1998;
RNJ-K	Order of Custody, [M.G.] v. [C.S.] and [M.S.], IMO [M.M.C.], A Minor, No. FD-13-1525-93 (Ch. Div. May 26, 1993)
RNJ-L	Order to Show Cause for Protective Services, With Removal and Custody, DYFS v. [M.G.], IMO [M.M.C.], No. FD-13-76-97-B (Ch. Div. May 14, 1997)
RNJ-M	Letter from Department of Human Services, March 10, 1998

OAL DKT. NO. EDU 425-99
AGENCY DKT. NO. 347-11/98

BOARD OF EDUCATION OF THE BOROUGH OF HIGHLANDS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY AND THE STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENTS.	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and Respondent State of New Jersey, Department of Education's (Department) reply were timely filed pursuant to *N.J.A.C.* 1:1-18.4. No exceptions were filed by Respondent Middletown Township Board of Education.

Highlands Board of Education (Board) vigorously excepts to the Administrative Law Judge's (ALJ) conclusion that it may not be relieved from financial responsibility for the costs of M.M.C.'s education for the 1997-1998 school year because *N.J.A.C.* 6:28-7.4(b)5ii, the regulation under dispute herein, was repealed in July 1998. The Board argues, *inter alia,* that the ALJ erroneously applied the doctrine of "time-of-decision" articulated in *Riggs v. Long Beach Tp.,* 101 *N.J.* 515 (1986), when concluding that the regulations that govern in this matter are those in effect at the time of trial, *N.J.A.C.* 6A:14-1.1 *et seq.*, not those in effect at the time the Department made the determination that the Board was financially responsible for M.M.C.'s

education, *i.e.*, *N.J.A.C.* 6:28-1.1 *et seq.* Petitioner's exceptions set forth at length the Board's legal position on the applicability of the general prospectivity rule to the instant matter as opposed to the "time-of-decision" doctrine. These arguments are briefly summarized below.

The Board urges the general rule is that regulations are to be applied prospectively only. *Seashore Ambulatory Surgery Center, Inc. v. N.J. Department of Health*, 288 *N.J. Super.* 87, 97 (App. Div. 1996); *Mitchell v. Cavicchia*, 29 *N.J. Super.* 11, 15 (App. Div. 1953). It further argues that legislation may be applied retroactively only if there is an expression of intent to retroactively apply, when reasonable expectations of those affected by regulation warrant retroactive application, or if the regulation is ameliorative or curative in nature. *Seashore*, *supra,* at 97. As to this, the Board states:

> None of these criteria apply. There is no expression by the Department of any explicit or implicit intention to apply these regulations retroactively. The reasonable expectations of school districts clearly do not point to retroactive application. The change in the special education regulations was not to correct some defect in the original regulations but to "improve special education programs by assuring a balance of flexibility and safeguards...and to comply with the Individuals with Disabilities Education Act., 20 U.S.C. §§ 1400, et seq.***" If the special education regulations were to be applied retroactively, school districts would be subject to countless violations of special education requirements, merely because the requirements changed. Surely, that is not what the Department intended. (Board's Exceptions at pp. 2-3)

Moreover, the Board contends that regulations may not be applied retroactively if to do so will result in manifest injustice to the party affected, *Seashore, supra*, at 98, which it believes would occur in the instant matter if it is required to pay for DYFS's unilateral placement of M.M.C. It urges, *inter alia,* manifest injustice is especially true in this matter because Highlands was entirely innocent in its actions and the ALJ's ruling means that without input by Highlands, the Highlands taxpayers must pay for M.M.C.'s education. The Board, therefore,

avers that the Commissioner should not reward DYFS's failure to follow the law. Of this, it states:

> The time-of-decision rule is often applied to promote public policy as embodied by the actions of the Legislature. However, condoning a failure to follow applicable regulations contravenes public policy and places financial burden on a small group of local taxpayers whose board of education was deprived of the right to make educational decisions. Thus, applying the time-of-decision rule in this case would not promote public policy. (Board's Exceptions at p. 4)

In addition to its strong objections to the ALJ's application of the "time-of-decision" doctrine in this matter instead of the general prospectivity rule, the Board also objects to the ALJ's conclusion that it is financially responsible for M.M.C.'s education based upon *N.J.S.A.* 18A:7B-12(b), urging that the ALJ reliance upon that statutory provision is misplaced. As to this, the Board avers that the ALJ essentially ignored the uncontroverted fact that M.C. has not resided with his parent since approximately 1990. As such, placement pursuant to that regulation does not conclusively point to the Board. The Board, therefore, contends that the State must assume financial responsibility for M.M.C.'s education, not the Highlands Board of Education.

The Department urges affirmance of the ALJ's recommended decision, maintaining that the ALJ properly applied the "time-of-decision" rule in assigning financial responsibility to the Board. As to this, the Department emphasizes that the change in the law that occurred in the instant matter involves repeal of an existing regulation and not the enactment of a new one. The Department also contends that it is well-established that the same rules which govern the construction and application of statutes and municipal ordinance also govern the

construction and application of administrative regulations. In summarizing its legal position, the Department states:

> the ALJ's application of the "time-of-decision" rule was correct because the repeal of *N.J.A.C.* 6:28-7.4(b)5ii effectively extinguished any cause of action which might have arisen under it. Further, under a traditional retroactive application analysis, it is clear that the repeal of *N.J.A.C.* 6:28-7.4(b)5ii was intended to be retroactive, as it was curative and not contrary to the reasonable expectations of the parties. Moreover, retroactive application of the regulation does not infringe upon a vested interest of the petitioner and does not result in manifest injustice. (Department's Reply Exceptions at p. 11)

The Department also urges affirmance of the ALJ's determination that it properly applied *N.J.S.A.* 18A:7B-12(b) when assigning the Board financial responsibility for M.M.C.'s education for the 1997-1998 school year. The Department avers that the Board would read into the statute a requirement that a child must have resided with his parents *immediately prior* to his most recent placement, or the State assume financial responsibility, an interpretation which the Department contends has never been previously made and for which the Board provides no authority. The Department further contends that the precise wording of the statute dictates that the time M.M.C. resided in foster placement is not counted; hence, the mother's residence is determinative of his district of residence.

Upon a thorough and comprehensive review of the record in this matter, the Commissioner agrees with and adopts as his own the findings and conclusions of the ALJ that, pursuant to the statutory provisions of *N.J.S.A.* 18A:7B-12(b), the Board was properly assigned by the Department to be the district of residence for M.M.C. for the 1997-1998 school year for the reasons well-expressed by the ALJ in the Initial Decision.

However, the Commissioner also finds upon his independent review of the record that during the period this matter was under consideration by the ALJ, the parties did not present

any legal arguments or engage in any legal analysis whatsoever relative to what has emerged as the second major issue in this matter, namely, whether the general prospectivity rule or the "time-of-decision" doctrine should be applied, given the repeal of *N.J.A.C.* 6:28-7.4(b)5ii in July 1998, after the 1997-1998 school year concluded. Given the determination herein that the Highlands Board was properly assigned as M.M.C.'s district of residence for the 1997-1998 school year, this issue takes on prominence in the present matter in light of the Commissioner's decision in *Prospect Park, supra.* Therein, the Commissioner waived Prospect Park Board of Education's financial responsibility for the education of a student assigned to it under the provisions of *N.J.S.A.* 18A:7B-12(b) because DYFS had failed to comply with the requirement set forth in *N.J.A.C.* 6:28-7.4(b)5ii, that it meet with the district of residence prior to placing a student in a residential facility. Careful scrutiny of the record reveals that the ALJ did not have the benefit of the extensive briefing and legal arguments of the parties contained in the exceptions and reply exceptions prior to the issuance of the Initial Decision wherein he determined that the "time-of-decision" doctrine as articulated in *Riggs, supra,* should apply in the present matter.

Consequently, the Commissioner concludes that the matter must be remanded to the OAL so that the parties will have an opportunity to present, and the ALJ will have the opportunity to consider in the first instance, legal arguments with respect to the impact of the July 1998 repeal of *N.J.A.C.* 6:28-7.4(b)5ii on the Board's financial responsibility for the 1997-1998 school year, which were set forth for the first time in the exceptions, and for consideration of such other submissions relative to this issue as the ALJ may deem fit.

Accordingly, that aspect of the Board's petition which appealed the action of the Department designating it, pursuant to *N.J.S.A.* 18A:7B-12(b), as the district of residence for

student M.M.C. is hereby **Dismissed**. However, the question of whether the Board remains responsible for the costs of M.C.C.'s education is remanded to the OAL in order that the ALJ may have full opportunity to consider the legal arguments of the parties as to the applicability to the regulations in dispute of the "time-of-decision" doctrine and the prospectivity rule in light of the facts of this matter and the Commissioner's decision in *Prospect Park, supra.* *

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 23, 1999

* This decision, as the Commissioner's determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

422-99

NANCY MELLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning tenured teacher alleged the District's action to charge her sick days for work-related injury/illness violated *N.J.S.A.* 18A:30-2.1. The District contended her petition was untimely filed.

The ALJ found that petitioner had adequate notice of the termination of her compensation benefits. Moreover, the ALJ found that petitioner presented no reason upon which to predicate a relaxation of the 90-day limitation and that the petition was filed approximately 10 months after the notice of the action taken by the District. Petition was dismissed as untimely.

The Commissioner adopted findings and determination in Initial Decision as his own.

December 23, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSING PETITION

OAL DKT. NO. EDU 3959-99

AGENCY DKT. NO. 12-1/99

NANCY MELLO,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT

CITY OF JERSEY CITY, HUDSON COUNTY,

Respondent.

Michael Chulak, Esq., appearing for Petitioner

Charlotte Kitler, Esq., appearing for Respondent

Record Closed: October 8, 1999 Decided: November 3, 1999

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

Petitioner is seeking an order restoring sick days for certain absences from her work as a tenured teacher. Although she alleges that she was injured at work on February 27, 1997, as a result of falling down the stairs of her school, she continued working until October 5, 1997, since which she has been absent from work.

Respondent asserts that certain days of Petitioner's absence were, in fact, treated as due to work related injuries; however, her absences since March 4, 1998, have been charged against her sick bank. Moreover, Respondent asserts that Petitioner was notified many months ago that further time lost from work would not be treated as being due to work related injuries.

Although Petitioner was given notice in March, 1998 that continued absences from work would not be compensable as work related, she did not file her petition until January, 1999. Accordingly, Respondent is seeking dismissal of the verified petition for failure to comply with the 90-day requirements of *N.J.A.C.* 6:24-1.2.

DISCUSSION AND CONCLUSIONS

The operative facts relevant to a determination of this application to dismiss this petition for failure to comply with the 90-day requirement set forth in *N.J.A.C.* 6:24-1.2 are uncontroverted. They are:

1. Petitioner's sick bank has been charged with her absences from March 4, 1998.

2. Respondent's compensation carrier sent a letter dated March 5, 1998 to Petitioner, advising her that no further medical treatment was found to be necessary and no further lost time from work would be authorized.

3. Petitioner received the letter on March 10, 1998.

4. Petitioner has not returned to work.

5. There is a pending workers compensation claim.

Notwithstanding the fact that Petitioner did receive notice from the carrier that she no longer required treatment and would no longer receive authorized lost time from work, Petitioner asserts that because her attorney was not notified by the carrier of the termination of compensation benefits and because she is not an attorney familiar with the governing statutes and regulations, the requirement of *N.J.A.C.* 6:24-1.2 should be relaxed. The regulation provides, in pertinent part, that a petition challenging an action by a district board, such as this, must be filed no later than 90 days from the date of receipt of the notice of the action.

The sole issue to be resolved, therefore, is whether notice to Petitioner was sufficient to trigger the 90-day period. Although Petitioner urges that the carrier had an obligation to notify her attorney of the termination of benefits, she offers no authority in support of her position. Petitioner merely claims ignorance of the regulation and its meaning. This position, however, is untenable and unpersuasive for many reasons, not the least of which is the well established principle that an individual cannot be absolved from a legal responsibility simply because she is unaware of that responsibility. Moreover, at the time she received the notice in question, Ms. Mello had already retained the services of an attorney. Presumably, the responsibility for notifying him of the change in status devolved upon her. Moreover, other than to say that the notice she received was not adequate because it was not also sent to her attorney, there is nothing in the record to explain the 10-month delay in filing the petition.

Review of the letter sent to the carrier by the attorney (Petitioner's Exhibit A) reveals that he requested that he be kept ". . . abreast of the matter with medical reports and evaluations." The notice in question was clearly neither an evaluation or medical report. The carrier is under no obligation to go beyond the four corners of the request drafted by counsel.

Finally, I note that the procedures to be followed by the doctor and their ramifications, including the consequences of a release to return to work, were clearly stated by letter to Petitioner dated November 7, 1997. (P-1).

Petitioner relies on the provision of the regulations granting the Commissioner authority to relax the rules. *N.J.A.C.* 6:24-1.15. That provision, however, requires a showing that such an action by the Commissioner is required to avoid injustice or inappropriate or unnecessary action. Petitioner has offered no explanation of the great delay.

Accordingly, I **FIND** that petitioner had adequate notice of the termination of compensation benefits. I further **FIND** that petitioner has presented no reason upon which to predicate a relaxation of the 90-day limitation. I further **FIND** that the petition herein was filed approximately 10 months after the notice of the action taken by the board.

Consequently, based on the foregoing as well as the recognition by the Supreme Court of New Jersey that the 90-day limitation period is "a fair and reasonably necessary requirement for the proper and efficient resolution of disputes under the school laws"[1] I **CONCLUDE** that this petition should be **DISMISSED** for failure to be timely filed.

It is so **ORDERED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

[1] *Kaprow v. Berkeley Twp. Bd. of Ed.*, 131 *N.J.* 572, 582.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 3, 1999
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

11/8/99
DATE

Debbie Antanaitis/lp
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 8 1999
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

Witnesses:

Carol Warlirawski

Nancy Mello

Exhibits:

P-1 Letter - Mello from Matthews (2 pages), November 7, 1997

R-1 Letter and application for Leave of Absence (2 pages), December 19, 1997

R-2 Letter - Mello from Matthews, March 5, 1998

R-3 Letter and application for Leave of Absence (2 pages), May 29, 1998

OAL DKT. NO. EDU. 3959-99
AGENCY DKT. NO. 12-1/99

NANCY MELLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the District's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in rendering the within decision.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the ALJ that the within Petition of Appeal is properly dismissed as untimely, pursuant to *N.J.A.C.* 6:24-1.2(c), and that petitioner has failed to demonstrate cause for relaxation of the 90-day filing requirement. *N.J.A.C.* 6:24-1.15

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein. The Petition of Appeal is dismissed.*

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

December 23, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

419-99

EDU #8582-98
C # 419-99
SB # 4-00

WILLIAM MARSH,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, December 21, 1999

For the Petitioner-Appellant, New Jersey Principals and Supervisors Association (Wayne J. Oppito, Esq., of Counsel)

For the Respondent-Respondent, Michael C. Epps, Esq.

William Marsh (hereinafter "petitioner") was employed by the Board of Education of the City of Atlantic City (hereinafter "Board") in July 1979. From 1979 until 1997, he was employed as the Neighborhood Facilities Coordinator. For the 1997-98 school year, the petitioner served as the District Coordinator of Adult Education and Community Use of Schools. Although the Board took no formal action, petitioner's employment was terminated as of June 30, 1998.

The petitioner filed a petition of appeal with the Commissioner of Education, seeking an order that his employment be continued. The Board countered that petitioner was not entitled to continued employment because the Atlantic City Council

Oct. 4, 2000

had not restored the funding to support the position after the voters had rejected a supplemental spending question submitted to them pursuant to N.J.S.A. 18A:7F-5(d)(9).

Observing that the powers and duties of the Board are set forth in N.J.S.A. 18A:11-1, the Administrative Law Judge ("ALJ") stressed that under N.J.S.A. 18A:27-1, the Board must appoint teaching staff members by a recorded vote of the majority of its full membership. Reading N.J.S.A. 18A:27-1 together with N.J.S.A. 18A:28-9, which authorizes district boards to reduce the number of teaching staff members employed in the district, the ALJ found that a board must vote to abolish a position before it could subject an employee to a reduction in force. Concluding that there was no statutory provision to effect abolishment of positions duly established by a district board on the basis of a voter defeat of the board's annual school budget, the ALJ further concluded that a board must take affirmative action to abolish any position it creates. Because the Atlantic City Board had taken no action to abolish petitioner's position, the ALJ found that the position had remained in existence and that the Board's actions in terminating petitioner's salary and benefits was ultra vires. The ALJ therefore recommended that the Commissioner direct petitioner's reinstatement with all salary and benefits retroactive to June 1998.

The Commissioner set aside the ALJ's determination. Citing N.J.S.A. 18A:7F-5d, along with N.J.A.C. 6:19-2.4(e) and N.J.A.C. 6:19-2.4(f), the Commissioner initially observed that a rejection of proposed expenditures by the voters is final where the local governing body does not restore such expenditures and that the district board cannot modify its base budget to effectuate them. The Commissioner, however, rejected the Atlantic City Board's argument that it was excused on this basis from any obligation to

adopt a resolution abolishing the petitioner's position. In this respect, the Commissioner relied on the ALJ's analysis of a district board's statutory obligation to appoint and abolish the positions of teaching staff members.

Finding that the petitioner had been on notice that his position was to be abolished, the Commissioner concluded that petitioner had not been prejudiced by the Board's failure to take formal action in this case, and he declined to award relief to the petitioner. The Commissioner also concluded that he could not permit relief that would compel a board to fill a position which it did not have the authority to fund. Nonetheless, because the circumstances suggested that the Board had been aware of its responsibilities when it failed to act, the Commissioner directed the Atlantic County Superintendent to inquire into the circumstances surrounding the matter and to report to the Commissioner with his findings and recommendations.

Based on our review of the record in this matter and the relevant law, we modify the ALJ's findings, which were relied upon by the Commissioner to conclude that the Board had a statutory obligation to act affirmatively in this case. Initially, our examination of the record indicates that the petitioner was not a certificated employee of the Board. Hence, the petitioner was not a teaching staff member. N.J.S.A. 18A:1-1 ("teaching staff member" is defined as a member of the professional staff of any district whose employment is of such character that the qualifications require him to hold a certificate issued by the State Board of Examiners). By their express terms, N.J.S.A. 18A:27-1 and N.J.S.A. 18A:28-9, upon which the ALJ relied, apply only to teaching staff members. Consequently, the Board's failure to take formal action to abolish the petitioner's position was not in violation of those statutes.

However, further review of the education statutes indicates that N.J.S.A. 18A:27-4.1, which imposes procedural obligations on district boards with respect to the appointment and removal of employees, applies to both certificated and noncertificated employees. Under this statute, the Board had an obligation to act upon the Superintendent's recommendation by recorded roll call vote of a majority of the full Board in order to properly remove petitioner from his position. Moreover, N.J.S.A. 18A:16-1, which provides the authority for district boards to employ and dismiss officers and employees regardless of certification, also required that the Board take formal action to effectuate petitioner's dismissal. Based on the requirements of these statutes, we concur with the Commissioner's conclusion that the Board in this case had a statutory obligation to take formal action irrespective of whether it had the authority to fund the position at issue.

However, for the reasons that follow, we also agree with the Commissioner's determination that the petitioner is not entitled to reinstatement as the result of the Board's failure to take formal action to dismiss him. We do so solely on the grounds that the petitioner has shown no entitlement to such relief under the education laws. In this respect, we again stress that since the petitioner was not a teaching staff member, the Board was not required by N.J.S.A. 18A:28-9 to abolish the position in which he had been serving before it could dismiss him. Accordingly, the petitioner cannot claim relief under that statute. Nor do the procedural requirements of N.J.S.A. 18A:27-4.1 provide a basis for reinstatement in this case. Moreover, as found by the Commissioner, the petitioner had actual notice that he was to be dismissed and, therefore, cannot claim any relief on the grounds that he was prejudiced by the Board's failure to take formal

action to dismiss him. Accordingly, while we join the Commissioner in cautioning the Board that it must fulfill its obligations to take appropriate action in all personnel matters regardless of the status of the funding that underlies the positions affected, we, like the Commissioner, find that the petitioner in this case is not entitled to relief.

Attorney exceptions are noted.

October 4, 2000

Date of mailing OCT 06 2000

423-99

E.A., SR. AND D.A., on behalf of minor child, E.A., JR.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY, MARIE MORRISSEY AND RICHARD DIPATRI,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning parents challenged District's disciplinary transfer of 7th grader, E.A., Jr., from the James F. Murray School to another school within the District. E.A. had been enrolled in P.S. 38 pursuant to an Open Enrollment program. Petitioners sought E.A.'s reinstatement in good standing as a student at P.S. 38 retroactive to December 3, 1997, reimbursement in the amount of $5000 relevant to costs incurred for E.A.'s education and an award of counsel fees and costs.

The ALJ dismissed the petition. The ALJ concluded that the due process requirements of notice and hearing applicable to the exclusion of students from a public education system were not applicable in the current matter (E.A. was not excluded from participation in the District's educational system); that petitioners did not prove by a preponderance of credible evidence that respondents acted in an arbitrary, capricious or unreasonable manner regarding the transfer of E.A., Jr.; and that petitioners did not prove discrimination.

The Commissioner adopted findings and determination in Initial Decision as his own.

December 23, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3499-98
AGENCY DKT. NO. 50-3/98

E.A., Sr. AND D.A., ON BEHALF OF MINOR CHILD, E.A., JR.,
Petitioners,
v
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, MARIE MORRISSEY, AND RICHARD DIPATRI,
Respondents.

Edmond E. Lynch, Esq., for petitioners
(Lynch & Lynch, attorneys)

Charlotte Kitler, Esq., for respondent

Record Closed: September 13, 1999 Decided: October 28, 1999

BEFORE **DIANA C. SUKOVICH,** ALJ:

PROCEDURAL HISTORY

On or about February 27, 1998, the Reverend E. A., Sr. (E.A.) and Mrs. D.A. (D.A.) filed a petition with the State Department of Education (DOE), seeking relief, on behalf of their minor child, E.A., Jr., from the State-Operated School District of Jersey City (respondent or District), Marie Morrissey (Morrissey or respondent), and Richard DiPatri (DiPatri or respondent). Respondents filed an answer on March 20, 1998, and

the DOE transmitted the matter to the Office of Administrative Law on April 9, 1998 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to 13.

Telephone and in-person conferences were conducted. Hearings were conducted on April 23 and 27 and May 27, 1999. The parties filed post-hearing briefs. The record was closed on September 13, 1999, the date of final communications with the parties.

NATURE OF THE CASE

As of December 1997, E.A., Jr. was enrolled in the seventh grade at the James F. Murray School, School No. 38 (P.S. 38), in the District. He had been enrolled in P.S. 38 since September 1993, pursuant to an "open enrollment" program. (Exh. R-1.) On or about December 3, 1997, Morrissey, the Principal of P.S. 38, terminated E.A., Jr.'s enrollment at P.S. 38 and transferred him to Public School No. 15 (P.S. 15), his local neighborhood school in the District. That action was based upon a conclusion by Morrissey that E.A., Jr. had signed his father's name on a mathematics test.

E.A. and D.A. stated in their petition that the transfer was implemented without a fair hearing before an impartial forum, in violation of E.A., Jr.'s basic due process rights. They also alleged that various education statutes were violated.

Petitioners initially sought an order rescinding E.A., Jr.'s transfer, which request was withdrawn during the proceedings. Petitioners also sought the imposition of monetary sanctions against the District, DiPatri, the State District Superintendent, and Morrissey and an award of costs regarding the placement of E.A., Jr. in a private school subsequent to December 3, 1997. In their post-hearing brief, petitioners request that E.A., Jr. be reinstated in "good standing" as a student at P.S. 38, retroactive to December 3, 1997; that respondents be required to reimburse petitioners in the amount of $5000 relevant to costs incurred for E.A., Jr.'s education; and an award of counsel fees and costs.

The issues, broadly, are whether petitioners have met the burden of proving their claims, by a preponderance of the credible evidence, and, if so, what relief should be granted.

FINDINGS OF FACT

The testimony of the witnesses differed substantially regarding the question of whether E.A., Jr. had, in fact, signed his father's name to the test in question.

E.A., Jr. testified that when Ellen Stevenson (Stevenson), his mathematics teacher, returned the test, he took it home and told his mother he had not passed the test. She told him to have his father sign it. E.A., Jr. also stated that he put the paper on his father's desk, with other documents. The next morning, E.A. signed the test while driving his son to school. E.A. Jr. noted that E.A. had papers, including the test, on the steering wheel, and that he signed it while the vehicle was stopped at a light. E.A. was not angry but told his son to do better in school. E.A., Jr. also testified that Stevenson asked him only once whether he had signed the paper and that no one else was ever present when he spoke to Stevenson regarding the matter. E.A., Jr.'s testimony regarding his communications with Stevenson was ambiguous and contradictory.

E.A. recollected that during the first week of December 1997, his son had left a mathematics paper on his desk, with other school documents. When E.A. arrived home later in the evening, he put the papers in his briefcase. The next morning, while driving E.A., Jr. to school, he signed the mathematics test when stopped at a light. E.A. specifically recollected that he used a mechanical lead pencil, that he had difficulty with it, and that he had to retrace his signature. E.A. stated that he did not wait until he had arrived at school to sign the test because it was his practice to do many things simultaneously because he was busy.

On rebuttal, E.A. again testified that he had signed the test with a mechanical pencil while driving E.A., Jr. to school. He noted that he retraced his signature because the lead "broke off."

Stevenson testified that upon reviewing the mathematics test, she noted that what appeared to be the signature of E.A., Jr., at the top of the paper, was odd in appearance, had apparently been misspelled, and seemed to have been written over. Stevenson spoke with E.A., Jr., after class, inquiring if his father had seen the test and signed it. Stevenson testified that E.A., Jr. stated his father had signed the document. She then told E.A., Jr. to be honest, that it did not have to go any further, and again inquired whether his father had seen the test and signed it. At that point, he told her that E.A. had not signed the document. Stevenson testified that when she inquired who did, E.A., Jr. indicated that he had. She then went to speak with Patricia Clarritt (Clarritt), whose class was across the hall, requesting that the latter retrieve documents with E.A. Jr.'s signature, to compare them. Stevenson also testified that she again went to Clarritt, E.A. Jr.'s homeroom teacher, accompanied by E.A., Jr., and asked E.A., Jr., in Clarritt's presence, about the signature on the test. E.A., Jr. said he had signed his father's name on the test paper

Clarritt testified that on that day, Stevenson came to her classroom, requesting documents containing E.A.'s signature, to compare them with the signature on a mathematics test. Clarritt retrieved the documents, observed them and the mathematics test, and indicated to Stevenson that the signature on the mathematics test was not that of E.A. Clarritt also testified that a little while after that, Stevenson brought E.A., Jr. to her classroom. E.A., Jr. was asked about the signature on the test, and he said that he had signed his father's name. Clarritt recollected then saying to him; "E.-E.-E. Why did you do that?" E.A., Jr. did not respond, but shrugged his shoulders. Clarritt stated that she then told him that he was in trouble.

Morrissey testified that Stevenson, on approximately December 3, 1997, informed her that E.A., Jr. had admitted that he had forged his father's name on a mathematics test. Stevenson showed Morrissey the test and they examined the

signature, comparing it with E.A.'s signature on other school documents. Morrissey then directed the school secretary to issue a transfer notice to E.A., Jr., which notice was given to him later that day. Morrissey also testified that after school, she spoke with D.A., in the principal's office, regarding the matter. In addition, Morrissey stated that D.A. advised her that E.A., Jr. had told his mother that he had signed his father's name on the test, but that D.A. did not believe that was sufficient reason to transfer him. Stevenson stated that D.A. also said that her son told her had done so because he was fearful of showing the test to his father. On rebuttal, D.A. denied making those statements to Morrissey.

Both D.A. and E.A. testified regarding their good relationships with their children, the fact that E.A., Jr. would have had no reason to fear showing his father the test, and to E.A., Jr.'s general truthfulness.

The witnesses also differed, in certain respects, regarding an Open House which was conducted at PS 38 on November 24, 1997. The general purpose of the Open House, as testified to by Morrissey, was for parents to meet with teachers, obtain report cards, and generally assess the performance of their children.

E.A. testified that shortly before the Open House, in November 1997, D.A. advised him of an incident involving E.A., Jr. which had occurred in the school gymnasium. D.A. indicated that she had scheduled an appointment for petitioners to meet with Morrissey at the Open House to discuss the matter. E.A. testified that petitioners waited 20 minutes for Morrissey, in the latter's outer office, during which time the principal "ignored them." When the principal arrived and entered her office, petitioners waited another 10 to 12 minutes. E.A. also testified that at some point during their meeting, Morrissey told D.A. to "go upstairs" to obtain E.A., Jr.'s "folders" and that she did so as a "command." D.A. indicated that she would do so after the meeting, but Morrissey told her "no, you go now," and D.A. did.

When they finally spoke with the principal, Morrissey indicated that she had to see other parents as well. E.A. also stated when petitioners entered Morrissey's office,

he greeted her as follows: "Good evening." Morrissey replied, "what makes you think I want to keep your son in my school." E.A. was "shocked." D.A. responded that E.A., Jr. had a right to attend a school in Jersey City and that they had applied for, and received, approval to attend P.S. 38. At that point, Morrissey told them that E.A., Jr. was "causing a lot of trouble." E.A. indicated that he was not aware of such, although he knew of an incident in the gymnasium. Morrissey responded that E.A., Jr. was "failing everything." E.A. expressed concern, referencing a prior report card. When he saw the report card, he indicated that he did not believe the failing grades reflected E.A., Jr.'s work.

To E.A.'s perception, Morrissey's "attitude" was that she "wanted him out." E.A. was "baffled," especially because he had never met Morrissey. At some point, Morrissey told petitioners that "I don't have to keep him around here." As they spoke more, Morrissey became more "insistent" about appearing to want E.A., Jr. "out." E.A. also stated that when he requested assistance for E.A., Jr. in reading and mathematics, Morrissey responded that "you're not getting anything from me." Morrissey also indicated that "this is my school" and it was her "prerogative" not to have E.A., Jr. at the school. Towards the end of the meeting, when some type of consensus had been reached, Morrissey stated that if E.A., Jr. "doesn't do better, he is going to be out of here." E.A. also indicated that when D.A. returned with the folder, which she had obtained from Clarritt, D.A. told him, while they were still waiting for Morrissey, that Clarritt had told her that "they would get him."

On cross-examination, E.A. testified that Morrissey did not explicitly state that she was going to transfer E.A., Jr., but that she indicated, in discussing his grades, "what makes you think I have to keep him?"

On rebuttal, E.A. testified that he had called P.S. 38 and spoke with an office employee, indicating that he wanted to speak with Morrissey. He was told that he could do so at the end of the Open House. E.A. also testified that he had requested the meeting because E.A., Jr. had advised him of an incident in the gymnasium and because both E.A., Jr. and D.A. had told him that Morrissey had said she "wanted him

gone." E.A. also testified on rebuttal that when he requested remedial assistance for E.A., Jr., Morrissey replied that he . . . "would get nothing from me," at which time the meeting ended.

D.A. testified that Morrissey was "antagonistic" to petitioners at the Open House. D.A. also testified that Morrissey told her to go upstairs to E.A., Jr.'s class to obtain his "folder." When D.A. indicated that she would obtain it later, Morrissey told her: "No, you won't be going up to meet teachers. Go up and get the folder." E.A., who "was not very docile," was "upset," but "respectable," and expressed "disagreement." D.A. left the room and obtained the report card from Clarritt, telling her that petitioners were meeting with Morrissey. D.A. testified that Clarritt said she was glad, "because they are going to try to get E.," and cautioned that petitioners should "watch out."

On cross-examination, D.A. testified that it was her understanding, at the time, that petitioners met with Morrissey because of an incident in the gymnasium. It was her recollection that Morrissey had requested the meeting. D.A. also testified that Morrissey did not state that she would transfer E.A., Jr. and that a transfer was not referenced.

On rebuttal, D.A. reiterated that Morrissey told her to obtain E.A., Jr.'s folder and report card from Clarritt, which she did.

Morrissey testified that she did not know, prior to meeting with petitioners, that they wanted to speak with her that evening. She stated that when she arrived at her office, petitioners were sitting in the outer office. She also stated that she met with petitioners as soon as she arrived. Morrissey also testified that she did not tell D.A. to obtain E.A., Jr.'s "folder," but that she did request she obtain his report card. Morrissey elaborated that a "cum" folder is maintained in the school's main office. She also testified that she "absolutely" did not tell petitioners that they would not be meeting with E.A., Jr.'s teachers.

On cross-examination, Morrissey testified that it was her understanding that petitioners wanted to meet with her to discuss a prior transfer. She also testified that it was not true that she wanted E.A., Jr. out of the school and that it was "absolutely false" that she indicated such at the Open House. She also refuted D.A.'s rebuttal testimony that Morrissey had stated, in reference to the incident in the gymnasium, that she was "tired of E.A." and "he's out of here."[1] Morrissey also testified on cross-examination that she was not concerned that E.A., Jr.'s grades would decrease the school's "academic profile." She stated that she had previously determined to transfer E.A., Jr. because of his academic performance, his report card, and his behavior in class, as well as the fact that progress reports had been sent home. Morrissey stated on cross-examination that she did not "dislike" E.A., Jr. and that she would have treated any other student in the same manner. She had never been involved in an involuntary transfer because of a forgery.

Morrissey testified on rebuttal that at the Open House, petitioners wanted assurances regarding how E.A., Jr. could improve academically and that she told them to speak with his teachers. She also testified that she "absolutely did not" tell them that they would "get nothing" from her.

On cross-examination, Clarritt testified that she did not agree that Morrissey wanted E.A., Jr. out of P.S. 38 because he was decreasing the school's average and that Morrissey had never said that to her. Clarritt testified that she did not recollect the date of the Open House meeting with petitioners, D.A. requesting documents pertinent to E.A., Jr., and any conversation with D.A. that evening. Clarritt also did not recollect that Morrissey had told her that the principal was going to meet with petitioners. She did not recollect if she sent E.A., Jr.'s report card downstairs. Nor did she recollect how petitioners obtained the report card that evening. However, Clarritt did remember that, at some point, she told D.A. to "watch" E.A. Jr.'s behavior because he "could be taken out of the school." Clarritt also testified that Morrissey had never told her that the principal was concerned regarding inspections at the school by State personnel.

[1] Testimony was heard out of order, at the parties' requests.

The witnesses also testified regarding an incident in the school gymnasium on or about November 21, 1997.

E.A., Jr. testified that the students were playing "kick ball" during physical education class. He was the "catcher." When he went to retrieve the ball, a female student, T, "hit him." E.A., Jr. just "looked at her," and T. stated that he had hit her. The physical education teacher, "Mr. Gross" (Gross), sent both students to Morrissey's office. E.A., Jr. stated that upon reviewing a report regarding the matter, Morrissey indicated she was going to suspend E.A., Jr. He indicated that he said nothing in response and that T. was sent back to class. When his mother came to pick him up, she saw him in the principal's office. D.A. spoke with Morrissey, requesting to see Gross, which she did. Gross indicated that T. had hit E.A., Jr., and Morrissey then stated that he would not be suspended.

E.A., Jr. reiterated on cross-examination that Gross sent him and T. to Morrissey's office. Morrissey read a report and said that E.A., Jr. was suspended, although she did not state the reasons. He asked her why he was suspended, and she "never gave him an answer." E.A., Jr. also testified on cross-examination that Morrissey told him to carry a box to a class, at which time T. had already left the office. E.A., Jr. followed Morrissey's directions and then returned to his homeroom, at which time his mother came to school. When T. returned to class, Gross asked her why E.A., Jr. was not with her. Gross then "wrote it up on a piece of paper."

On rebuttal, D.A. testified that she arrived at school early to pick up E.A., Jr. Morrissey, who was in the outer office, "flared up" at D.A., stating that she was " tired of E.A., Jr." and that they had to do something about him. An ex-student of D.A., "Christine", who was also present, told her what had happened. D.A. went to the gymnasium, accompanied by Christine. Gross told D.A. about the incident and referred her to the school office. When D.A. returned to the office, Christine obtained a copy of Gross' report for D.A., although the latter did not know how that was accomplished. Apparently, Gross told D.A. that T. had "hit E.A., Jr." and E.A., Jr. had done nothing.

On cross-examination, on rebuttal, D.A. testified that she did not know if Christine were employed by the District at the time in question. However, she believed that Christine would have told her if she were. To D.A.'s knowledge, Christine did not have children in the school. D.A. asked Christine to accompany her to the gymnasium because she was not sure of its location. D.A. also testified that she did not talk to Morrissey that day specifically regarding the incident.

Morrissey testified that she had never seen Gross's report, until the hearings in the current matter. She also stated that the report was not in a "discipline file" for E.A., Jr. and that Gross should have given it to her or her assistant. She testified that if there is a "confrontation," the teacher is to meet with the administration. Morrissey also stated that she "absolutely did not" gesture towards, nor speak with, D.A. on the day in question.

D.A. and E.A. impressed me as sincere witnesses. However, Clarritt and Stevenson were also credible witnesses. The burden of proof, as indicated herein-above, is on petitioners, by a preponderance of the credible evidence. Based upon a review of the entire record, I am persuaded that petitioners have not proven that E.A., Jr. did not, in fact, sign his father's name on the test in question.

Stevenson testified in detail regarding her conversation with E.A., Jr. regarding the test, both when she spoke to him alone and in Clarritt's presence. Clarritt, who corroborated Stevenson's testimony, was very specific regarding the statements that she made to E.A., Jr. The fact that there was no apparent reason for Stevenson to question who had printed E.A., Jr.'s name on the paper also lends credence to their testimony. E.A., Jr.'s testimony, in that respect, was ambiguous. In addition, as noted, he testified that he did not speak with Stevenson in anyone else's presence. Also, as the District argues, there is no apparent reason why Clarritt and Stevenson would lie regarding the statements made to them by E.A., Jr. As reflected in the findings of fact, they testified that although E.A., Jr. was somewhat disruptive in class, he was also polite to them, and they viewed some of his behaviors as that typical of a student his age. Clarritt, in addition, had previously warned E.A., Jr. regarding his behavior and

the possible effects thereof. Both testified, as reflected in the findings of fact, that they had no involvement in the transfer of students and that Morrissey did not consult them before deciding to transfer E.A., Jr. In addition, a report which Stevenson subsequently wrote was consistent with her testimony.

However, as respondents argue, it is not necessary to reach a finding in that respect. As discussed in more detail hereinafter in the discussion, the standard of proof in a case such as this is whether the action in question was arbitrary, capricious, or unreasonable. . Based upon a review of the record, I am persuaded that Morrissey, Clarritt, and Stevenson reasonably concluded, based upon the information available to them, that E.A., Jr. had admitted that he had signed his father's name on the test, and that he did so admit.

Except for arguably being relevant to credibility issues, the differences among the witnesses regarding the Open House and the incident in the gymnasium are not material to a determination of the issues presented in this case. I am also not persuaded that the fact Morrissey changed the dates on the pertinent transfer documents is determinative. Morrissey's testimony that she did so because of an inadvertent error was credible.

Based upon a review of the entire record, including credibility assessments of the witnesses, I **FIND** the following to be facts.

E.A. and D.A., a married couple, reside in Jersey City, with their children, E.A., Jr. and an older daughter, A.A. D.A. has been employed as a teacher by respondent for approximately 20 years. As of 1997, she taught Business Education at Snyder High School (Snyder).

E.A. is an ordained Baptist minister and has been a pastor in Newark, New Jersey, and employed in various positions as a "professional educator" for 27 years. (E.A.'s direct testimony.) He was previously an educational consultant to St. Peter's College, in Jersey City, and was respondent's Affirmative Action Officer. E.A. is

currently employed full-time with the John F. Kennedy Recreation Center in Rahway, New Jersey.

E.A. has also been actively involved as a volunteer with various non-profit organizations, for some 22 years, on the local and national levels Since 1995, E.A. has been a "public critic" of the District, participating in "rallies" in "Trenton". He opposed the State takeover of the District. He organized, and has been an active member of, a group of clergy, the "Concerned Clergy for Education" (Concerned Clergy), which has been active in "looking on" the school system in Jersey City. The group addresses "concerns" raised by parents and "taxpayers" pertinent to the State takeover of the District. (D.A.'s direct testimony.)

Morrissey has been employed by the District for 34 years, in various positions at various schools. For the past eight years, she has been the Principal of P.S. 38. DiPatri is the State District Superintendent. The District's official job description for the title of elementary school principal is as stated in Exhibit P-12.

For some time, including from 1993 until 1997, the District has made available an "open enrollment" program which, subject to the availability of "slots", allows students to attend any of its public schools. The primary purpose of the program is to "improve the racial balance" within schools. Open enrollment is also permitted because of "space availability" reasons. (Exhs. R-1 & R-2 & Morrissey's direct testimony.) The District does not impose a stricter academic standard upon Open Enrollment students than those not enrolled in the program.

The District circulated a letter to parents regarding the program. The letter noted, in part, "THAT ONLY REQUESTS THAT WILL HELP CORRECT MINORITY ISOLATION WILL BE CONSIDERED." (Exh. R-2.) The letter also noted that transfer applications would be approved, contingent upon availability of space in the schools in question; that effective September 1997, expanded open enrollment would be available to students in grades 1 through 12, "WITHIN THE LIMITATIONS OF AVAILABLE SPACE AND FOR THE IMPROVEMENT OF MINORITY ISOLATION";

that applications should be sent to the appropriate "Cluster Associate Superintendent"; and that:

> It is a requirement of the program that the children attend regularly, show good behavior and give concentrated attention to class work. (*Ibid.*)

The District refers applications to the schools involved, and the principals determines whether to accept, deny, or hold them pending availability. The principals notify the applicants and the pertinent associate superintendent of the decision.

E.A., Jr. attended St. Aloysius, a private school in Jersey City, through the second grade. Although he liked his teachers and peers, E.A., Jr. did not want to remain because he "did not like having to wear a uniform" and thought "he would feel better in a public school." (E.A., Jr.'s testimony on cross-examination.) A.A. also attended St. Aloysius and wanted to go to a public school. Petitioners consented. The fact that D.A. is employed as a teacher in the District also apparently was a factor.

E.A.'s designated local public school is P.S. 15. P.S. 15 and 38 are elementary schools. The closest elementary school to the A. residence is P.S. 41, which is located "around the corner." (E.A.'s testimony on cross-examination.) P.S. 15 is farther away; and P.S. 38, still farther. P.S. 38 is approximately two to three miles from the family's residence; P.S. 15 is approximately four blocks from P.S. 38. As of the fall of 1997, there were approximately 1,000 students at P.S. 38; and approximately 50 to 75 more students, at P.S. 15. All schools in the District follow the same curriculum.

P.S. 15 was not petitioners' choice of school for their children. E.A. believed that P.S. 15 was in the "heart of the drug den" in Jersey City. (*Ibid.*) In E.A.'s view, P.S. 15 was not in the family's "neighborhood" and was "certainly less desirable" than P.S. 38, although E.A. had "no disrespect" for the school, nor its administration. (E.A.'s testimony on recross examination.) Based upon his knowledge as an "activist" in Jersey City, E.A. believed that P.S. 15 was "clearly touted" as the "worst" school in the District and was located in one of the "most dangerous" areas in Jersey City. (E.A.'s

direct testimony.) P.S. 38 was designated as a "special school", and petitioners thought that their children would do "fairly well" there. (D.A.'s direct testimony.)

In July or August 1993, petitioners filed applications pursuant to the Open Enrollment program, requesting that E.A., Jr. and A.A. be allowed to attend P.S. 38. Petitioners received a copy of the District's letter regarding the program at that time. D.A.'s understanding was that the applicable conditions were equivalent to those in the District's "code of conduct", that students in the open enrollment program would have to demonstrate "good behavior". (*Ibid.*) E.A.'s understanding was that attendance pursuant to the program would have to have a "positive impact" on integration in the District, that is, decrease "segregation." (E.A.'s redirect testimony.)

Morrissey reviewed the applications, determined that space was available in the pertinent grades, and approved the applications. The pertinent Assistant Superintendent also reviewed the applications.

Students at P.S. 38 were "predominantly African American", as are E.A., Jr. and A.A. If petitioners' applications had been considered "that way", they would not have been accepted. (Morrissey's direct testimony.) To Morrissey's understanding, the open enrollment program was implemented to achieve "racial balance in the schools", and the impetus was a prior court order. (Morrissey's testimony on recross-examination.)

An associate superintendent advised petitioners that the applications had been approved by notice dated August 31, 1993. E.A., Jr. and A.A. commenced attending P.S. 38 at the beginning of the 1993-1994 school year, in the third and sixth grades, respectively. A.A. ultimately graduated from the eighth grade from P.S. 38. There were no "problems" with A.A. (*Ibid.*) E.A., Jr. thought that P.S. 38 was a "good school". He believed he had "no trouble in school." (E.A. Jr.'s direct testimony.) He had friends at P.S. 38, who lived in the vicinity of the school. His friends from his neighborhood did not attend P.S. 38.

D.A. drove E.A., Jr. to school in the morning, and his father drove him home in the afternoon. Both parents were actively involved in their children's education. D.A. was a member of the Parent/Teachers Council. The parents attended parent/teacher conferences and communicated with their children's teachers on a regular basis.

The children were required to complete their homework at certain times, and homework was checked by petitioners. E.A. usually reviewed E.A., Jr.'s homework assignments. E.A. was not usually at home when the children returned after school, and reviewing the homework kept him "part of the loop" and provided an opportunity for him to help "remediate" any errors. (E.A.'s direct testimony.) E.A., Jr. usually left his completed homework assignments and tests in a certain area on E.A.'s desk. E.A. and E.A., Jr. had a "system" for communicating by facsimile transmissions when E.A. was at work, so that E.A. could review E.A., Jr.'s assignments. (D.A.'s direct testimony.) E.A. did not sign any tests, nor homework assignments, until he had reviewed them with E.A., Jr.

E.A., Jr. exhibited "academic problems" in reading when he entered P.S. 38. (Morrissey's direct testimony.)

He did not read at grade level during fifth grade, the 1995-96 school year. E.A., Jr. received an "F" in Reading, Writing, and Social Studies for the third marking period. (Exh. R-11.) The responses to checklists on his report card indicated that E.A., Jr. experienced difficulties in practicing self-control, writing, behaving properly outside school, writing legibly, following written and oral directions and completing class and homework assignments. Written comments for the first marking period indicated that E.A., Jr. had to practice "self-discipline" and that he should be encouraged to continue reading every night. Comments for the second period indicated that he had to "focus more on tasks"; and for the third marking period, that E.A., Jr. was experiencing "much difficulty with 5th grade work" and that he had not been completing all assignments. (*Ibid.*) D.A. signed the report cards for each of the three marking periods.[2]

[2] Personnel at P.S. 38 did not have a complete report card for the 1995-96 school year. All records in E.A., Jr.'s cumulative folder were sent to P.S. 15 in December 1997 and could not be found.

During the fifth grade, E.A., Jr. was placed in a "Basic Skills Program", a program for students with less than the "minimum level of proficiency on standardized tests." He was also referred to the school's "resource committee" (Committee), which was comprised of a guidance counselor, E.A., Jr.'s teacher, and an administrator. Review by the Committee is a "prelude" to a referral to the Child Study Team (CST) for an "evaluation." (Morrissey's direct testimony.) The purpose of a referral to the Committee is to provide assistance to pupils experiencing difficulties, including the development of strategies, techniques and recommendations. E.A., Jr.'s parents gave approval for the referral. The Committee received a copy of E.A., Jr.'s report card.

The Committee recommended that E.A., Jr. attend a reading program at Jersey City State College, which he did. He completed the program in May 1996. The program was not available in the fall of 1997.

The Committee also recommended that E.A., Jr. be referred for a CST evaluation. Although petitioners apparently initially consented, they subsequently objected, and E.A., Jr. was not evaluated by the CST. A handwritten note was sent to D.A., dated September 30, 1996, requesting that D.A. meet with CST members to sign regarding the testing of E.A., Jr. Another handwritten note, by E.A., indicated that he had "changed his mind" and that petitioners would "not give a signature for the test." (Exh. R-9.)

E.A. believed that classification reflected "racial profiling" of students and that the District utilized the evaluation process to deal with children who "didn't learn the way they thought they should." E.A. also believed that because the District had been taken over by the State, personnel were concerned with "pupil performance" and that the grades of classified children were not utilized when the State was "evaluating schools." (E.A.'s direct testimony.) D.A. believed that since the State takeover, the children were "not the concern of the State." To her knowledge, "special education" children were located in the basement at P.S. 38. (D.A.'s direct testimony.)

E.A., Jr. met the "standards" for promotion from fifth to sixth grade. In Morrissey's view, E.A., Jr. performed "satisfactorily" in sixth grade, the 1996-1997 school year. (Morrissey's testimony on cross-examination.) E.A., Jr. passed all his courses; seventy was a passing grade.

At the end of the school year, E.A., Jr. received a 'B' in Language Arts, Reading, Writing, Mathematics, Health, Consumer Sciences, Applied Technology, and Art; a 'C', in Listening/Speaking, Science, Social Studies, Behavior, and Work Habits; and an 'A', in Physical Education and Art. Written comments on his report card for the first marking period indicated that E.A., Jr. needed to work harder in all areas; for the second marking period, that he had shown some progress but needed to continue to work hard and "get his silliness in check", and for the third marking period, that his grades had fallen because of a lack of concentration and a concern with "socialization." (Exh. P-11.)

E.A., Jr. was promoted to seventh grade, the 1997-98 school year. As of June 1997, the District required that a student obtain "passing grades" in four "major subject areas" to be promoted. (Morrissey's testimony on cross-examination.)

Stevenson, a teacher in the District, has been assigned to P.S. 38 for the past 16 years. She was E.A., Jr.'s Mathematics teacher during seventh grade. Clarritt has been employed by respondent for 25 years, 12 at P.S. 38. E.A., Jr. was assigned to Clarritt's Science, Health, and homeroom classes in September 1997. Clarritt's function as a homeroom teacher was to "monitor" students' presence in the school. (Clarritt's testimony on cross-examination.) E.A., Jr. "liked" Clarritt; Stevenson was "alright." (E.A., Jr.'s direct testimony.)

E.A., Jr.'s other teachers during seventh grade were Cathy Peliti, Language Arts, and Norma Bresnick, Social Studies. There were four teachers assigned to a group, and all agreed regarding discipline matters. The teachers had a "common practice

time", 45 minutes daily, and all their classes were "housed together." Teachers were able to speak with each other "at any time". (Clarritt's testimony on cross-examination.)

Stevenson found E.A., Jr. to be an "average" student with "some difficulties" in mathematics. However, E.A., Jr. engaged in "disruptive behavior", behavior "disturbing" to the other students, was "unprepared," and did not "focus" on his assignments. (Stevenson's direct testimony.) Such behaviors occurred on a "daily" basis. However, E.A., Jr. was "polite" to Stevenson, not "threatening." His behavior was "not so destructive" that Stevenson had to have him "removed from class." (Stevenson's testimony on cross-examination.) Stevenson never met E.A. but she did meet, and otherwise communicate with, D.A. More particularly, Stevenson met with D.A. because Stevenson had called her regarding "discipline" pertinent to E.A., Jr., as well as regarding academic matters. (Stevenson's direct testimony.) D.A. told Stevenson that she would work with him. Stevenson also apparently spoke with D.A. when D.A. returned progress regarding E.A., Jr. Overall, Stevenson viewed E.A., Jr. as an "average student", that is, he had "difficulty" with "certain concepts" and did "very well" with others. (Stevenson's testimony on cross-examination.)

Clarritt viewed E.A., Jr. as a "typical rambunctious seventh-grade boy". However, she had input into progress reports issued to him and spoke to D.A. on "various occasions." E.A., Jr. exhibited "unruly behaviors" in class. (Clarritt's direct testimony.) In the course of disciplining him, Clarritt warned E.A., Jr. several times that he could be transferred from P.S. 38 if he did not change his behavior. E.A., Jr. "laughed and played" constantly in class, but he was not "disrespectful." E.A., Jr. exhibited "respect" to Clarritt and was not involved in "altercations" with peers. Nor did he exhibit "problems" regarding property. Clarritt "knows" D.A. and had spoken with her regarding discipline issues pertinent to E.A., Jr. The situation developed "to the point" where Clarritt spoke to D.A. at the latter's vehicle at school regarding "discipline" matters. (Clarritt's testimony on cross-examination.)

E.A., Jr. did not meet with his guidance counselor during seventh grade, but he was aware there were reports that he was "talking too much in class." Clarritt, as well

as other teachers, had told him so. E.A., Jr. understood that he should not do so, and he "tried to stop." (E.A., Jr.'s direct testimony.) He was never suspended, and did not have problems with his peers; he had many friends. Morrissey "informally" spoke with E.A., Jr. during seventh grade. She never met with him regarding his academic performance. E.A., Jr. had "perfect attendance" during seventh grade, a "good sign." (Morrissey's testimony on cross-examination.)

A progress report was issued to E.A., Jr. on approximately September 26, 1997, indicating that E.A., Jr. was not doing satisfactory work, more specifically, that he did not pay proper attention in class; he exhibited an indifferent attitude; he displayed a lack of cooperation; and he had to practice self-discipline. Comments indicated that E.A., Jr. "talked " . . . all the time! Must constantly be monitored." (Exh. R-5.) The report also contained a printed statement that:

> If the quality of work does not improve, it may mean a failure for the marking period/grade. (*Ibid.*)

The progress report was signed by D.A. Consistent with her practice, Morrissey initialed the progress report.

Another progress report was issued on approximately October 3, 1997. The report indicated that E.A., Jr. exhibited some lack of progress in English, behavior with peers, and class participation. Comments reflected that E.A., Jr. "talks and plays constantly." (Exh. R-4.) It was initialed by Morrissey and Catherine Ann Romano (Romano), the Assistant Principal at P.S. 38, and signed by D.A. All four of E.A., Jr.'s teachers initialed the progress reports. Morrissey spoke with them at the time.

E.A. subsequently spoke to Clarritt regarding the reports. She indicated that she would work with petitioners, and E.A. gave her his pager number. E.A. signed a document, on approximately September 28, 1997, indicating that he had read and reviewed the District's elementary promotional policy for the 1997-98 school year.

All staff members and the principal met monthly. A teacher might also speak with Morrissey subsequent to meeting with a parent. E.A., Jr. was referenced "several times" at meetings, including in approximately September and October 1997. In general, Morrissey "kept abreast" of the academic and behavioral performance of students. Clarritt understood that if E.A., Jr. did not "improve", he would be transferred. E.A., Jr. passed "seventh grade science, and Clarritt had no "jurisdiction" regarding his other classes. (Clarritt's testimony on cross-examination.)

On November 21, 1997, E.A., Jr. and a female peer, T., were involved in an incident in the school gymnasium during a physical education class. T. alleged that E.A., Jr. had hit her with the ball, and he denied doing so. The teacher, Gross, apparently wrote a student referral form regarding the matter. The content of that report is as stated in Exhibit P-9.

Later in the day, D.A. arrived at P.S. 38 to pick up E.A., Jr. early. When she entered the office, a former student of D.A., "Christine", who was present, advised D.A. of the incident. D.A., accompanied by Christine, then went to the gymnasium. Gross told D.A. what had happened, indicating that E.A. Jr. had not hit T., and referred D.A. to the office. D.A., again accompanied by Christine, returned to the office, and Christine obtained a copy of the student referral form for her.

To Morrissey's knowledge, the student referral form was not in any file pertinent to E.A., Jr. No personnel at P.S. 38, including Morrissey, ever took disciplinary action against E.A., Jr. relative to the incident.

For the first marking period in grade seven, E.A. Jr. received an "F" in Language Arts, Listening/Speaking, Writing, Mathematics, and Social Studies. He received a "C", in Reading, Science, Health, Music, and Art; and a "B", in Physical Education. Checklists on his report card indicated that E.A., Jr. participated in Applied Technology, Educational Technology, and Library Media skills and that he was exhibiting difficulties in practicing self-control and preparation, behavior, following written and oral directions, completing class and homework assignments, and putting forth a good effort

daily. Written comments indicated that although he had perfect attendance, E.A., Jr. did ". . . not take his studies seriously. He is forgetful and does not follow directions." (Exh. R-11.) E.A., Jr. received an "F" regarding behavior from all four of his teachers, including Clarritt. (Clarritt's testimony on cross-examination.) The report card was signed by D.A. Morrissey had no input into the grades given to E.A., Jr.

Upon reviewing the report card, Morrissey was "very concerned." In her experience, it was "unusual" for a student to receive such grades. The first marking period of a school year is usually the "best period" because it constitutes a "review." She was "appalled" by E.A., Jr.'s report card. (Morrissey's direct testimony.) In Morrissey's experience, a student exhibiting problems in being prepared for class was not a "common occurrence." Only 52 "failures" regarding behavior had been given for the marking period. (Morrissey's testimony on cross-examination.)

As a result, on or about November 24, 1997, Morrissey issued a "transfer" back to P.S. 15. (*Ibid.*) Morrissey told her staff to give the transfer form to E.A., Jr. She notified John Pacifico, an Associate Superintendent, but not in writing. She did not speak with E.A., Jr.'s teachers to obtain their opinions prior to issuing the transfer.

Morrissey did not know why E.A., Jr. received a failing grade in Mathematics, although she was "very concerned" regarding the situation. In her view, it was the individual teacher's responsibility to make recommendations for improvement. (*Ibid.*) Morrissey's believed that Stevenson was available before and after school, and during lunch periods, to assist students. Stevenson told Morrissey that she offered assistance to E.A., Jr. but that he did not come for help. Morrissey was also aware that progress reports had been issued.

E.A., Jr. was assigned to a guidance counselor at the school. However, guidance counselors generally presented lessons to students regarding matters such as drug and alcohol usage and worked with eighth-grade students. They became involved with "problems" upon referrals by teachers and others. (*Ibid.*) Morrissey was

not aware that E.A., Jr. had been referred to a guidance counselor, and she did not consider doing so.

D.A. was generally aware that E.A., Jr. was "talking in class", and she discussed his study habits with him. In D.A.'s experience, it was "not uncommon" for students in grades six and seven, "adolescents", to exhibit such behaviors. (D.A.'s direct testimony.) D.A. spoke with E.A., Jr.'s teachers on various occasions each year he was at P.S. 38. His behavior was "never a big problem", to her understanding, during the third, fourth and fifth grades. (D.A.'s testimony on cross-examination.)

An Open House was scheduled for, and conducted on, the evening of November 24, 1997 at P.S. 38. Open House was an opportunity for parents and teachers to discuss a student's progress, including any academic or behavioral difficulties. The practice was that homeroom teachers distributed report cards at Open House, obtaining them from Morrissey's office. Parents signed them and received copies. The teachers retained the originals. Generally, parents did not have opportunities to meet with teachers prior to an Open House.

Petitioners first attended a parent's meeting at the Open House and then went to Morrissey's office. Petitioners met with Morrissey in the main office for 20 to 25 minutes. During the course of the meeting, Morrissey requested that D.A. get E.A., Jr.'s report card. D.A. left the room, and obtained the report card from Clarritt and returned to Morrissey's office. Petitioners had not previously met Morrissey, although D.A. knew who she was.

Petitioners and Morrissey discussed E.A., Jr.'s report card, as well as strategies to assist him. To Morrissey's perception, the meeting was "tense", and petitioners were "very upset" regarding the prior transfer, although they did not tell her so. (Morrissey's testimony on cross-examination). To D.A.'s perception, Morrissey was "antagonistic" towards petitioners, which was "even" evident from her "tone of speech." (D.A.'s direct testimony.)

Petitioners asked how E.A., Jr. could improve academically, and Morrissey responded that they should contact his teachers. Petitioners agreed to monitor E.A., Jr.'s grades closely.

E.A. expressed concerns regarding E.A., Jr.'s grades on his report card, indicating that although he was aware E.A., Jr. needed to improve, he believed E.A., Jr.'s work at home was not reflected in the grades. E.A. queried how grades were determined. E.A. also indicated that petitioners had previously requested assistance for him with Mathematics and Reading.

Morrissey noted that petitioners had previously not agreed to a CST evaluation. E.A. emphasized that he did not want an evaluation, but instead wanted "testing" and "remediation." (E.A.'s direct testimony.) E.A. also indicated he would not agree to a transfer of E.A., Jr. to another school, but would work with the school and E.A., Jr. at home. He felt that he had received no assurance from Morrissey that assistance would be provided in Mathematics and Reading.

They did not discuss the incident which had occurred in the gymnasium, although E.A. had understood that Morrissey had "some desire" to have E.A., Jr. "out of the school." (E.A.'s testimony on cross-examination.)

Morrissey "voided" the prior transfer", allowing E.A., Jr. to remain at P.S. 38. She told petitioners that the transfer was rescinded. She also told petitioners that the second marking period would be "crucial", that she would determine if E.A., Jr. would remain at P.S. 38 based on that, and that he would be transferred if his grades and behavior did not improve. (Morrissey's direct testimony. *See, also*, E.A.'s testimony on cross-examination.) Morrissey did not indicate that she was about to transfer E.A., Jr. immediately.

At the end of the meeting, other parents were still waiting to speak with teachers. There was insufficient time for petitioners to do so. To E.A.'s knowledge, D.A. had

spoken with some of E.A., Jr.'s teachers. They were not "prevented" from seeing teachers. (E.A.'s direct and redirect testimony.)

The next day, at Morrissey's direction, the school secretary "tore up" the transfer notice. (Morrissey's testimony on cross-examination.) Morrissey subsequently sent petitioners a letter, dated December 3, 1997, memorializing their meeting at the Open House. That letter read as follows:

> This letter is a follow-up to our conference on Open House evening during which we discussed E.'s lack of progress the first marking period. His grades - failures in Language Arts, Listening, Speaking, Writing, Mathematics, Social Studies and Behavior - including Habits/Attitudes and Work Habits - must improve significantly in order for him to remain at P.S. 38 and not be transferred to his district school.
>
> During this crucial second marking period, it is expected that you monitor his classwork, homework, test results, etc. Very closely and maintain close contact with his teachers.
>
> Your continued co-operation is appreciated. (Exh. R-12)

The letter reflected the "agreement" which had been reached at the Open House. (DA's testimony on cross-examination.)

In the interim, in November 1997, sometime before Thanksgiving, Stevenson gave a mathematics test to E.A., Jr.'s class. She returned the graded tests to the students the next day so that they could bring them home for their parents' reviews and signatures. E.A. Jr., received a grade of 55, and Stevenson wrote "Very Poor" on his test paper. (Exh. P-4).

Parents of all students at P.S. 38 were required to sign all of their children's tests, a method to keep parents informed. Another purpose was for classroom "management." (Stevenson's testimony on cross-examination.) Stevenson did not put

signature lines on her tests. Although Stevenson generally requested that students return signed tests the next day, a certain percentage did not do so.

E.A., Jr. thereafter returned the test to Stevenson on approximately December 3, 1997. His name was printed on the bottom, and what, on its face, appeared to be the signature of "Rev. A.," at the top. (*Ibid.* and Exh. P.4.) E.A., Jr. had two periods of mathematics daily, one in the morning and one in the afternoon. He returned the test during his morning class.

Consistent with her practice, Stevenson noted the signature and printed name. The signature seemed to be "odd," and Stevenson observed that Rev. A.'s last name appeared to be misspelled. (Stevenson's direct testimony.) Stevenson spoke to E.A. Jr. in the hall, after class, requesting that he remain. Stevenson did not want to speak in front of the other students.

She asked him if his father had seen the test and signed it. E.A. Jr. responded in the affirmative. When she asked if E.A., Jr. had signed it, E.A., Jr. responded in the negative. She then asked: "Are you sure? Be honest with me. This doesn't have to go any further." However, she apparently also indicated that it was not "one hundred percent certain" that it would "go no further." (Stevenson's re-direct testimony.) When Stevenson again asked who had signed it, E.A., Jr. replied: "I." (Stevenson's direct testimony.)

Stevenson then spoke to Clarritt, whose classroom was across the hall, in the hallway. Stevenson brought the test to Clarritt for "verification" of the signature. (Clarritt's direct testimony.) Stevenson asked Clarritt to retrieve any documents which Clarritt possessed that had been signed by D.A. or E.A. After comparing the test with the other documents, Clarritt told Stevenson that it was not E.A.'s signature.. Clarritt also showed her documents to Stevenson. Based on her observations of them, Stevenson believed that the signature for Rev. A. was not that of E.A. It appeared to Stevenson that the signature was " a little bit of both lead and ink", as if the signature had been "written over." (Stevenson's testimony on cross-examination.) In addition,

E.A., Jr.'s name should have been at the top of the paper. E.A., Jr. was in the hall while she spoke to Clarritt.

Stevenson left, taking the test paper, and subsequently returned with E.A., Jr. Stevenson told E.A., Jr. to "tell her," and E.A., Jr. stated that he had signed his father's name on the test. (*Ibid.*). Clarritt then said to him: "E.-E.-E. How could you do that?" E.A., Jr. "shrugged his shoulders" and "looked down." (Clarritt's direct and cross-examination testimony.) Clarritt also told E.A., Jr. "You know you're in trouble." In Clarritt's view, a "forgery" constitutes a "misrepresentation" of a signature. (Clarritt's testimony on cross-examination.)

Classes were changing at the time, and Stevenson returned to her classroom. She did not contact E.A. regarding the matter. Stevenson referred the matter to "another level", *i.e.*, to Morrissey, an avenue available to all teachers at the school. (Stevenson's testimony on cross-examination.) Later that day, Stevenson spoke to Morrissey regarding the matter. Morrissey compared the signature on the test with the documents she possessed and concluded that E.A. had not signed the test. Morrissey indicated that she would handle the matter. Stevenson wrote a report regarding the incident on approximately December 3, 1997.

One reason Stevenson reported the matter to Morrissey was that Stevenson was "disturbed" that E.A., Jr. had initially "lied" regarding the signature. In addition, Morrissey was Stevenson's "boss." (Morrissey's testimony on cross-examination.) Also, E.A., Jr.'s parents had to be informed, and "it's just something that I do." (Stevenson's re-direct testimony.) Stevenson did "not expect" that E.A., Jr. "would be put out of school" because of the incident. However, Stevenson made no recommendations to Morrissey regarding E.A., Jr.'s status. Morrissey did not ask Stevenson for her views regarding what action should be taken.

That day, Morrissey acted to transfer E.A., Jr., The second marking period had not yet ended. Morrissey told her secretary to "issue" the document and give it to E.A., Jr. (Morrissey's direct testimony.)

Morrissey decided to transfer E.A., Jr. because he had admitted to his teachers that he had "forged" his father's signature on the Mathematics test and because the incident occurred shortly after she had met with petitioners at the Open House. She did not believe it was necessary to speak with E.A., Jr. first because she recently met with petitioners and had "voided" the prior transfer. She concluded that that meeting had had "no impact" on E.A., Jr. (*Ibid.*)

Adele Linder (Linder), the school secretary, completed the transfer forms. Consistent with the general practice in the District, Linder wrote Clarritt's name, in an area designated for "Teacher", writing as if it were signed. None of E.A., Jr.'s teachers executed, nor signed, transfer forms. The purpose of the form was to "notify the new school" of the pupil's prior teacher, thereby facilitating the receipt of pertinent records by that school. However, Morrissey believed that P.S. 15 should have had records regarding E.A., Jr. because it was "his District school." (*Ibid.*) Morrissey did not tell Linder to provide any other information to E.A., Jr.

The practice in every school in the District is that principals do not fill out and sign a Notice of Transfer. That task is designated to a clerical employee. In addition, teachers do not approve transfers.

Morrissey believed that a seventh-grade student should be responsible enough to take "a piece of paper" home to his/her parents. (Morrissey's redirect testimony.) She had no prior knowledge that E.A., Jr. had never taken documents home. In general, all types of documents, including medical policies, are sent to parents via their children.

Prior to issuing the transfer forms, Morrissey unsuccessfully attempted to call D.A. at Snyder. She did not attempt to contact E.A. because she "always" called D.A.; it was much easier to reach D.A. She had contacted D.A. at Snyder a "couple of times"

over the years. Romano did not have input into Morrissey's decision, and Morrissey did not discuss the matter with anyone in "central administration." Morrissey did not need approval to "rescind" an open enrollment. (Morrissey's testimony on cross-examination).

Later in the day, while in Clarritt's science class, E.A., Jr. was called to the office by Linder. The school secretary gave E.A., Jr. a "form letter" regarding the transfer, addressed to petitioners. It was in a sealed envelope, with a Notice of Transfer form. He was told to give the envelope to his parents. E.A., Jr. did not open it, and he did not question her regarding it. The letter and form contained incorrect dates. The letter was signed by Morrissey and Romano. Morrissey did not check a space regarding behavior problems on the form letter because she had spoken about such matters with petitioners the prior week.

When D.A. picked E.A., Jr. up at school that day, he was "upset. D.A. asked him what had happened, and he gave her the envelope. D.A. opened it and read the contents. E.A., Jr. told her that Linder had told him he was "out of here." D.A. was "upset" by what the secretary had said to E.A., Jr. as well as the content of the documents. D.A. went into the school, alone, "upset." (D.A.'s direct testimony.)

D.A. entered the outer office as Stevenson was "signing out." Morrissey was also present. (D.A.'s direct testimony on rebuttal.) Morrissey recognized D.A. and addressed her by name, indicating that they needed to talk regarding the transfer. Morrissey requested that Stevenson and D.A. come into her office. The three met there for approximately 20 minutes.

Morrissey told D.A. that she had "issued the transfer". D.A. was "upset" and "disagreed" with it. (*Ibid.*) Morrissey indicated that she was transferring E.A., Jr. because of the "forgery." (D.A.'s testimony on cross-examination.) D.A. had not previously seen the mathematics test in question. Although E.A., Jr. had told her he had taken the test, he did not tell her his grade. Stevenson indicated that she had asked E.A., Jr. if he had signed the test and he responded that he did. She then

showed D.A. the test. D.A. believed, and stated, that it appeared to be E.A.'s signature. Morrissey showed her the Transfer Notice, and, at that time, corrected the date on it.

D.A. queried how Morrissey could allow a clerical employee to advise a student of a transfer and why she had not first contacted petitioners. Morrissey told D.A. that she had called Snyder and told a clerical employee what had transpired, but D.A. was not in the school building at the time. D.A. indicated that that was not an acceptable procedure and inquired if Morrissey had spoken to E.A. Morrissey responded that she had not. D.A. queried how personnel could "put an adolescent on the street." D.A. felt that Morrissey had "transferred" E.A., Jr. the prior month without first speaking to D.A. (D.A.'s direct testimony.)

To D.A., it seemed as if the transfer had "already been processed." D.A. felt that Morrissey had not adhered to the prior "agreement" petitioners had with her. (*Ibid.*) D.A. believed that the prior conference had addressed E.A., Jr.'s grades if he were to remain at P.S. 38. She also understood that E.A., Jr. would remain at the school at least through the second marking period.

The meeting ended with D.A. being "upset" and Morrissey indicating that E.A., Jr. was transferred. There was no discussion of a "hearing", nor "alternative action." (*Ibid.*) D.A. indicated that she would speak to E.A. regarding the matter. No one suggested that efforts be made, at that point, to contact E.A., and no one told her that Morrissey had attempted to do so. An employee at Snyder subsequently told D.A. that a clerical employee at P.S. 38 had called, between 2:00 and 2:30 p.m., indicating that E.A., Jr. was being transferred.

Upon returning to her vehicle, D.A. asked E.A., Jr. about the test. He told her he had shown it to E.A. and that his father had signed it. She told him not to worry, that they would call E.A.

E.A. had given school personnel his number at his place of employment, a "voice mail paging system", and his beeper number. Phil Flood (Flood) is the District's Affirmative Action officer. Flood was the "emergency contact" individual listed by petitioners on school forms regarding E.A., Jr. E.A. did not receive a call to his beeper from P.S. 38 on December 3, 1998. (E.A.'s direct testimony.)

E.A. received a "page" from D.A. at approximately 4:15 p.m. (*Ibid.*) D.A. advised him that Morrissey had "put E. out of school" for forging a signature. E.A. arrived home at approximately 4:45 p.m. D.A. told him what had happened. E.A., Jr. told his father that the school clerk had advised him that he was "out", but that he did not really know why. (E.A.'s testimony on cross examination.) D.A. indicated that she had been informed that E.A., Jr. had admitted forging his father's signature. E.A. asked E.A., Jr. why he had said that, and the latter stated that he had done so because he thought his teacher had asked if he had signed his own name to the test paper. E.A., Jr. showed his father the printed name on the test paper. E.A., noting that there had been a "misunderstanding", told his son not to worry. (E.A.'s direct testimony.) E.A. called P.S. 38 at approximately 5:00 p.m., but no one answered.

After experiencing a "horrible night", and in light of the conversation with Morrissey the prior week, E.A. decided to go to the District's administrative offices the next morning, rather than to E.A., Jr.'s school. (*Ibid.*) Upon his arrival, in response to a query from a security person, E.A. indicated that he wanted to speak with someone regarding a public elementary school. He was referred to Picifico, who apparently referred E.A. to Horace Smith (Smith), respondent's Director of Elementary Education, an individual whom E.A. has known for twenty years.

E.A. told Smith that E.A., Jr. had been summarily "dismissed" from P.S. 38 because of a "forgery claim." Smith responded that personnel should not "put a student out of school", that that was a matter between the parents and the child. (*Ibid.*)

E.A. told Smith that he was "very concerned" regarding the "atmosphere" at P.S. 38. Referencing the prior incident in the gymnasium, E.A. also expressed the view that

Morrissey had "jumped to a conclusion" regarding that matter and was now doing so regarding the test in question, without contacting petitioners. E.A. also indicated that he expected problems, "no matter how E.A., Jr. behaved." He also told Smith that he would not have E.A., Jr. attend P.S. 38 until "the matter was cleared up" and that he wanted to speak with Morrissey and a "higher-up." E.A. stated that to do otherwise would mean that he had "accepted the transfer," although he had "no disrespect" for P.S. 15. (E.A.'s testimony on cross-examination.) Smith's wife was the principal of that school.

In E.A.'s view, it would have been "less desirable" to send his son to P.S. 15, which was one of the largest elementary schools in the District, and which had "poor" academic performance. The latter was important because E.A., Jr. already had had "academic difficulties" and had not received the "attention he needed." (E.A.'s testimony on redirect examination.) E.A. believed that it would be "insulting to both of us" to send E.A., Jr. to P.S. 15; it would "justify throwing him out" for something he had not done. (E.A.'s direct testimony.)

Smith offered "to make a call." After discussing the matter further, and apparently at Smith's suggestion, E.A. decided to contact respondent's Legal Department and to obtain information regarding the District's "student code." An individual at the Board of Education apparently gave him a copy of the code. (*Ibid.*)

E.A. then went to the District's Legal Department, asking for, and speaking with, Charlotte Kittler (Kittler), an attorney employed by the Board. Kittler, who was "very gracious" and "very lawyer-like," advised E.A. that that she could not comment on the matter because she represented the District and because she did not know what had transpired. E.A. requested information regarding the Open Enrollment program and, at his request, Kitler subsequently arranged for such to be sent to him by facsimile transmission. E.A. expressed his intent to not have E.A., Jr. attend P.S. 15, and Kittler indicated that it was appropriate for E.A. to be in school. E.A., agreeing, requested information regarding home schooling, which Kitler provided.

At some point, E.A. told Smith's office not to send E.A., Jr. to P.S. 15. Smith subsequently spoke with Morrissey. He did not ask Morrissey to reconsider the matter, but inquired what had occurred. Morrissey explained the situation. Morrissey denied having decided to transfer E.A., Jr. when the incident in the gymnasium occurred.

Later that day, after receiving information regarding home schooling, E.A. called Smith, who indicated that he "had not solved the problem" and did not explain what had happened. Smith stated that he had spoken with Morrissey and that there was "no resolution." (*Ibid.*) E.A. advised that no one from the District had called to ask if he had signed the test in question. Smith asked if he had, and E.A. responded in the affirmative, indicating that he had never spoken with Morrissey regarding the matter.

Although E.A. anticipated that District personnel would subsequently contact him, no one did. He therefore communicated with DiPatri by letter dated December 15, 1997. The content of that letter is as stated in Exhibit R-3.

When he did not imminently receive a response, E.A. consulted a lawyer, authorizing counsel to make efforts to "get a hearing," which, in his view, had never been conducted by respondents. (E.A.'s direct testimony.) At some point, E.A. apparently received a reply from DiPatri.

Morrissey did not speak with petitioners subsequent to December 3, 1997. E.A. Jr. never returned to P.S. 38. He was educated at home until January 1998 by E.A., who took time from work to do so. In December 1999, petitioners enrolled E.A., Jr. in The Lutheran Parochial School, (Lutheran Parochial), a private school in Jersey City. E.A., Jr. commenced attending that school during the first week of January 1998. E.A. did not attempt to enroll his son in any public school in the District, although he had investigated other private schools in the area. Those schools were more expensive than Lutheran Parochial.

As of the time of hearings in the current matter, E.A., Jr. was "doing well" at Lutheran Parochial; his grade average was a "B." (E.A., Jr.'s direct testimony.) E.A., Jr. liked Lutheran Parochial "very much". It was "small", and one-to-one assistance

was available when needed. He did not want to return to P.S. 38. To E.A., Jr.'s perception, P.S. 15 did not have "as good a reputation" as did P.S. 38, among the students; it did not have the same "student-teacher friendship." He did not discuss the mathematics test in question "too much" with his parents subsequent to December 3, 1997. (E. A., Jr.'s direct testimony.) Petitioners planned to subsequently enroll E.A., Jr. in St. Anthony's School, a private high school in Jersey City.

Petitioners' expenses at Lutheran Parochial totaled $5,055 for the period from December 1997 to the current time. They paid approximately $300 monthly, an estimated figure. At the time of the hearings, E.A., Jr. was scheduled to complete the eighth grade during the first week of June, 1999. Expenses had been paid through May, 1999.

In addition, the family expended funds for "uniforms" and "fund-raising." Lutheran Parochial has a "dress code." The family purchased E.A., Jr.'s "uniform" at a "uniform store" in Jersey City. The required shirt was a yellow one, "which could be purchased at various places." The required trousers were "blue pants", a "specific blue color." Boys also had to wear "plaid ties." Normally, E.A. would not have purchased that "type" of slacks for E.A., Jr. (E.A.'s direct testimony.)

To E.A.'s perception, subsequent to December 3, 1997, E.A., Jr. initially was "very quiet and reclusive" and "embarrassed" with his family and to see his friends at P.S. 38. E.A. suggested that his son go to P.S. 38 to say good-bye to his friends and give them his phone number. E.A., Jr. indicated that he would not do so. E.A., Jr. has since "rebounded," although, occasionally, when in proximity to P.S. 38, he "looks away." (E.A.'s direct testimony.) D.A. also observed that E.A., Jr. was "very quiet" for a while, although he "has come out of it now." He still has respect for "authority" and the "school system." He did not want to attend P.S. 15. D.A. believes that he was treated "unfairly." (D.A.'s direct testimony.)

Several of E.A., Jr.'s friends called him on approximately December 4, 1997, when he did not return to school. Some told him that they had "found out" from the

"teacher" "what had happened." (E.A. Jr.'s testimony on cross-examination.) E.A., Jr. saw a friend on one occasion. The friend did not ask what had happened, but he "knew a little bit." E.A., Jr. was "embarrassed." (E.A., Jr.'s direct testimony.) He never read the Transfer Notice, nor the letter to his parents, until petitioners consulted counsel.

No personnel at P.S. 38 ever subsequently spoke to E.A., Jr. regarding the matter. E.A., Jr. felt that he was "not treated fairly", and the incident still "bothers him." (E.A., Jr.'s direct testimony.) E.A., Jr. was aware that he had had difficulties with Mathematics. He also believed that he could not "read as good as everybody else": However, he believed that he had "no problems" in school prior to third grade. (E.A., Jr.'s testimony on cross-examination.)

As Clarritt was leaving the building at the end of the day on approximately December 3, 1997, she learned from Linder that E.A., Jr. had been "transferred." She did not subsequently see E.A., Jr. Students in the class thereafter inquired about him, and she told them that he had been "transferred." (Clarritt's direct testimony.) She discussed nothing else with the students.

Clarritt was not asked to provide input regarding the "transfer." She was not sure what she would have indicated, if so requested, because she ". . . never gave it thought." Clarritt never had involvement with the "transfer of students in or out of the school." (Clarritt's testimony on cross-examination.) She had no administrative duties and was not involved in disciplinary matters regarding her homeroom students.

Morrissey had never told Clarritt that the principal wanted E.A., Jr. "out" of the school because he was "bringing down the overall average." In general, at various meetings, Morrissey told the teachers that there was "always room" for improvement and that it was up to the teachers to find ways to do so. Clarritt believed, in general, that "no one likes academic failures." However, in the course of previously disciplining E.A., Jr., Clarritt had told him that it was "an honor", a "privilege", to be at P.S. 38 and that "they will remove you" if you "upset the balance." Clarritt did so because she believed that he would "be removed" if his academic and behavioral performance did

not improve. She had previously taught at another school prior to teaching at P.S. 38 and "had seen it happen before." She was aware that E.A., Jr. had "workbooks full of blank pages." However, Clarritt was never aware of any document relevant to E.A., Jr., nor his parents, indicating that E.A., Jr. was "in danger of a transfer." (*Ibid.*)

Clarritt never asked anyone why E.A., Jr. had been "transferred." She assumed that it was because of "discipline problems" and because he was "not academically sufficient." In her view, however, "forgery" was not part of "behavior." At some point, Clarritt observed to Morrissey, "in passing", that: "I see he's gone." Morrissey responded, "yes", and the two did not have a conversation regarding the matter. (*Ibid.*)

None of Stevenson's students in EA Jr.'s mathematics class subsequently inquired of her regarding E.A., Jr., and she never told any student that he had been "put out of the school." (Stevenson's direct testimony.)

To E.A.'s knowledge, State personnel have been "holding principals" in the District accountable for student performance, and principals are evaluated based on such performance. Some principals had "concerns" regarding the situation, and E.A. had been involved in the matter, via his participation in Concerned Clergy. Based upon newspaper articles he had read, E.A. believed that there was a "Squat Team" which evaluated principals and teachers and that the team's attitude was "do it our way or be in trouble." However, E.A. did not know what consequences there would be for Morrissey if a "high percentage" of students at P.S. 38 "failed," although he believed that another principal had been "run out of town." In E.A.'s view, P.S. 38 was located in an area of Jersey City in which "many students" were Caucasian, and a "large portion" of students were of Asian or oriental background. The students came from an "economic strata" that was "better" than in other areas of the city. E.A. believed that if Morrissey could not "exclude" E.A., Jr.'s "performance" from the overall "school grade", then she "wanted him out of there." (E.A.'s direct testimony.) Such concerns had been expressed to Concerned Clergy.

In fact, "comprehensive reviews", by the State of the District were conducted, and continue. Morrissey had heard the phrase "squat team." (Morrissey's direct testimony.)

Morrissey never prepared a report for the District regarding the matter because it "was not necessary." It was the District's policy that a school principal could "rescind" an Open Enrollment." She was not aware of any pertinent written guidelines. In her view, E.A., Jr. did not meet the "criteria" to remain in P.S. 38. (Morrissey's testimony on cross-examination.) At the time in question, Morrissey anticipated that petitioners would oppose the transfer, based on their discussions at the Open House. Morrissey never subsequently asked E.A., Jr. if he had signed the test in question

She based her decision on information received from E.A., Jr.'s teachers, who had compared signatures, her own review of documents, and her understanding that E.A., Jr. had admitted signing his father's name. Morrissey placed emphasis on the fact that she had met the prior week with petitioners, in a "very long meeting", regarding E.A., Jr.'s "lack of commitment" to his studies and behavioral "problems" and that she had rescinded the prior transfer. E.A., Jr.'s action in December 1997 indicated to her that the meeting had had "no impact" on him. (Morrissey's testimony on cross-examination.) In Morrissey's view, a "forgery" was "dishonest" and "unconscionable." Morrissey also considered the fact that E.A., Jr. was "disruptive in class", received an "F" in behavior on his report cards, and had "academic failures" and "behavioral problems" and that progress reports had been issued. However, the "forgery" was the final straw. (*Ibid.*)

To Morrissey's understanding, E.A. Jr. had improved during the second marking period, to the extent of his performance on one test in Social Studies. He had not improved in Mathematics. She did not consider any such improvement in making her decision. It was based on his behavior. In her view, forgery is not "minor", but a "very serious infraction"; "adults are prosecuted for it." Morrissey believes that "forgery" is "signing another person's name", a "misrepresentation." (*Ibid.*)

In Morrissey's view, as confirmed by the letter sent to petitioners subsequent to the Open House, E.A., Jr. had been given a "whole marking period" to improve his academic performance. However, soon thereafter, he "forged a signature." At that point, there was nothing he could do "to save himself. Morrissey did not consider E.A., Jr.'s attendance record. In her view, it was not relevant; E.A., Jr. could have perfect attendance "in any school." *Ibid.*

Morrissey did not consider referring E.A., Jr. to his guidance counselor. She did not believe it was necessary. She also did not believe that the counselor could provide "help" to E.A., Jr., *i.e.*, "counseling" regarding "forgery." (*Ibid.*)

Morrissey had previously "transferred" Open Enrollment students for various reasons, including behavioral problems, disciplinary matters, attendance, and grades. She transferred approximately seven to eight students since the late 1960's. She never "involuntarily transferred" students not enrolled in the Open Enrollment program. (*Ibid.*)

Morrissey viewed her action as rescinding the Open Enrollment. She believed that a suspension was "more punitive" than a transfer. In addition, she was aware that E.A., Jr.'s local public school was "only a few blocks" from P.S. 38. (Morrissey's direct testimony.)

The content of the District's Student Code of Conduct (Code) is as stated in Exhibit P-1. The Code provides, in part, that students are responsible for adhering to all school rules, policies, and directions from teachers and other individuals in authority. The Code addresses, among other topics, attendance policies and "Progressive Disciplinary Action Steps." (Exh. P-1, p.8.)

The disciplinary policy states, in part, that "disruption of the school climate by a student" can result in disciplinary actions "at a higher level." (*Ibid.*) Corrective action is dependent upon the age and developmental level of the student, as well as the circumstances related to specific behavioral problems and actions.

Prior to implementing formal discipline, "proactive remedial actions" are to be employed, including, but are not limited to, consultation with teachers, guidance counselors, or CTS members; parent/guardian conferences; warnings; detention; referral to appropriate staff or administrators; student contracts; conflict resolution; peer mediation; and referrals to a school committee or a counselor. Such steps are to be generally handled by the teacher involved. Referral to a "higher level" should be done when such measures do not result in a favorable student response. The Code notes, in that respect, that continued inappropriate student behavior shall result in "disciplinary action." (*Id.* at 9.)

Disciplinary action, in turn, may result in an in-school suspension; suspension; expulsion; other disciplinary action; Saturday detention/suspension; or placement in an alternative school or setting.

The Code also sets forth the procedures applicable to disciplinary actions. Violations referred for disciplinary action should be accompanied by a written statement. Students will be assigned to before-or-after school supervised detention for infractions of school rules. Only principals have authority to suspend students. The parents of a suspended student are to be notified, and every attempt is to be made to contact a parent by phone at the time of the suspension. Written notification is to be sent on the day of the suspension, and a copy of such is to be maintained while the student is enrolled. A parent/guardian and student conference must be conducted with an administrator before a suspension is lifted.

"Chronic violators" may be referred to outside supportive agencies. (*Id.* at 9.) Students on out-of-school-suspensions are prohibited from entering any District property. Students on suspension cannot participate in school activities, including clubs, plays, concerts, and athletic events.

A principal may suspend an elementary school student for up to ten days. Students suspended for non-violent or non-criminal actions shall be suspended at the end of the school day. A student presenting a danger to persons or property may be

immediately suspended and removed from the school, subsequent to an "informal hearing", *i.e.*, a meeting with an administrator, a parent or guardian, and the student to inform the student of the charges and give him/her a chance to reply.

A student's "discipline file" shall be destroyed upon graduation. If a student leaves a school without graduating, "discipline records" will be maintained for one year and then destroyed. (*Id.* at 10.)

The Code defines "expulsion" as the "permanent denial" of a student's right to attend school. (*Ibid.*) Expulsion may be imposed only by the State District Superintendent. A student can appeal an expulsion decision to the Commissioner of the DOE (Commissioner) and the State Board of Education.

Referencing *N.J.S.A.* 18A:37-2, the Code articulates the type and conduct constituting good cause for suspension or expulsion. The Code also provides that any student who commits an assault, as defined pursuant to pertinent criminal statutes, upon a teacher, administrator, board member, or other employee of the District, acting in the performance of his/her duties, and in a situation where his/her authority to so act is apparent, shall be immediately suspended, consistent with "procedural due process pending expulsion proceedings before the local District." (*Id.* at 11.) Such proceedings are to occur no later than 21 calendar days subsequent to the day on which the student is suspended.

The Code provides, in addition, that the power to expel a student is given only to the State District Superintendent. Expulsion is to be considered only if the principal has exhausted all means of bringing about a correction of the misconduct and shall have brought the case before the State Assistant Superintendent for school operations and the parents/guardians have been interviewed and advised of the student's right to a full hearing, which will afford the student "procedural due process," and the right of parents/guardians to appeal to the Superintendent. (*Id.* at 11.)

A first-level appeal available to a parent/guardian is before an Associate Superintendent. Such "informal hearing" shall be held within five days of an initial suspension. (*Id.* at 11.) A second level of appeal is before the State Assistant for School Operations. The case will be presented to the State Assistant Superintendent with the Principal's and Associate Superintendent's recommendations. Such hearing is to be conducted no later than eleven days after a student suspension.

If the State Assistant Superintendent determines that the charges are true and may warrant expulsion, a "formal hearing" may be set at that time before the State District Superintendent. Such hearing must be conducted within 21 days after the State Assistant Superintendent's recommendation for expulsion. The District's legal counsel will arrange for "legal notice" to all parties concerned. *(Id.* at 12.) The student has the right to be represented by an attorney. To assure a student's "constitutional rights and the protection of due process," the student shall be given an opportunity for a hearing if the student or his/her parents or guardians desire to have one. (*Ibid.*) The hearing shall be conducted to permit the student to contest the facts which may lead to suspension by a principal, or continued suspension, or expulsion by the State District Superintendent.

A "formal due process hearing" shall include the student's right to notification of the charges; the names of adverse "witnesses"; copies of the statements and affidavits of such witnesses; and the opportunity to be heard, to cross-examine witnesses, and to be represented by counsel. (*Ibid.*) In all cases where expulsion is considered, a student must be given an alternative form of instruction, *i.e.*, home instruction or alternative programs. The Code also sets forth guidelines pertinent to disciplinary actions relative to students with educational disabilities.

The number of days applicable to suspensions/expulsions for first, second and subsequent offenses for various infractions are also set forth. The causes of suspension/expulsion are noted in that respect with specificity. If any student is suspended for a violent act, possession of a weapon, vandalism, or substance abuse,

documentation regarding such must be listed on the District's suspension form and submitted with an Incident Report Form.

In general, the Code provides that the District shall attempt to keep as many students as possible in school or regular classrooms. Whenever possible, for a first or second offense, excluding violent or criminal acts, mediation should be considered as a first alternative prior to an in-or out-of-school suspension.

The Code defines an "in-school suspension" as the temporary removal of a student from classes to address a problem through proper intervention so that the student can return to class the same day or the next day. (*Id.* at 18.) Students should be referred to support staff for appropriate interventions. Another option available is a Saturday suspension program.

The content of P.S. 38's Student/Parent Handbook (Handbook) for the 1996-97 school year is as stated in Exhibit P-7. The Handbook notes, in part, that report cards are distributed to parents, and student progress is discussed, at an Open Houses at the school. If a parent does not attend an Open House, an appointment should be arranged to meet with a student's teacher.

The Handbook also sets forth a Student code of conduct which lists the causes of suspensions/expulsions and the length of such regarding first, second, and subsequent violations. That code is the same as set forth in the Code.

The Handbook also sets forth policies regarding transfers. It notes, in part, that parents may request transfers for students when they move to another "school zone" in the City and for reasons pursuant to current District policies. (Exh. P-7, p.7.) A pupil leaving one school to enter another in the District must obtain a written transfer from the principal of the school he/she has left, or from the Superintendent, and shall be required to present the transfer to the principal of the school he/she is to enter.

DISCUSSION

Petitioners argue that E.A., Jr., was removed from P.S. 38 for disciplinary reasons, without being afforded the required due process, more specifically, without a fair hearing before an impartial forum. Petitioners also argue that the removal of E.A., Jr. from P.S. 38 was based solely upon a disciplinary reason and that respondent did not follow the Code regarding the matter. In addition, petitioners argue that neither the Code, nor the Handbook, provided notice to students, and parents, of the potential consequences of a student signing a parent's name to a test, and that E.A., Jr. had not been warned, counseled, or in any way advised regarding such consequences. Petitioners argue that the fact that the pertinent transfer documents had different initial dates results in an inference that the incident involving the mathematics test was a pretext for a predetermined decision by Morrissey to forcibly transfer E.A., Jr. because of her hostile attitude towards petitioners. Petitioners reference, in that respect, the Open House meeting and the fact that no one from the District spoke to E.A. prior to Morrissey's determination.

Respondents argue that the transfer of a student from one public school to another does not constitute disciplinary action and that in any event, E.A., Jr. was afforded due process. Respondents also argue that the Commissioner does not have the authority to grant the monetary relief requested and that petitioners did not prove that respondents discriminated against E.A., Jr.

The Commissioner generally has jurisdiction to hear and determine controversies and disputes arising under the school laws. *N.J.S.A.* 18A:6-9 (Supp. 1999.) Public schools are required to provide a free education to individuals between the ages of 5 and 25 years in certain circumstances, including to individuals who are domiciled within the school district. *Id.* at 38-1. No pupil in a public school in this State shall be discriminated against regarding admission to, or obtaining any advantages, privileges, or courses of study of a school, because of race, color, creed, sex, or national origin. *N.J.S.A.* 18A:36-20.

Petitioners analogize to expulsions and suspensions, pertinent to their due process arguments. I am not persuaded by this analysis

A seminal case regarding due process in student matters is *Gross v. Lopes*, 419 *U.S.* 565, 95 *S. Ct.*, 729, 42 *L. Ed.* 2d. 725 (1975) (*Gross*). Gross involved an appeal by administrators of the Columbus, Ohio, public school system challenging the determination of a federal court that the appealees, high school students, were denied due process, contrary to the Fourteenth Amendment, because they were temporarily suspended without a hearing, neither prior to the suspensions nor within a reasonable time thereafter, and enjoining the administrators to remove all references to the suspensions from the students' records.

State law provided for a free education to all children between the ages of 6 and 26 and empowered principals to suspend a pupil for misconduct for up to ten days or to expel a student. In either case, the principal was required to notify the student's parents within 24 hours and to state the reasons for the action. The student, or his/her parents, could appeal to the local board of education and would then be permitted to be heard at a board meeting. The board could subsequently reinstate the student. No such procedure was provided for a suspended student. The school system had not issued written procedures applicable to suspensions, nor had any of the individual high schools involved in the case. Each high school had, formally or informally, however, described the conduct for which suspensions could be imposed. 42 *L. Ed.* 2d at 730-731.

Preliminarily, the Court rejected appellants' argument that the Due Process Clause does not protect against expulsions from a public school system because there is no constitutional right to an education at public expense. *Id.* at 733-735.

The Court also rejected the argument that even if there were a right to a public education protected by the Due Process Clause, generally, the Clause only applies when a state subjects a student to a 'severe detriment or grievous loss' and that a loss of ten days did not meet such criteria. The Court noted in that respect that when

considering whether due process requirements apply, the "*nature*" of the interest, not the "weight", must be considered. *Id.* at 735. (citation omitted.)

Although the appealees in *Gross* were "excluded" from school temporarily, the length and consequent severity of a "deprivation", although relevant to determining the appropriate form of a hearing, 'is not decisive of the basic right' "to a hearing of some kind." "... as long as a property deprivation is not *de minimus*, its gravity is irrelevant ..." to the question of whether account must be taken of the Due Process Clause. *Ibid.* (citations omitted.) The Court determined that a ten-day suspension is not *de minimus,* although it noted that a "short suspension is, of course, a far milder deprivation than expulsion." *Id.* at 735,736. ". . . total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for ten days, is a serious event in the life of the suspended child." *Id.* at 736.

The Court held that due process requirements require that, at a minimum, a student facing the possibility of a suspension, " . . . and the consequent interference with a protected property interest . . .", must be given some type of notice and some kind of a hearing. *Id.* at 737 (citation omitted.) More specifically, in cases involving a suspension of ten days or less, the student must be given oral or written notice of the charges and, if the student denies them, an explanation of the evidence the authorities have and an opportunity to present his/her "side of the story."

In addition, there needs to be no delay between the time the 'notice' is given and the time of the "hearing." The Court recognized, however, that in most cases, the disciplinarian may "informally discuss" the misconduct alleged with the student "minutes after it had occurred":

> We hold that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is . . . *Id.* at 739 (citation omitted.)

As a general rule, the notice and hearing should precede removal, although there are recurring situations in which such cannot be required. "Students whose

presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school." However, the notice and "rudimentary hearing" should occur as soon as "practical." *Ibid.*

However, the Court made clear that the Due Process Clause does not require that hearings regarding a "short suspension" afford a student the opportunity to obtain counsel, confront and/or cross-examine witnesses, or call witnesses. The school administrator would have discretionary authority, subsequent to informally discussing the matter with the student, to allow more formal procedures. The Court recognized, in that respect, the practical difficulties that would be imposed upon school districts by such a requirement. *Id.* at 740.

Finally, the Court made clear that it considered in *Gross* only "short" suspensions, *i.e.*, those not exceeding ten days, and that in "unusual" situations involving short suspensions, something more than the "rudimentary procedures" might be required. "Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures." *Id.* at 740.

As respondents argue, courts have subsequently held that where there is no exclusion from the educational process, there is no constitutionally protectable interest to which due process attaches.

In *Nevares v. San Marcos Consol. Independent School*, 111 *F.* 3d, (5th Cir. 1997) (*Nevares*), the court held that a high school student challenging a transfer to an alternative educational program did not assert deprivation of a federally protected property, nor liberty, interest. Nevares was detained for aggravated assault by local police. Upon receiving the police report, the assistant principal questioned Nevares. The student refused to make a statement other than to indicate that school authorities should contact his father and lawyer. His father subsequently called the principal, admitting that the act in question had occurred but asserting that his son's behavior

had been in self-defense, and requesting a meeting before the school took action. The principal indicated that pursuant to school regulations, once there was reason to believe an aggravated assault had been committed, the student would be reassigned to an alternative educational program. When the principal confirmed with authorities that the assault charge was still pending, he decided to transfer Nevares to the alternative program, a program maintained for students whose violation of the school's code of conduct fell short of triggering suspensions or expulsions, but who, because of reasons of safety and order, had to be removed from the regular classroom. *Nevares*, at 26.

Referencing *Gross*, the court noted that Navares was " . . . not being denied access to public education, not even temporarily." He was only to be transferred from one school program to another program with stricter discipline. *Ibid.* The court also referenced prior decisions holding that there is no protected property interest in a denial by a school to offer a student a particular curriculum; there are no protected interests in the separate components of an educational process, such as participation in interscholastic athletics; and there is no constitutional right to the particular incidents of education, such as sports, advance placement classes, attending a particular school, or in a transfer to a different school for disciplinary reasons. Although recognizing the importance of trust between students and administrators and that, for that reason, a student and parent should be treated fairly and given an opportunity to explain why anticipated assignments may not be warranted, the court concluded;

> but that is for Texas and the local schools to do. We would not aid matters by relegating the dispute to federal litigation and because the United States Constitution has not been offended in the present dispute, we retire from it. *Id.* at 27.

Similarly, a high school student removed from his science class because of disruptive behavior for the remaining five weeks of the school year, and who was taught

during that time individually by a Dean of Science, did not assert a constitutionally protected property interest, nor liberty interest, because he "was not deprived of his right to a public education." *Casey v. Newport School Committee*, 13 *F.Supp.* 2d. 342,246 (D.R.I. 1998)(*Casey*). The court in *Casey* noted that the right to a public education " . . . does not include entitlement to particular aspects of the educational program", nor does it ' . . . necessarily encompass every facet of the educational program'. *Ibid.* (citations omitted.)

In *Glidden v. County of Monroe*, 950 *F.Supp.* 73 (W.D.N.Y. 1997) (*Glidden*), the court held that a high school student did not have a protectable property interest in participation in a school marching band, whether such was deemed to be a curricular or extra-curricular activity, although, under applicable state law, he had a legitimate claim of entitlement to a public education. The court interpreted *Gross* as follows:

> Therefore, under *Gross*, the property interest which is protected by the Due Process Clause is the right to participate in the entire educational process and not the right to participate in each individual component of that process. Accordingly, it is only when a student is excluded from the entire educational process that due process must be afforded. His exclusion from a particular course, event or activity is of no constitutional import. *Glidden* at 73.

Nor do the due process requirements of the Fourteenth Amendment apply to a one-year prohibition of a high school student from inter-scholastic athletic competition, pursuant to a local rule prohibiting such participation when a student transferred from one school district to another but did not reside in the transferee district with a parent or guardian. *Dallam v. Cumberland Valley School District*, 391 *F.Supp.* 358 (1975). In addition, a student does not have a constitutional right to such "incidents of education" as participation in sports, the taking of advance placement classes, and attending a

particular school. *Seamons v. Snow*, 84 *F.*3d, 1226 (10th Cir. 1996). And college students at a state university who were placed on probation and denied certain school privileges did not assert grievances rising " . . . to the level of the deprivation of a right secured by the Constitution requiring judicial relief." *Sill v. Pennsylvania State University*, 462 *F.*2d, 463 (1972) (*Sill*).I

The transfer of a high school student for disciplinary reasons to another school within a school district, which school " . . . seemingly had less standing as an educational institution . . . ", a sanction "far less severe than expulsion . . .", also did not implicate the Due Process Clause. *Zamor v. Pomeroy*, 639 *F.*2d, 662,669-670 (1981) (*Zamor*). Citing *Sill*, the court also concluded that the parents' allegation that the transferee school were "so inferior" to constitute an expulsion from the educational system were not demonstrated in the record and that in the absence of a "clear showing" that the school assignment was "substantially prejudicial," the parents lacked standing to attack the actions on that ground. *Id.* at 670.

I am not persuaded by petitioners' reliance on *Jordan v. School Dist. of City of Erie, Pa.*, 583 *F.*2d, (1978) (*Jordan*) and *R.L. v. Kingsway Regional High School District Board of Education*, 95 *N.J.A.R.* 2d EDU 296 (*R.L.*), in support of their argument that the decision to transfer E.A., Jr. violated accepted standards of progressive discipline, constituted deprivation of due process, and warrants reinstatement and an award of appropriate remedial steps.

The court in *Jordan* ordered modification of a previously entered consent order to require notice of a proposed action and the basis thereof, as well as an opportunity for a student to explain his/her version of the facts in an informational meeting with a principal prior to removal for disciplinary reasons of a non-disruptive student, or one who does not present a continuing danger to persons or property, to an alternative facility designed to meet the needs of disruptive students, a situation not specifically

before the court. The court found that such would meet the requirements of *Gross. Jordan*, at 97.

R.L., a twelfth-grade student, was expelled from a local high school, after a hearing, based upon a determination that he had inappropriately touched and/or made vulgar sexual remarks and suggestions to a number of elementary school girls. *R.L.* at 297. The presiding Administrative Law Judge (ALJ) concluded that the preponderance of the credible evidence demonstrated that he had committed many of the acts alleged and that the charges were true. *Id.* at 299. The school's pertinent parent/student handbook provided for "progressive discipline," *i.e.*, for first and subsequent offenses, suspensions were progressively higher. The handbook also prohibited a student from engaging in obscene or lewd physical acts and sexually assaultive behavior. However, the applicable punishments could be 'supplemented by more severe punishment where circumstances warrant.' *Id.* at 30.

The ALJ's ultimate conclusion was that petitioners had not demonstrated that the local board of education had acted in an arbitrary nor capricious manner. However, the board was willing to change the expulsion to a long-term suspension and continue homebound instruction until the end of the school year so that R.L. could graduate, although he could not participate in the graduation ceremony. With that modification, the ALJ affirmed the board's action. The Commissioner adopted the ALJ's decision. (*Ibid.*)

Jordan involved modification of a previously agreed upon consent order regarding removal of students, a situation not at issue in the current matter. Similarly, *R.L.* involved expulsion of a student and subsequent action by the local board of education to voluntarily change the expulsion to a long-term suspension, neither of which is applicable to EA, Jr.

New Jersey law is consistent with federal law. Pupils in public schools must comply with " . . . rules established in pursuance of law for the government of such schools, pursue the prescribed course of study and submit to the authority of the teachers and others in authority over them." *N.J.S.A.* 18A:37-1.

A pupil guilty of continued and willful disobedience; open defiance of the authority of a teacher or a person having authority over him/her; the habitual use of profanity or obscene language; or who cuts, defaces, or otherwise injures any school property; is liable for punishment and suspension or expulsion from school. Illustrative examples of such conduct are continued and willful disobedience; open defiance of authority; conduct of such character constituting a continuing danger to the physical well-being of other students; physical assault upon another student; taking, or attempting to take, personal property or money from another student, or from his/her presence, by force or fear; willfully causing. or attempting to cause, substantial damage to school property; participation in an unauthorized occupancy by any group of pupils of any school or other building owned by any school district and failure to leave promptly after having been directed to do so by the principal or another person in charge, incitement intended to and resulting in unauthorized occupation by any group of students or others of any part of a school or other facility owned by any school district; incitement intended to and resulting in truancy by other students; and knowing possession or knowing consumption, without legal authority, of alcoholic beverages or controlled dangerous substances on school premises or being under the influence of such while on school premises. *Id.* at § 2.

The teacher in a school having only one teacher or the principal in all other cases may suspend a student for good cause. Such suspension shall be reported "forthwith" to the superintendent of schools in the district, if there is one. The superintendent, or the teacher or principal, as appropriate, shall report the suspension to the board of education at its next regular meeting. The teacher, principal, or superintendent may reinstate the pupil prior to the second regular meeting of the board

of education held after such suspension, unless the board reinstates the pupil at the first such regular meeting. *Id.* at § 4. No suspension shall be continued longer than the second regular meeting of the board of education after such suspension, unless such is continued by the board. The power to reinstate, continue any suspension reported to it, or expel a pupil shall be vested in each board of education. *Id.* at § 5.

Any pupil committing an assault, as defined pursuant to *N.J.S.A.* 2C:12-1, upon certain specified individuals, not involving the use of a weapon or firearm, shall be immediately suspended from school consistent with procedural due process, pending suspension or expulsion proceedings before the local board of education. Such proceedings shall occur no later than 30 calendar days following the day on which the pupil is suspended. The board's decision shall be made within 5 days after the close of the hearing. An appeal to the Commissioner shall be made within 90 days of the Board's decision. *N.J.S.A.* 18A:37-2.1a (Supp. 1999-2000). Whenever a teacher, administrator, board member, or other employee of a board of education, or a labor representative on behalf of an employee, alleges in writing that the board member or employee has been assaulted by a pupil, the principal must file a written report with the district superintendent. The superintendent, or if there is no superintendent in the district, the principal who received the allegation shall report the alleged assault to the board of education at its next regular meeting. *Id.* at § b.

Any pupil who commits an assault upon certain individuals, with a weapon, on any school property, on a school bus, or at school-sponsored function, shall be immediately removed from the school's regular education program, pending a hearing before the local board. *Id.* at § 2.2. A student removed from the regular education program pursuant to this provision shall be placed in an alternative education program. If such is not available, the pupil shall be provided home instruction or other suitable facilities and programs until a placement is available. However, nothing in the pertinent statutory provision shall be construed as prohibiting the expulsion of a pupil. *Ibid.*

Any pupil removed pursuant to *N.J.S.A.* 18A:37-2.2 shall be entitled to a hearing before the local board of education to determine if the pupil is guilty of committing such an assault. If it is found that the pupil is not guilty of the offense, he/she shall be immediately returned to the regular education program. *Id.* at § 2.4(a). The required hearing shall take place no longer than 30 days following the day the pupil is removed from the regular education program. *Id.* at § b. The board's decision shall be made within 5 days after the close of the hearing. Any appeal to the Commissioner shall be made within 90 days of the Board's decision. *Id.* at § c. The chief school administrator shall determine when the pupil is prepared to return to the regular education program, in accordance with procedures to be established by the Commissioner. *Id.* at § 2.5.

In addition, pursuant to the Zero Tolerance for Guns Act, *N.J.S.A.* 18A:37-7 *et seq.*, any pupil who is convicted or adjudicated delinquent for possession of a firearm or a crime or armed with a firearm, or found knowingly in possession of a firearm on any school property, on a school bus, or at a school-sponsored function, shall be immediately removed from the school's regular education program, pending a hearing before the local board of education to remove the pupil from the regular education program for a period of not less than one calendar year, subject to modification on a case-by-case basis by the chief school administrator. Any pupil removed from the regular education program pursuant to this provision shall be placed in an alternative education program. If such is not available, the pupil shall be provided home instruction or other suitable facilities and programs until placement is available. Nothing in this provision is to be construed as prohibiting the expulsion of a student. *Id.* at § 8. Any pupil removed pursuant to *N.J.S.A.* 18A:37-8 shall be entitled to a hearing before the local board of education to determine if the pupil was convicted or adjudicated delinquent of such offenses or was guilty of not only possessing a firearm in any school property, school bus, or at any school-sponsored function. If it is found that the pupil is not guilty, he/she shall be immediately returned to the regular education program. The required hearing shall occur no later than thirty days following

the day the pupil is removed from the regular education program. Prior cite, *Id* at § 10b. The board's decision shall be made within five days after the close of the hearing. An appeal to the Commissioner shall be made within ninety days of the Board's decision. *Id* at § c. The chief school administrator shall determine whether the pupil is prepared to return to the regular education program or shall remain in an alternative education program, home instruction, or other suitable facilities and programs, in accordance with procedures to be established by the Commissioner. *Id* at § 11.

N.J.S.A. 18A:37-2, 37-4 and 37-5 require that the possible imposition of a ". . . serious sanction such as suspension or expulsion" mandates procedural due process pursuant to the Fourteenth Amendment. *R.R. v. Bd. of Ed., Shore Reg. H.S.*, 109 *N.J. Super.*, 337,346 (Ch. Div. 1970) (citations omitted.) (*R.R.*)

I am not persuaded by petitioners' reliance on *R.R.* and *State v. Conk,* 180 *N.J. Super.* 140 (App. Div. 1981) (*Conk*), for the proposition that a charge of forgery and removal of a student from his school of choice based upon such charge constitute disciplinary action concerning which the student and his parents have certain due process rights, including a fair hearing and progressive discipline.

R.R. involved a suspension because of alleged actions, which, parenthetically, occurred off school premises. *R.R.* at 339-340. Conk was an 18 year-old twelfth grade student enrolled in a special work study program, his classes concluding at 10:20 a.m., daily. Following a particular incident, the school's principal and vice-principal told him that, in the future, he would have to leave school at the conclusion of his last class. He was subsequently observed in school during the afternoon, having an odor of alcohol, and became involved in an altercation with another student. Communications with a teacher and the vice-principal ultimately resulted in local police being called to the school. Conk was arrested, and the vice-principal signed a criminal complaint. Conk

subsequently appealed from a conviction of defiant trespass, in violation of *N.J.S.A.* 2C:18-3(b), for which he was fined $25.00 and assessed costs.

In rejecting Conk's argument that *N.J.S.A.* 18A:37-1 to 5 precluded the board of education from utilizing remedies available under the code of criminal justice, the court, citing *Gross*, noted that the " . . . focus of these sections of the school laws is to guarantee student discipline and the student's due process rights in proceedings taken by the school administration which could result in the imposition of the serious sanctions of suspension or expulsion." *Id.* at 144. (citation omitted). In rejecting other arguments not germane to the instant matter, the court also noted that the right to an education was not absolute but subject to a student's adherence to lawful conditions reflected in the referenced statutes. *Id.* at 145. The conviction was affirmed. *Id.* at 145-146.

New Jersey law, as discussed hereinabove, is consistent with federal law. The due process protections set forth in *Gross* are applicable to sanctions such as suspension or expulsion, *R.R., supra. Conk, supra.* The pertinent statutory provisions regarding the discipline of students, including those who present a danger to themselves and others, are also consistent with federal law.

Hearings to address claims of procedural deficiencies in violation of *Gross* are not *de novo* but are intended to review the action in question and the process provided, to determine whether a school district acted in an "arbitrary or capricious manner." The "heavy burden of persuasion" rests with petitioners. *R.W. v. Hunterdon Central Regional High School District Board of Education*, 93, *N.J.A.R.* 2d. (EDU) 114,115. (*R.W.*) (citation omitted.)

The fact that EA, Jr. was transferred to his local public school, pursuant to the District's determination of school attendance zones lends additional support for the conclusion that he was not entitled to the due process requirement set forth in *Gross.*

The authority of local boards of education to design school attendance area boundaries is "well-established." *Hoffman v. Board of Education of the Twp. of Cherry Hill*, 1973 *S.L.D.* 406,408 (citations omitted.) A board's determination in that respect will be upheld if such were not arbitrary, capricious, or discriminatory. *See, Hoffman*, at 409. A local board of education has discretion to determine pupil attendance zones. In the absence of prejudice or discrimination, a board may transfer students from school to school. The Commissioner will not interfere with the determination of a local board regarding school attendance lines unless there is " . . . evidence of unjust discrimination." *J.A.P. v. Morristown Board of Education*, 1988, *S.L.D.* 2651,270 (citation omitted).

The Commissioner has held, for example, that the matter of class assignment, and, specifically, the session assignment of kindergarten pupils, constitutes a 'management prerogative' of local boards of education, which will not be assumed nor usurped by the Commissioner unless there is " . . . a definite showing that the action of a local board of education was arbitrary, in bad faith, without rational basis, or discriminatory." *Paddock v. Demarest Bor. Bd. of Educ.*, 1974 *S.L.D.*, 435, 440.

More on point, it has been held that the burden of proving unreasonableness, in an action challenging a change in the geographic designation for attendance in kindergarten classes was on petitioners, and that such was within the management prerogative of a local board of education, which would not be "usurped or assumed by the Commissioner of Education absent a definitive showing of bad faith or arbitrary actions taken in bad faith without a rational basis." *G.M. v. Roselle Park Borough Board of Education*, 95 *N.J.A.R.* 2d. (EDU) 107,109.

Respondents argue that, even if certain procedural due process requirements were applicable, such were met. Respondents stress, in that respect, the fact that EA, Jr. admitted to both Stevenson and Clarritt that he had signed his father's name on the

test and that, after being given opportunities to discuss the matter with them, Clarritt, Stevenson, and Morrissey reviewed other documents signed by EA, that Morrissey based her decision on information provided to her by Stevenson, as well as her review of the other documents, and that Morrissey subsequently spoke with D.A.

The requirements that a student who denies charges be given an explanation of the evidence forming the basis of the charges and an opportunity to present his/her side of the story apply only when the student denies the charges. *Giangrasso v. Kittatinny Reg.* High *Sch. Bd. of Educ.*, 865 *F.Supp.* 1133 (*D.N.J.* 1994). Arguably, however, EA, Jr. should have had an opportunity to discuss the matter with Morrissey, the decision-maker.

However, it is not necessary to reach issues in that respect. For the reasons discussed hereinabove, I am persuaded that the requirements of *Gross* were not applicable and that petitioners have the burden of establishing, by a preponderance of the credible evidence, that Morrissey's action was arbitrary, capricious, or unreasonable. I am persuaded that petitioners have not met their burden and that based upon the information available to her at the time in question, and the other considerations important to her decision, Morrissey's decision to transfer EA, Jr. was not arbitrary, capricious, or unreasonable.

EA, Jr. was not excluded from the public education system, a factor important to the Court's holding in *Gross,* and subsequent cases. Morrissey's action in the current matter is more analagous to a transfer which, as was held in *Nevares,* does not give rise to a federally protected property, nor liberty, interest. As respondents argue, the holdings in *Glidden, Casey, Dallam, Seamon*, and *Sill* also support a conclusion that EA, Jr. was not entitled to the hearing required by *Gross.* EA, Jr. was not excluded from the educational process, nor an incident thereof. The transfer of EA, Jr. is more analagous to the disciplinary transfer in *Zamor.*

I also am not persuaded by petitioners' argument that the manner in which EA, Jr. was transferred was inconsistent with pertinent provisions in the Handbook and Code. Those documents do not expressly address the Open Enrollment program, and on their face, are not applicable to it. However, the letter sent by the District to parents did articulate the reasons for termination of an Open Enrollment placement, including behavioral infractions. As respondents argue, the signing of a parent's name to a test, or any other document, when a parent was required to do so, by a student, clearly constitutes inappropriate behavior.

In that respect, I am not persuaded by petitioners' argument that the fact that "forgery" was not specifically set forth as a reason for termination warrants granting the requested relief. School boards are not required to establish an "exhaustive shopping list of infractions with specified disciplines" when developing a student handbook. It is sufficient to impose discipline if the conduct in question "clearly violated the letter and spirit of school rules." *R.W.* at 115 (citation omitted.) It is not unreasonable to expect that a seventh-grade student would be expected to anticipate that signing his/her parent's required signature is inappropriate behavior. In addition, petitioners were advised of the requirements of continued participation in the Open Enrollment Program at the time their applications were filed.

As reflected in the above findings of fact, Morrissey's testimony that, the principals of each school in the District had the authority to act upon applications pursuant to the Open Enrollment program, and to change the status of participation of students in that program, was credible. The official job description for the position of principal is not inconsistent with that testimony. For the reasons discussed hereinabove, I am persuaded that her action in the current matter was consistent with the applicable legal principles. In addition, petitioners presented no evidence that DePatri was involved in the decision to transfer EA, Jr. to any extent. To the contrary, the evidence offered by respondents supports the conclusion that he was not.

Petitioner's reliance on *N.J.S.A.* 18A:37-10 is also misplaced. As respondents argue, E.A., Jr. was not charged with a weapons offense, and he was not transferred to an alternative education program.

Petitioners did not demonstrate, by a preponderance of the credible evidence, that Morrissey's actions, or those of any other employee of the District, resulted from prohibited discrimination. To the contrary, as reflected in the above findings of fact, Morrissey testified that she approved petitioners' 1993 applications because space was available at P.S. 38 and that race was immaterial, because the enrollment of E.A., Jr. and A.A. would not improve the racial balance of the school. In addition, although not determinative, as the District argues, the fact that A.A. attended the school for several years, and graduated from its eighth grade, without any problems, indicates that discrimination was not involved.

Petitioners impressed me as being extremely sincere regarding the reasons why they wanted their children to attend P.S. 38 and not P.S. 15. However, their desires in that respect do not change the fact that they voluntarily removed EA, Jr. from the public school system, or the fact that he was not excluded by respondents from participation in the District's educational system. Parenthetically, petitioners have not proven, by a preponderance of the credible evidence, that their conclusions regarding P.S. 15, as reflected in the above findings of fact, were accurate.

I am persuaded that the petition should be dismissed and that the relief requested by petitioners should not be granted. It is unnecessary to reach respondents' argument that the Commissioner does not have the authority to grant the requested monetary relief. Notwithstanding, petitioners' arguments, and the concerns raised by petitioners, regarding the manner in which the transfer was handled have merit, from the perspectives of a student who had been at P.S. 38 for several years, and his parents. Although not constituting a due process violation, it would have been more appropriate, as well as sensitive, for Morrissey to have discussed the matter with

EA, Jr., as well as his parents, prior to implementing the transfer, even if such resulted in several days' delay in reaching a decision.

CONCLUSIONS

I **CONCLUDE** that that the due process requirements of notice and hearing applicable to the exclusion of students from a public education system are not applicable in the current matter; that petitioners did not prove, by a preponderance of the credible evidence, that respondents acted in an arbitrary, capricious, or unreasonable manner regarding the transfer of EA, Jr.; that Morrissey's action in that respect was not arbitrary, capricious or unreasonable; that petitioners have not proven, by a preponderance of the credible evidence, that respondents discriminated against EA, Jr., in violation of *N.J.S.A.* 18A:36-20; and that petitioners are not entitled to the relief requested.

ORDER

It is hereby **ORDERED** that the petition in this matter be and is hereby **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 28, 1999
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

11/8/99
DATE

Debbie Antanaitis/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 8 1999
DATE

Barbara A. Haines
OFFICE OF ADMINISTRATIVE LAW

\mvh

APPENDIX

WITNESSES

For Petitioners:

E.A., Jr.

D.A.

Rev. E.A.

For Respondents:

Ella Stevenson

Patricia Clarritt

Marie Morrissey

EXHIBITS IN EVIDENCE

P-1 Student Code of Conduct

P-2 Student/Parent Handbook 1996-1997

P-3 Policy on Transfers; Withdrawals, dated April 28, 1989

P-4 Mathematics Test of E.A., Jr.

P-5 Letter dated December 2, 1997, to Rev. and Mrs. A. from the Principal and Assistant Principal of P.S. 38

P-6 Notice of Transfer, with discharge dated 12/4/97

P-7 Letter dated May 9, 1996 to Mr. and Mrs. A. from Barbara McGrath

P-8 Envelope with postmark of 12/4/99

P-9 Handwritten statement of Ellen Stevenson, undated

P-10 Report of Mr. Gross, dated 11/21/97

P-11 Report card for 1996-1997

P-12 Job Description, Elementary Principal

R-1 Letter dated 8/31/93 to parents, approving application for open enrollment/special permission

R-2 Letter to Parents, undated, regarding open enrollment program

R-3 Letter dated December 15, 1997, to Dr. Richard DePatri from Rev. A.

R-4 Progress Report dated October 3, 1997

R-5 Letter to parents dated September 26, 1997

R-6 Receipt of Student Code of Conduct

R-7 Student data slip signed by E.A.

R-8 Elementary promotional policy slip signed by E.A.

R-9 Letter dated 9/30/96

R-10 Report card for 1995-1996

R-11 Report card for 1997-1998

R-12 Letter dated December 3, 1997, to Rev. & Mrs. A. from Marie R. Morrissey

OAL DKT. NO. EDU 3499-98
AGENCY DKT. NO. 50-3/98

E.A., SR. AND D.A., on behalf of minor child, E.A., JR.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY, MARIE MORRISSEY AND RICHARD DIPATRI,	:	DECISION
RESPONDENTS.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the District's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4.

Petitioners' arguments on exception challenge, *inter alia*, the "unilateral action of Principal Marie Morrissey" transferring E.A., Jr., from the James F. Murray School (P.S. 38) "without seeking the advice of the student's teachers, without providing assistance from a guidance counselor, [and] without notifying the Jersey City Board of Education ***." Petitioners claim the principal's action "constitutes a gross violation of reasonable, discretionary and proper school administration." (Petitioner's Exceptions at p. 5) With respect to the relief sought, although petitioners indicate that E.A., Jr., has "graduated from the Jersey City Elementary School System," and, therefore, reinstatement to the James F. Murray School is not an appropriate relief, they ask the Commissioner to

> enter a decision rescinding the unilateral action of the Principal *** and declaring that the transfer of the student, E.A., Jr. was unjustified. Such remedial action by the Commissioner will cure, to some degree,

> the adverse impact of the Principal's decision upon the academic record of the student and its harmful and damaging effect upon his self-esteem. Further, the parents should be compensated by the School District for the expense which they would not have incurred but for the arbitrary action of the Principal *** in removing their child from his school of choice. This very modest expense of $5,055.00 was not disputed at the hearing. *** Counsel fees incurred by the parents in seeking redress for the wrongful conduct of the Principal *** should also be awarded ***. (*Id.* at p. 7)

In reply, the District underscores that, as principal of P.S. 38, Ms. Morrissey reviewed the applications for admission to the Open Enrollment program, determining whether to admit or deny a student, and, therefore, it "was ***consistent with the operation of the program and the job description for the position of principal for [Ms. Morrissey] to rescind the open enrollment approval***." (District's Reply at p. 4) That this procedure was not reduced to a written policy does not necessarily, according to the District, render it arbitrary. (*Id.* at p. 5, citing *Gebhart v. Hopewell Twp. Bd. of Educ.*, 1938 *S.L.D.* 570 (1927); *aff'd* 1938 *S.L.D.* 576 (1928).) Moreover, the District argues that there is no requirement for a principal to consult with any teacher regarding the transfer of a student, and the evidence in this matter shows that the teachers at P.S. 38 had never been involved in making such an administrative decision. (*Id.* at p. 6) Finally, the District notes that the ALJ expressly found that petitioners *had not* proven that E.A., Jr., did not forge his father's signature, and that the boy's admission to same "was a serious infraction which, coupled with his previous behavioral problems, not only represented a violation of the requirement of the Open Enrollment program for good behavior, but also indicated to the Principal that E.A., Jr., lacked commitment to improve at P.S. 38." (*Id.* at p. 8) Consequently, the District urges the Commissioner to affirm the Initial Decision of the ALJ.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the ALJ that petitioners have failed to demonstrate that the action taken herein to rescind E.A., Jr.'s open enrollment approval, under these circumstances, contravened school law, violated E.A. Jr.'s due process rights, was arbitrary, capricious, unreasonable or otherwise induced

by improper motive. To the extent petitioners challenge the facts determined by the ALJ based on the testimony of the witnesses and the credence ascribed to such testimony, the Commissioner notes that the record before him does not include transcripts of the hearing conducted at the OAL in this matter. Challenges to the factual findings predicated upon credibility determinations made by an administrative law judge require the party to supply the agency head with the relevant and necessary portion of the transcript. *See In re Morrison*, 216 *N.J. Super.* 143, 158 (App. Div. 1987). In the absence of transcripts from the hearing, due regard should be given to the person who heard the live testimony and assessed the witnesses' behavior at the hearing. *Close v. Kordulak Bros.*, 44 *N.J.* 589, 599 (1965).[1]

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein.[2] The Petition of Appeal is dismissed.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

December 23, 1999

[1] While it is not necessary to specifically address petitioners' request for reimbursement for educational costs and counsel fees, the Commissioner notes that he is without the authority to award such fees and costs. *B.B., on behalf of her son, L.C. v. Board of Education of Union County Regional High School District No. 1 and Donald Merachnik, Superintendent of Schools, Union County*, 1987 *S.L.D.* 323 at 336; *Balsley v. North Hunterdon Bd. of Educ.* 117 *N.J.* 434, 442, 443 (1990).

[2] Contrary to the ALJ's statement on page 43 of the Initial Decision that "[p]ublic schools are required to provide a free education to individuals between the ages of 5 and 25 in certain circumstances ***," the Commissioner herein clarifies that, pursuant to N.J.S.A. 18A:38-1, any person over the age of five and under 20 who is domiciled in the district is entitled to a free public education. Additionally, pursuant to N.J.S.A. 18A:46-6, local boards must provide for the identification of "handicapped" persons between the ages of five and 21 residing in the district who require educational services.

[3] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

423-99

EDU #3499-98
C # 423-99
SB # 2-00

E.A., SR. AND D.A., on behalf of minor child, E.A., JR.,

PETITIONERS-APPELLANTS,

V.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY, MARIE MORRISSEY AND RICHARD DiPATRI,

RESPONDENTS-RESPONDENTS.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, December 23, 1999

For the Petitioners-Appellants, Lynch & Lynch (Edmund E. Lynch, Esq., of Counsel)

For the Respondents-Respondents, Charlotte Kitler, Esq.

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. In so doing, however, we reiterate the Administrative Law Judge's admonition that:

> Although not constituting a due process violation, it would have been more appropriate, as well as sensitive, for [the school's principal] to have discussed the matter with EA, Jr., as well as his parents, prior to implementing the transfer, even if such resulted in several days' delay in reaching a decision.

Initial Decision, slip op. at 59-60.

APR. 5, 2000

We deny as unnecessary for a fair determination of this matter the appellants' motion to supplement the record.

April 5, 2000

Date of mailing APR 7 2000

424-99

IN THE MATTER OF THE TENURE	:	
HEARING OF JAMES JOHNSON,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF JERSEY CITY,	:	
HUDSON COUNTY.	:	

December 23, 1999

AGENCY DKT. NO. 354-12/99

IN THE MATTER OF THE TENURE	:	
HEARING OF JAMES JOHNSON,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF JERSEY CITY,	:	
HUDSON COUNTY.	:	

For the District, Ken Iwama, Esq., Associate General Counsel

For the Respondent, Sanford R. Oxfeld, Esq., (Balk, Oxfeld, Mandell & Cohen)

This matter having been opened before the Commissioner of Education on December 1, 1999, through certification of tenure charges of excessive absenteeism and unbecoming conduct against a tenured crisis intervention teacher by the State-operated School District of the City of Jersey City; and

The Commissioner having directed respondent and his attorney, via both certified and regular mail by letter dated December 2, 1999 to file an Answer to the tenure charges against him[1]; and

Such communication clearly having provided respondent and his attorney notice that, pursuant to *N.J.S.A.* 18A:6-16[2], an individual against whom tenure charges are certified shall have **15 days** from the date the charges were certified to the Commissioner to submit a written response to the charges, and that failure to answer within the prescribed period will, absent granting of an extension for good cause shown, result in the charges being deemed

[1] The certified copy of said notice having been signed for by respondent on December 4, 1999.
[2] Formerly, *P.L.* 1998, *c.* 42, effective June 30, 1998.

admitted and the Commissioner deciding the matter on a summary basis pursuant to *N.J.A.C.* 6:24-1.4(e); and

The Commissioner having received on December 20, 1999, a request from respondent's counsel for an additional 14 days to file an Answer on respondent's behalf, and having noted that, even assuming *arguendo* that the request was timely filed, counsel failed to identify "good cause" for such an extension, as required by *N.J.S.A.* 18A:6-16[3], and, indeed, failed to articulate *any* reason for the request; and

The Commissioner having determined that respondent failed to submit a timely Answer, he finds that both counts of the charges are deemed admitted, thus rendering this matter appropriate for summary decision; and

The Commissioner having reviewed the tenure charges certified against respondent by the District and the statement of evidence in support of those charges indicating that respondent has been absent a total of 311 days from the start of the 1993-94 school year through the end of the 1998-99 school year[4]; that respondent has been repeatedly informed of the District's attendance requirements and advised that his attendance was unsatisfactory and needed improvement; that despite respondent's salary increments being withheld for the 1997-1998 and 1999-2000 school years, there has been no improvement in his attendance; that, as of September 7, 1999, respondent has failed to report to work for the 1999-2000 school year; and

[3] The statute provides, in pertinent part, that "[t]he individual against whom the charges are certified shall have 15 days to submit a written response to the charges to the commissioner. Upon a showing of good cause, the commissioner may grant an extension of time.***" *N.J.S.A.* 18A:6-16.

[4] By way of example, the District avers that respondent was absent for an approximate total of 23 days and tardy for three days in the 1993-94 school year; respondent was absent for an approximate total of 25 days in the 1994-95 school year; respondent was absent for an approximate total of 25 days and tardy for eight days in the 1995-96 school year; respondent was absent for an approximate total of 64 days and tardy for eight days in the 1996-97 school year; respondent was absent for an approximate 28 days and tardy for six days in the 1997-98 school year; and respondent was absent for an approximate 122 days in the 1998-99 school year. (Statement of Charges at pp. 1-2)

that, consequently, his chronic and excessive absences have had a significant adverse effect on the students of the District; and

The Commissioner further noting that the District avers respondent is guilty of unbecoming conduct, inasmuch as he has been absent without leave since March 1999[5], and, therefore, the District avers that respondent has breached his responsibilities as a teacher; and

Deeming such charges to be admitted, and noting that respondent has chosen not to deny the specific allegations contained therein, the Commissioner finds that respondent's actions constitute excessive absenteeism and conduct unbecoming a teaching staff member, sufficient to warrant his dismissal from his tenured position; now, therefore

IT IS SO ORDERED this _____ day of _____ that summary judgment shall be granted to the District, and James Johnson shall be dismissed from his tenured position as a crisis intervention teacher in the District's employ as of the date of this order. This matter shall be referred to the State Board of Examiners pursuant to *N.J.A.C.* 6:11-3.6 for action against respondent's certificate as it deems appropriate.[6]

Douglas B. Groff

ACTING COMMISSIONER OF EDUCATION

December 23, 1999

[5] By letter dated May 3, 1999, respondent was directed to report to work on May 6, 1999, but has failed to do so. By letter dated May 12, 1999, respondent was again directed to return to work, but failed to do so. By letter dated May 27, 1999, respondent was directed to report to the Human Resources Department in the District to discuss his employment status, but failed to do so. (Statement of Charges at p. 3)

[6] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

425-99

C.H., on behalf of minor child, S.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SPOTSWOOD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning parent sought to have her son, S.H., attend school in the East Brunswick schools with tuition paid by respondent Spotswood school district. Petitioner alleged there was abuse and discrimination against her child by Spotswood staff and students. Respondent asserted that S.H. was a resident of Helmetta and that the Helmetta school district was in a sending-receiving relationship with respondent; consequently if petitioner prevailed in her argument to have her son attend school elsewhere, Helmetta would have to pay the tuition. Therefore, Helmetta was an indispensable party in this action.

ALJ dismissed petition. Since petitioner was unsuccessful in finding any school willing to take her son and he was presently attending school in Spotswood, petitioner did not oppose the Motion to Amend and to Dismiss Petitioner's Action Based Upon Failure to Name an Indispensable Party.

December 27, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ON MOTION DISMISSING
PETITION
OAL DKT. NO. EDU 6750-99
AGENCY DKT. NO. 258-8/99

C.H. ON BEHALF OF MINOR
CHILD S.H.,
Petitioner,
v.
BOARD OF EDUCATION OF
SPOTSWOOD, MIDDLESEX COUNTY,
Respondent.

Harvey H. Rothman, Esq., for petitioner (Eisdorfer, Eisdorfer, Eisdorfer, Patton & Suarez, attorneys)

Philip H. Shore, Esq., for respondent (Shore & Zahn, attorneys)

Record Closed: October 26, 1999 Decided: November 9, 1999

BEFORE **AUGUST E. THOMAS,** ALJ T/A:

STATEMENT OF THE CASE

On August 18, 1999, petitioner filed a petition and request for emergent relief asking the State Department of Education to send her son to the East Brunswick schools with tuition paid by

the school district of Spotswood. This request was made because of alleged abuse and discrimination against her child by bus drivers, teachers, the principal of the school and other students. At that time, the East Brunswick Board of Education also was a party respondent. By Order dated September 10, 1999, petitioner's request for emergent relief was denied and the administrative law judge (ALJ) dismissed the action against the East Brunswick Board of Education.

After a prehearing conference, this matter was scheduled for a hearing. During discovery, respondent filed a Motion to Amend Answer and to Dismiss Petitioner's Action Based Upon Failure to Name an Indispensable Party. Respondent asserts that S.H. is a resident of Helmetta and that the Helmetta School District is in a sending-receiving relationship with Spotswood; consequently, if petitioner prevails in her argument to have her son attend a school district other than Spotswood, Helmetta would have to pay S.H.'s tuition expenses. Therefore, Helmetta is an indispensable party in this action.

In a three-way telephone conference with counsel on October 26, 1999, beginning at 9:30 a.m., counsel for petitioner stated that his client was unsuccessful in finding any school willing to take her son and that her son was presently attending school in Spotswood. Petitioner offered nothing further and did not oppose the Motion to Amend Answer and to Dismiss Petitioner's Action Based Upon Failure to Name an Indispensable Party.

Based on the above, respondent's motion is granted and the petition is **DISMISSED**. It is so **ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is

otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 9, 1999
DATE

August E Thomas by ALS
AUGUST E. THOMAS, ALJ t/a

Receipt Acknowledged:

11/12/99
DATE

Debbie Antanaitis/ls
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 15 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 6750-99
AGENCY DKT. NO. 258-8/99

C.H., on behalf of minor child, S.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SPOTSWOOD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and Initial Decision on Motion issued by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review of the record, the Commissioner adopts the Initial Decision as the final decision in this matter.

Accordingly, the Petition of Appeal is hereby dismissed for the reasons stated in the Initial Decision.*

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

December 27, 1999
Mailing Date December 27, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

426-99

MAUREEN MURRAY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

December 27,1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7079-98
AGENCY DKT. NO. 196-6/98

MAUREEN MURRAY,
Petitioner,
v.
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, COUNTY OF HUDSON,
Respondent

Allan S. Porwich, Esq., for petitioner
Feintuch, Porwich & Feintuch, attorneys)

Charlotte Kitler, Esq., General Counsel, Jersey City School District, for respondent

Record Closed: October 27, 1998 Decided: November 3, 1998

BEFORE **ARNOLD SAMUELS**, ALJ:

On June 15, 1998, the petitioner, Maureen S. Murray, filed a Verified Petition with the Commissioner of Education concerning a dispute with the respondent pertaining to the deduction of sick leave time. On July 23, 1998, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) for hearing and determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 to 13.

Counsel agreed to place the matter on the Inactive List, pending completion of a Worker's Compensation proceeding, because the only issue in dispute was the length of petitioner's temporary period of disability following a work related accident.

The four month Order of Inactivity expired in September 1999, and on October 26, 1999 the parties filed a Stipulation of Settlement. This followed a determination of temporary disability by the Division of Worker's Compensation. A copy of the Stipulation of Settlement is attached hereto and made a part hereof.

Having reviewed and considered the issues involved in this dispute, it is **CONCLUDED** that the parties have voluntarily and knowingly agreed to the settlement, as evidenced by the attached document. It is further **CONCLUDED** that the settlement is fair and fully dispositive of all issues in controversy.

It is therefore **ORDERED** that the settlement be approved and that this matter be dismissed.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

OAL DKT. NO. EDU 7079-98

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 3, 1999
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

11/9/99
DATE

Debbi Antanaitis/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 10 1999
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

OCT 27 8 40 AM '99

FEINTUCH, PORWICH & FEINTUCH
26 Journal Square
Jersey City, New Jersey 07306
(201) 656-8600
Attorneys for Petitioner

MAUREEN MURRAY, Petitioner, vs. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, COUNTY OF HUDSON, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY Agency No. 196-6/98 OAL DKT NO. EDUOR-7079-98 STIPULATION OF SETTLEMENT

THIS MATTER having been timely filed before the Commissioner of Education seeking to restore certain sick days for absences due to work-related injuries, and a determination having been made by a Judge of Workers' Compensation that the petitioner was temporarily disabled on the days in question because of injuries from an accident at work on February 27, 1998, it is hereby stipulated by the parties, based upon the determination of the Judge of Workers' Compensation, as follows:

1. Respondent shall restore nine days to Petitioner's sick leave bank for her absences on March 2, 6, 9, 12, 13, 17, 20 and 23, 1998 and April 15, 1998.

2. All other claims are withdrawn, with prejudice.

FEINTUCH, PORWICH & FEINTUCH
Attorneys for Petitioner

By: _____
ALAN S. PORWICH
DATED: October 25, 1999

_____
CHARLOTTE KITLER, ESQ.
Attorney for Respondent
DATED: October 22, 1999

OAL DKT. NO. EDU 7079-98
AGENCY DKT. NO. 196-6/98

MAUREEN MURRAY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, Stipulation of Settlement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

December 27,1999
Date of Mailing December 27, 1999

427-99

IN THE MATTER OF THE TENURE HEARING OF LAURA ISAACS, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

December 27, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7451-99
AGENCY DKT. NO. 165-6/99

IN THE MATTER OF THE TENURE CHARGES AGAINST LAURA ISAACS, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY

Gregory G. Johnson, Esq., for petitioner, State-Operated School District of the City of Paterson

Nancy I. Oxfeld, Esq., for respondent, Laura Isaacs (Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: November 3, 1999 Decided: November 5, 1999

BEFORE **EDITH KLINGER**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on July 13, 1999 for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. Hearings were scheduled on September 30, October 1 and 7, 1999 at the OAL in Newark. On the first day of hearing, the parties advised the undersigned that they had amicably resolved this matter.

On November 3, 1999, the parties submitted the attached Stipulation of Settlement, indicating the terms of agreement which are incorporated herein by reference.

I have reviewed the record and the settlement terms and I **FIND**:

1. The parties have voluntarily agreed to the settlement on the record.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

3. The agreement conforms with the *Cardonick* standards and with the concerns of the Commissioner of Education as set forth in his decision. *In re Cardonick*, decided by Commissioner, April 7, 1982, *affirmed*, State Bd. of Ed., 1990 *S.L.D.* 842, 846 (April 6, 1983).

I **CONCLUDE** that this agreement meets the safeguard requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

November 5, 1999
DATE

Edith Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged

11/9/99
DATE

Debbie Antanaitis/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 10 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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OFFICE OF ADMIN. LAW

Nov 3 1 21 PM '99

Gregory G. Johnson, Esq.
P.O. Box 2148
Trenton, New Jersey 08607
609-896-3550
Attorney for the Paterson Public Schools

BEFORE THE COMMISSIONER OF EDUCATION

IN THE MATTER OF THE TENURE HEARING OF LAURA ISAAC,

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.

OAL Dkt. No. EDUTH 07451-99N
Agency Ref. No. 165-6/99

STIPULATION OF SETTLEMENT

This Agreement made this on September 30, 1999, by and between the parties, petitioner State-Operated School District of the City of Paterson ("District"), and respondent Laura Isaac, a tenured teacher, residing at 10 Melrose Avenue, Bergenfield, N.J. 07621;

WHEREAS, Mrs. Isaac is a tenured teacher employed by the District;

WHEREAS, on or about May 24, 1999, tenure charges were filed against Mrs. Isaac alleging various instances of inefficiency as a teacher;

WHEREAS, on or about June 9, 1999, Mrs. Isaac through her attorneys filed a response to the charges essentially denying all charges;

WHEREAS, on June 14, 1999, the State District Superintendent acted to certify the charges against Mrs. Isaac. Mrs. Isaac is currently serving a 120 day suspension without pay pending a hearing pursuant to *N.J.S.A.* 18A:6-14.

WHEREAS, in light of the nature of charges, and the possibility of protracted litigation, it is in the best interest of the parties to resolve the certified charges before the Commissioner of Education;

NOW THEREFORE BE IT RESOLVED, the parties hereby stipulate and agree as follows:

1. Mrs. Isaac agrees to resign from her teaching position, effective January 31, 2000. Upon the final approval of the signed Agreement, the District shall and hereby does withdraw the tenure charges.

2. Effective October 1, 1999, Mrs. Isaac will be reinstated to the payroll. The District agrees to continue salary payments and benefits to Mrs. Isaac, at the 1998-99 pay level, up to January 31, 2000.

3. Mrs. Isaac specifically acknowledges that she has been advised of the duty of the Commissioner of Education pursuant to *N.J.A.C.* 6:11-3.6(a)(1) and *In re Cardonick* concerning referral to the State Board of Examiners for possible action regarding Mrs. Isaac's teaching certification.

4. The District will not pursue tenure charges against Mrs. Isaac as long as this settlement remains in effect and is not voided by any court of competent jurisdiction or agency with jurisdiction over this matter. However, if the settlement is voided, the District retains the right to reinstate the tenure charges against Mrs. Isaac.

5. The parties respectively acknowledge that each has had ample opportunity to seek independent legal counsel, financial or other advice regarding this Agreement, and that each is signing this Agreement freely and voluntarily, without coercion, duress or pressure from the other party.

6. This Agreement constitutes the full Agreement between the parties.

7. By entering this Agreement, each party releases and discharges the other with respect to all claims or rights that either party may have against the other. This includes all claims, including

those of which either party is not aware and those not mentioned herein. The releases by each party apply to all claims resulting from anything which has happened up to now. It specifically includes, without limitation, all claims which Mrs. Isaac may have respecting tenure, discrimination on any basis, rights under any collective bargaining agreement, disability payments, sick leave, salary or any other matter pertaining to her employment, except stated herein. However, the releases will be null and void if this Agreement is declared null and void by a court of competent jurisdiction or agency with jurisdiction over this matter.

8. This Agreement is subject to approval by the State District Superintendent, and Commissioner of Education.

FOR THE EMPLOYEE

Laura Isaac

Laura Isaac

Dated: 10/1/99

Nancy Oxfeld, Esq.
Attorney for Mrs. Isaac

Dated: 10/1/99

FOR THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON

Dr. Edwin Duroy, State District Superintendent

Dated:

Gregory G. Johnson, Esq.

Dated: 10/13/99

OAL DKT. NO. EDU 7451-99
AGENCY DKT. NO. 165-6/99

IN THE MATTER OF THE TENURE HEARING OF LAURA ISAACS,	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter, wherein respondent is charged with inefficiency. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

December 27,1999
Mailing Date December 27, 1999

428-99

ANDREA D. WICKER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF OAKLYN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent alleged her son's placement in a science course was not based on his academic needs, but on the Board's transportation needs. The Board contended that petitioner failed to state a cause of action upon which relief could be granted, that the petition was untimely filed, that petitioner failed to exhaust administrative remedies, and that the subject matter was moot.

The ALJ found that the Board did not act improperly. It tried to accommodate petitioner and it did devise a program for D.P., which did not satisfy petitioner. The ALJ granted respondent's motion for summary decision.

The Commissioner found that although he concurred with the ALJ that respondent was entitled to summary decision in its favor, the Board properly noted that this matter was moot. Petition was dismissed.

December 27, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

OAL DKT. NO. EDU 10885-98

AGENCY DKT. NO. 523-11/98

ANDREA D. WICKER,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF OAKLYN, CAMDEN COUNTY,

Respondent.

Andrea Wicker., petitioner, *pro se*

William D. Hogan, Esq., for respondent (Davis, Reberkenny & Abramowitz, attorneys)

Record Closed: August 16, 1999 Decided: November 9, 1999

BEFORE **KATHRYN A. CLARK**, ALJ:

Petitioner alleged that her son's placement in a science course was not based on his academic needs but because the Board of Education (respondent) does not provide transportation to Collingswood High School.

PROCEDURAL HISTORY

The petition in this matter was filed on December 24, 1998. This matter was assigned to this Administrative law Judge on February 4, 1999, with hearing dates set for August 6 and 24, 1999. A status conference was set for August 4, 1999. The hearing dates were postponed because of the filing of a motion for summary decision by respondent. Petitioner was given until August 13, 1999 to respond to the motion.

STATEMENT OF THE CASE

Petitioner's son, D.P., who attended 9th grade at Oaklyn Junior High School, was placed in Honors General Science at Oaklyn Junior High School, instead of Chemistry II at Collingswood High School, for the 1998-1999 school year. Petitioner alleged that he was not being academically challenged enough by this program.

Respondent answered that petitioner failed to state a cause of action upon which relief could be granted, that the petition was untimely filed under N.J.A.C. 6:24-1.2(c), that petitioner failed to exhaust administrative remedies, and that the subject matter was moot.

D.P. has done well in school, and has been permitted to take some courses at the next higher grade level, especially in math and science. In 9th grade, he was placed in Honors Science, since he had already completed the 9th grade courses in math and science while in 8th grade.

Oaklyn School District has a "sending-receiving" relationship with Collingswood High School for the education of their 10th, 11th, and 12th grade classes. There is no current agreement involving 9th grade students. For D.P. to attend a 10th grade class in science (Chemistry) at Collingswood while still an 9th grade student at Oaklyn, the prior approvals of the Collingswood and Oaklyn Superintendents and of the Collingswood and Oaklyn Boards of Education would have to be obtained.

The Oaklyn Superintendent had considered making the arrangements to obtain these approvals before the start of D.P.'s 9th grade. But in January, 1998, D.P.'s mother (petitioner) informed D.P.'s teachers and the principal of Oaklyn Junior High School that the family would be moving out of Oaklyn.

When the Oaklyn Superintendent heard that the family would be moving out of Oaklyn, he did not pursue the arrangements necessary to obtain approval. In May, 1998, the Oaklyn Principal again contacted petitioner to make sure that D.P. would not be attending 9th grade through the Oaklyn School District. He was assured that the family was moving and that D.P. would be going to school through his new school district.

However, D.P.'s family did not move out of the Oaklyn School District. Approximately 10 days before the start of the September, 1998 school term, petitioner called the Oaklyn Superintendent to advise him that D.P. would indeed be attending 9th grade through Oaklyn School District.

In attempting to arrange a program for D.P., the Oaklyn Superintendent found out that the only opening in science at Collingswood was in Chemistry II, an 11th grade class offered at 3rd period. The Superintendent concluded that the class level was inappropriate, and that transporting D.P. to Collingswood High School for a 3rd period class alone was impracticable, even if the Collingswood Superintendent and the Collingswood and Oaklyn Boards of Education agreed to D.P.'s taking a class at Collingswood High School.

The Oaklyn Administration developed a program for D.P. that offered Algebra II (taught on a 1-1 ratio) and Honors General Science.

Petitioner appealed. The Oaklyn Board of Education denied her appeal on October 20, 1999. petitioner appealed to the department of Education on November 23, 1999. She did not request emergent relief.

On June 16, 1999, D.P. graduated from Oaklyn Junior High School, and entered grade 10 at Collingswood High School in September, 1999.

LEGAL DISCUSSION

The relevant standard of review on a motion for summary decision is as follows:

The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. *N.J.A.C.* 1:1-12.5 (b).

When a motion for summary decision is filed the "adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." *N.J.A.C.* 1:1-12.5 (b). If the adverse party fails to meet this burden, "a summary decision, if appropriate, shall be entered." *Ibid.*

Summary decision is granted if, after considering the evidence presented in the light most favorable to the non-moving party, there exists no genuine issue of material fact. *Brill v. Guardian Life Ins. Co. of America,* 142 *N.J.* 520, 523 (1995). The essential question is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one sided that one party must prevail as a matter of law" *Id.* at 533. The Court recognized that this necessarily involves the judge in the process of weighing the evidence presented. *Id.* When determining whether a genuine issue of material fact exists, "the court should be guided by the same evidentiary standard of proof . . . that would apply" at a hearing. *Id.* This weighing differs from the weighing the judge would perform after a hearing in that "on a motion for summary [decision] the court must grant all the favorable inferences to the non-movant." *Id.* at 536.

"When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." *N.J.A.C.* 1:1-12.5(b). "If an adverse party does not so respond, a summary decision, if appropriate, shall be entered." *Id.*

DISCUSSION

In this matter, petitioner was allowed to file her response out-of-time, and when she did file a response, it was not in the form of an affidavit. Even giving allowance for this since petitioner is "pro se," i.e., representing herself (as allowance has been given for all timeliness and mootness issues), petitioner's response does not state a "genuine issue as to any material fact."

She is unhappy that her son was not adequately challenged in his 9th grade science class, but I can find no legal entitlement for D.P., a 9th grade student at Oaklyn who is not classified, to attend an 11th grade class in another school, or to be transported there.

Further, I can find nothing improper in the actions of the Oaklyn administration. They double-checked on the report that D.P. would not be attending 9th grade at Oaklyn. When they were advised otherwise, they did attempt to accommodate petitioner, but found out that this was impracticable. They did devise a program for D.P. There are no federal or state requirements for programming for students who are arguably "gifted and talented."

ORDER

The respondent's motion for summary decision is hereby **GRANTED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Nov. 9, 1999
DATE

Kathryn A. Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

11/12/99
DATE

Debbie Antanaitis/bp.
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 15 1999
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

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OAL DKT. NO. EDU 10885-98
AGENCY DKT. NO. 523-11/98

ANDREA D. WICKER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF OAKLYN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions.

Upon careful and independent review of the record in this matter, the Commissioner finds that although he concurs with the ALJ that respondent is entitled to summary decision in its favor,[1] the Board has properly noted that this matter is moot. Petitioner does not dispute that her son, D.P., graduated from the Board's District on June 16, 1999. As such, the Board duly recognizes that "there is no further education that the Oaklyn School District can furnish to him through its own staff and its own facilities," notwithstanding that it retains jurisdiction, under the existing sending-receiving relationship, for high school students living in its District to attend the Collingswood High School, and pays the tuition therefor. (Board's Brief in Support of Respondent's Motion for Summary Decision at pp. 11-12) Moreover, the record indicates that petitioner informed the Board's administration that she was

[1] The Commissioner herein clarifies that although there are currently no criteria for program requirements mandated by State law or regulation, local boards must, as a condition of their State monitoring, identify and demonstrate the availability of programs and services for gifted and talented students. *N.J.A.C.* 6:8-2.5(a)4.

moving outside the District, and D.P. was not enrolled in the Collingswood High School for the 1999-2000 school year. (Letter from Board's Counsel to the ALJ, August 4, 1999)

Accordingly, the Petition of Appeal is dismissed.[2]

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

December 27, 1999
Date of Mailing December 27, 1999

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

429-99

D.B. AND E.B. on behalf of minor child, I.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE GREATER EGG HARBOR REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

December 27, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6682-99

AGENCY REF. NO. 254-8/99

D. B. AND E. B. ON BEHALF OF MINOR CHILD, I.B.

Petitioner,

v.

BOARD OF EDUCATION OF THE GREATER EGG HARBOR REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,

Respondent.

D. B. and E. B., petitioners, *pro se*

Louis Greco, Esq., for respondent

Record Closed: November 15, 1999 Decided: November 18, 199

BEFORE **EDGAR R. HOLMES,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioner was expelled from the Oakcrest High School and requested a hearing and the matter was transmitted to the Office of Administrative Law (OAL) to be heard as a contested case pursuant to the Administrative Procedures Act *N.J.S.A.* 52:14B-1 to -15, and the act creating the OAL *N.J.S.A.* 52:14F-1 to -13.

On September 10, 1999, an Order for Emergent Relief was issued in which the Board of Education of Greater Egg Harbor Regional School District (Board) was to provide the petitioner with tuition and transportation to the Alternative School at Atlantic County Community College. This was not satisfactory to the parents who place the child, I.B., in a neighboring school district's high school. On October 5, 1999, the Commissioner of Education approved the Emergent Order and ordered a plenary hearing. The plenary hearing was scheduled for November 15, 1999.

The petitioner's parents called the OAL and indicated they would not appear on November 15, 1999 and said they would confirm in writing. They did not confirm in writing. They failed to appear on November 15, 1999. The Board was present and prepared to go forward.

I **CONCLUDE** that the petitioner's parents abandoned their request to reinstate petitioner in the Oakcrest High School. Accordingly, I **DISMISS** the petition filed herein.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

11/18/99
DATE

Edgar R Holmes
EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

11/23/99
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 24 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

lmh

OAL DKT. NO. EDU 6682-99
AGENCY DKT. NO. 254-8/99

D.B. AND E.B. on behalf of minor child, I.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE GREATER EGG HARBOR REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his independent review, the Commissioner affirms the Initial Decision. Because petitioners advised that they would not appear at the November 15, 1999 plenary hearing, and did not so appear, petitioners are deemed to have abandoned their request for I.B.'s reinstatement at Oakcrest High School.

Accordingly, the within Petition of Appeal is hereby dismissed.*

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

December 27, 1999
Date of Mailing December 27, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

430-99E

S.E., on behalf of minor child, J.E. AND L.F., on behalf of minor child, J.T.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF MORRIS HILLS, REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

December 27, 1999

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 11589-99
AGENCY DKT. NO. 322-10/99
ORDER FOR EMERGENCY RELIEF

S.E. on behalf of minor J.E. and
L.F. on behalf of minor J.T.,
Petitioners,
v.
BOARD OF EDUCATION OF MORRIS HILLS REGIONAL SCHOOL DISTRICT,
Respondent.

This matter having come before the Office of Administrative Law on November 22, 1999 on petitioners' application for emergency relief pursuant to *N.J.A.C.* 1:1-12.6 and *N.J.A.C.* 6:24-1.5; and petitioners appearing *pro se*; and Peter A. Marra, Esq. of the firm of Schenck, Price, Smith & King, L.L.P., appearing for respondent; and the administrative law judge having reviewed the pleadings, petitioners' moving papers and respondent's opposing papers; and petitioners having made a preliminary showing that: (1) emergency relief is necessary to prevent irreparable injury; (2) that petitioners have a reasonable probability of ultimate success on the merit; and (3) that the relative hardship to petitioners is greater than the relative hardship to respondent; and good cause having been shown,

It is on this 23rd day of November 1999,

ORDERED that the stay of imposition of the disputed suspensions granted by the Commissioner of Education on October 22, 1999 is hereby continued pending the outcome of this matter on the merits.

This order on application for emergency relief may be adopted, modified or rejected by the Department of Education, which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Department of Education does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

Nov. 23, 1999
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

al

OAL DKT. NO. EDU 11589-99
AGENCY DKT. NO. 322-10/99

S.E., on behalf of minor child, J.E. AND L.F., on behalf of minor child, J.T.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF MORRIS HILLS, REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

The record of this emergent matter, which included an audiotape of the hearing conducted at the Office of Administrative Law on November 22, 1999, along with the Order of the Administrative Law Judge (ALJ) have been reviewed. The parties filed no exceptions to the ALJ's Order.

Upon such review, the Commissioner affirms the Order granting emergent relief as he concurs with the ALJ's hearing determination that petitioners have satisfied the requisite standards for the granting of such relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) and, as such, the Board's imposition of a two-day in-school suspension on petitioners must be stayed pending a final determination of this case on its merits.

Accordingly, the Order of the ALJ granting emergent relief is hereby affirmed. This matter shall move forward, consistent with the recommendation of the ALJ, to a plenary hearing on the merits.*

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

December 27, 1999
Date of Mailing December 27, 1999

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

431-99E

A.J.G., on behalf of minor child, M.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

December 27, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING
EMERGENCY RELIEF
OAL DKT. NO. EDU 8807-99
AGENCY REF. NO. 327-10/99

A.J.G. ON BEHALF OF MINOR CHILD M.G.,

Petitioner,

v.

BOARD OF EDUCATION OF GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,

Respondent.

A.J.G., petitioner, *pro se*

Louis Greco, Esq., for respondent

Record Closed: November 16, 1999 Decided: November 17, 1999

BEFORE **EDGAR R. HOLMES,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (OAL) to be heard as a contested case pursuant to the Administrative Procedures Act *N.J.S.A.* 52:14B-1 to -15, and the act creating the OAL *N.J.S.A.* 52:14F-1 to -13 and *N.J.A.C.* 1:1-12.6(e).

FACTS

The petitioner disputed a determination by the Board of Education (Board) that it would no longer transport her child to a Charter School. She obtained emergency relief from the Commissioner to continue the transportation pending the outcome of this emergent relief hearing.

At the hearing the Board consented to an Order providing for the continued provision of transportation to the Charter School.

An expedited plenary hearing was Ordered to commence at 9:00 a.m. on December 14, 1999, at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City, New Jersey.

I therefore, **ORDER** the Board to continue to provide bus transportation for the petitioner's child, M.G. to the Charter School until the "outcome of the matter on the merits . . ." Letter Order October 28, 1999, Ellen Schechter, Assistant Commissioner.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

November 17, 1999
DATE

Edgar R. Holmes
EDGAR R. HOLMES, ALJ

lmh

OAK DKT. NO. EDU 8807-99
AGENCY REF. NO. 327-10/99

A.J.G., on behalf of minor child, M.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this interim matter and the decision on motion of the Office of Administrative Law granting petitioner's application for emergent relief pending the outcome of a hearing on the merits of her claim, have been reviewed. In so reviewing, the Commissioner notes that the Board has consented to an order of the ALJ providing for the continued transportation of M.G., and that it has filed no exceptions to the ALJ's decision on motion.

Accordingly, the decision on motion is affirmed and adopted as the final decision on motion for emergent relief in this matter, which shall proceed to determination on the merits as recommended by the ALJ.[1]

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

December 27, 1999
Date of Mailing December 27, 1999

[1] This decision, as the Commissioner's final determination in the emergent aspect of this matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

CHESTER PARLEVECCHIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASSAIC COUNTY REGIONAL SCHOOL DISTRICT NO. 1, PASSAIC COUNTY, DON DONADIO AND DAVID SAYER, BOARD MEMBERS,	:	DECISION
RESPONDENTS.	:	
	:	

December 27, 1999

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7366-99
AGENCY DKT. NO. 74-4/99

CHESTER PARLAVECCHIO AND THE PASSAIC VALLEY EDUCATION ASSOCIATION,
Petitioners,
v.
PASSAIC COUNTY REGIONAL HIGH SCHOOL DISTRICT #1, DON DONADIO AND DAVID SAYER, BOARD MEMBERS,
Respondents.

Louis P. Bucceri, Esq., for petitioners
(Bucceri & Pincus, attorneys)

Steven J. Veltri, Esq., for respondents

Record Closed: November 15, 1999 Decided: November 17, 1999

BEFORE: **ELINOR R. REINER**, ALJ:

On April 14, 1999, petitioners, Chester Parlavecchio and the Passaic Valley Education Association, filed a verified petition of appeal with the Commissioner of Education, alleging that respondents had abused their authority and attempted to violate their rights. Petitioners requested that the Commissioner of Education issue an order directing respondents to cease and desist from searches of school property. On

May 5, 1999, respondents filed an answer to the petition, alleging that petitioners failed to state a claim and seeking dismissal of the petition. On July 8, 1999, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The matter was assigned to the undersigned judge on July 19, 1999, and a telephone prehearing conference scheduled for September 14, 1999. As a result of settlement conferences held between the parties, a settlement was reached and the prehearing conference was not held.

The parties have agreed to settle this matter and have prepared the attached Settlement Agreement indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

November 17, 1999
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

11/22/99
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CHESTER PARLAVECCHIO and THE PASSAIC VALLEY EDUCATION ASSOCIATION,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioners,	:	O.A.L. DOCKET NO. EDU 7366-99N AGENCY REF. NO. 76-4/99
v.	:	
PASSAIC COUNTY REGIONAL HIGH SCHOOL DISTRICT #1, DON DONADIO and DAVID SAYER, Board Members,	:	
Respondents.	:	**SETTLEMENT AGREEMENT**

Petitioner, Chester Parlavecchio, residing at 211 Brooklake Road, Florham Park, New Jersey 07932, (hereinafter "Mr. Parlavecchio") and the Board of Education of Passaic County Regional High School #1, with offices at East Main Street, Little Falls, New Jersey 07424, (hereinafter the "Board"), hereby agree as follows:

WHEREAS the Board and Mr. Parlavecchio have determined that it is in their best interest and the interests of the school community to resolve this dispute by consensual agreement; and

WHEREAS, both the Board and Mr. Parlavecchio share a mutual concern for school security and the protection of the privacy rights of staff members in the school setting;

It is hereby agreed as follows:

1. The Board of Education hereby agrees to formally adopt the following as a part of its policy by resolution at its next public meeting:

> The Board of Education of Passaic County Regional High School #1 affirms and acknowledges that each of its professional staff members has a right to be secure as to the privacy of the desks, cabinets, closets and offices designated for their use in the school district's facilities. Entry into such areas outside the normal course of school business, without the authorization of an appropriate administrative directive or Board Resolution is forbidden, unless the employee gives permission, or an emergency exists requiring such entry. No directive or resolution authorizing such entry shall be issued in the absence of reasonable suspicion justifying a legitimate managerial purpose for such entry. In the absence of an emergency, the employee and/or his representative shall have the right to be present at the time of such entry.
>
> In particular, no school board member is authorized to seek or obtain entry into locked or closed desks, cabinets, closets or offices of staff members in the absence of the authorization prescribed herein.
>
> Nothing in this policy may be interpreted to impair the right of access to any area by duly authorized law enforcement officers engaged in the pursuit of their duties.

2. The Board of Education acknowledges the services provided by Mr. Parlavecchio to the school community during his tenure at Passaic County Regional High School. It acknowledges the responsible attitude taken by him in reaching this settlement.

3. Mr. Parlavecchio agrees to withdraw and dismiss the above-captioned litigation, with prejudice, as to all defendants. He acknowledges the responsible attitude taken by the school district in reaching this settlement.

4. This settlement is subject to the approval of the Administrative Law Judge and the Commissioner of Education.

5. This Agreement shall not constitute an admission of wrong-doing by any party.

For Petitioner

Chester Parlavecchio
Dated: 10/10/99

Louis P. Bucceri, Esq.

For Respondent

, President
Dated: 11-9-99

, Secretary
Dated: 10/25/99

Don Donadio

David Sayer

Steven J. Veltri, Esq.

OAL DKT. NO. EDU 7366-99
AGENCY DKT. NO. 74-4/99

CHESTER PARLEVECCHIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASSAIC COUNTY REGIONAL SCHOOL DISTRICT NO. 1, PASSAIC COUNTY, DON DONADIO AND DAVID SAYER, BOARD MEMBERS,	:	DECISION
RESPONDENTS.	:	

The record of this matter, Settlement Agreement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

December 27, 1999
Mailing Date December 27, 1999

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ABSENTEEISM
CD In the Matter of the Tenure Hearing of Cecilia James,
5/99 Newark School District, Essex County.
JAM May 24, 1999 (#159-99)

For case summary, see **TENURE HEARINGS-TEACHERS.**

ABSENTEEISM
CD In the Matter of the Tenure Hearing of James Johnson, Jersey
12/99 City School District, Hudson County.
JOH December 23, 1999 (#424-99)

For case summary, see **TENURE HEARINGS-TEACHERS.**

ABSENTEEISM
CD In the Matter of the Tenure Hearing of Sandra Joyner,
7/99 Newark School District, Essex County.
JOY July 7, 1999 (#217-99)

For case summary, see **TENURE HEARINGS-TEACHERS.**

ABSENTEEISM
CD In the Matter of the Tenure Hearing of Timothy Kasony,
4/99 Lawrence Township School District, Mercer County.
KAS April 22, 1999 (#121-99)

For case summary, see **TENURE HEARINGS-CUSTODIAL AND MAINTENANCE STAFF.**

ABSENTEEISM
CD North Bergen Federation of Teachers, Local 1060, American
10/99 Federation of Teachers, AFL-CIO, and Eileen Wende,
NOR Petitioners, v.
North Bergen Board of Education, Hudson County, Respondent.
October 28, 1999 (#339-99)

For case summary, see **INCREMENTS.**

ABSENTEEISM
CD "P.D.M.," on behalf of minor child, "K.M.," Petitioner, v.
10/99 Somerville Board of Education, Somerset County, Respondent.
P.D.M. October 12, 1999 (#323-99)

The C. determines that the Board's denial of credits for ninth grade to "K.M." as a result of her absences exceeding the maximum number was not arbitrary, capricious or unreasonable.

ABSENTEEISM
CD In the Matter of the Tenure Hearing of Gregory Vereen,
6/99 Lawrence School District, Mercer County.
VER In the Matter of the Tenure Hearing of Theodore
Prusakowski, Lawrence School District, Mercer County.
June 9, 1999 (#181-99)

For case summary, see **TENURE HEARINGS-CUSTODIAL AND MAINTENANCE STAFF.**

ABSENTEEISM
CD In the Matter of the Tenure Hearing of Danita Wilson, Elizabeth
10/99 School District, Union County.
WIL October 16, 1999 (#328-99)
For case summary, see **TENURE HEARINGS-TEACHERS**.

ANTI-UNION ANIMUS
CD In the Matter of the Tenure Hearing of Barbara Dirk,
10/99 Manchester Regional High School District, Passaic County.
DIR Manchester Regional High School District, Passaic County,
Respondent and
Manchester Regional High School District Educational
Secretaries Association, Charging Party.
Commissioner's Decision #336-99
PERC Dkt. No. CO-H-99-325
October 25, 1999
For case summary, see **TENURE HEARINGS-SECRETARIES AND CLERKS.**

ANTI-UNION ANIMUS
CD In the Matter of the Tenure Hearing of Rogelio Hernandez,
5/99 Newark School District, Essex County.
HER May 10, 1999 (#150-99)
For case summary, see **TENURE HEARINGS-TEACHERS**.

ASSOCIATION RIGHTS AND DUTIES
CD Pequannock Education Association and Robert Jones, on behalf of
6/99 minor child, "J.J.," Petitioners, v.
PEQ Pequannock Board of Education, Morris County, Respondent.
June 1, 1999 (#173-99)
For case summary, see **CURRICULUM**.

ATHLETIC POSITIONS
CD James Scelba, Petitioner, v.
12/99 Jackson Board of Education, Ocean County, Respondent.
SCE December 10, 1999 (#409-99)

The Board did not renew Petitioner's contract as head golf coach for the 1998-99 school year. The C. notes that tenure cannot be obtained in coaching positions. Therefore, N.J.S.A. 18A:27-10 et seq. does not apply. Petition dismissed.
Affirmed, State Board of Education, April 5, 2000.

ATHLETIC PROGRAMS
CD Hazlet Board of Education, Monmouth County, Petitioner, v.
12/99 New Jersey State Interscholastic Athletic Association and the
HAZ Somerville Board of Education, Somerset County, Respondent.
December 3, 1999 (#394-99)

Hazlet's Raritan High School played against the Somerville Board's team in a semifinal game. Hazlet avers that the NJSIAA officials "made an unreasonable, unexplained, and clearly erroneous decision," resulting in Somerville winning the right to proceed to the final championship game. The C. finds that the determination of the NJSIAA not to honor Petitioner's protest was a correct and lawful application of that organization's bylaws under the circumstances. The bylaw does not offend the due process rights of teams and student athletes whose districts adopt it as policy when joining the NJSIAA. The application for emergent relief is denied and the Petition dismissed.

ATHLETIC PROGRAMS
SBD "J.M." and "D.M.," on behalf of minor child, "J.L.M.,"
11/99 Petitioners-Appellants, v.
"J.M." Summit Board of Education, Union County, Respondent-Respondent.
November 3, 1999

Petitioners allege that the Board acted in an arbitrary and capricious manner in failing to give their child the Most Valuable Player awards for the high school cross-country track seasons of 1995 and 1996. The State Board of Education reverses the C.'s dismissal of the matter as untimely and remands it to him for further proceedings.

ATHLETIC SUSPENSIONS
CD Paterson School District and the Paterson Eastside High
1/99 School, Passaic County, Petitioners, v.
PAT New Jersey State Interscholastic Athletic Association, Respondent.
January 29, 1999 (#21-99)

The NJSIAA Executive Committee placed the high school's basketball team on probation for two years and suspended the team from participating in the 1999 Basketball Tournament. The suspension was due to unsportsmanlike conduct during a semi-final basketball championship game against Teaneck High School. The C. affirms the NJSIAA's decision.

BIDS
CD Alaska Services, Inc., Petitioner, v.
7/99 East Brunswick Board of Education, Middlesex County, Respondent.
ALA July 2, 1999 (#213-EM)

Petitioner Company asks for a stay in the awarding and/or beginning of a contract for custodial services by the Board. Emergent Relief is denied since the Company was not irreparably harmed by any action of the Board and cannot show a reasonable likelihood of success on the merits.

BIDS
CD Alaska Services, Inc., Petitioner, v.
10/99 East Brunswick Board of Education, Middlesex County, Respondent.
ALA October 18, 1999 (#329-99)

The ALJ finds, and the C. affirms, that Petitioner did not meet the requirements for bidders set by the Board to provide custodial services. Summary judgment is granted to the Board. Petition dismissed.

BIDS
CD Byram Bus Lines, Inc., Petitioner, v.
3/99 Mount Arlington Board of Education, Morris County, Respondent.
BYR March 9, 1999 (#62-99)

The C. finds that the Board complied with applicable laws and regulations in securing, through competitive bidding, the lowest responsible bidder for its transportation contract. He finds Petitioner's contention that the Board acted improperly in this regard to be without merit.

BIDS

CD 7/99 FRE — Fred M. Schiavone Construction, Inc., Petitioner, v. Kingsway Regional School District Board of Education, Gloucester County, and Ogren Construction, Respondents. July 9, 1999 (#222-99 E)

Petitioner alleges that it is the lowest responsible bidder and moves for emergent relief restraining Respondents from proceeding with activities and work pursuant to such award. The C. finds that Petitioner has failed to satisfy the standard for obtaining emergent relief. Motion denied. The matter shall continue at the OAL for further proceedings on the merits of Petitioner's claim as deemed necessary.

BIDS

CD 2/99 TAR — Taranto Bus Company, Petitioner, v. Saddle Brook Board of Education, Bergen County, and South Bergen Jointure Commission, Bergen County, Respondents. February 24, 1999 (#47-99)

Petitioner claims that the Saddle Brook Board violated the bidding laws when it decided to renew the existing contract after it had already taken bids. The ALJ finds, and the C. concurs, that the decision by the Saddle Brook Board to reject the bids was not arbitrary or capricious and was free from fraud, collusion and bad faith. The ALJ finds, and the C. agrees, that once Saddle Brook informed the Commission that it was withdrawing Route 450 and providing its own transportation, the Commission's authority regarding Route 450 was renounced. Thereafter, the Commission had no authority to contract with Taranto on behalf of Saddle Brook. No contract existed between Taranto and Saddle Brook or the Commission based on implied contract theory or agency. Petition dismissed.

BOARD MEMBERS

CD 8/99 BEA — Donald Beatty, Petitioner, v. Chester Board of Education, Morris County, Respondent. August 31, 1999 (#289-99)

Petitioner, a Board member, seeks an Order granting him access to the application materials for non-employee candidates and the relevant personnel file data for employee applicants, sufficiently in advance of the Board's August 24th meeting to make review meaningful. The Asst. C. orders interim relief. "The clear language of prior decisional law with respect to the central issue in this matter, the responsibility and authority of individual board members to cast informed votes with regard to accepting or rejecting the recommendations of the superintendent in filling district positions, creates a reasonable likelihood that petitioner will ultimately be found to be entitled to the fundamental relief he seeks. . . .Once lost, petitioner's opportunity to cast an informed vote cannot be recaptured or remedied, so that he would, indeed, sustain irreparable harm if interim relief were not accorded." The Asst. C. stresses that the Board can place reasonable limitations on the times and places for review of applicant materials by individual board members "so that the orderly administrative operation of the district and the timely filling of vacancies will not be compromised by demands for access on the part of individual Board members." The matter shall proceed to hearing.

BOARD MEMBERS
CD Wesley M. Smith, Petitioner, v.
3/99 Hazlet Board of Education, Monmouth County, Respondent.
SMI March 8, 1999 (#61-99 E)

Petitioner seeks relief from the Board's decision removing him as a Board member because he failed to attend three consecutive Board meetings. Petitioner contends that the Board's actions were arbitrary, capricious and unreasonable since he provided "good cause" for the absences. The C. denies emergent relief since the law underlying Petitioner's legal claim is unsettled. Petitioner can claim no likelihood of success on the merits and so his Petition fails to meet at least two of the necessary criteria under Crowe. The matter is returned to the OAL for further proceedings on the merits of the matter.

BOARD MEMBERS
CD In the Matter of Richard Tullo, Pinelands Regional School
4/99 District Board of Education, Ocean County.
TUL April 26, 1999 (#127-99)

xWorkers' Compensation

Respondent has filed a workers' compensation claim against the Board. The ALJ finds, and the C. affirms, that when a board member makes a claim against the board which will accrue to his/her personal benefit, such a claim disqualifies the individual from membership on the Board. Respondent is disqualified from continued membership on the Board as of the date of this decision.

BOARD MEMBERS
CD Patricia A. Walsh, Petitioner, v.
2/99 Middletown Township Board of Education, Monmouth County,
WAL Respondent, and
Middletown Township Board of Education, Monmouth County,
Petitioner, v.
Patricia A. Walsh, Respondent.
February 16, 1999 (#35-99)

Ms. Walsh, a Board member, requests indemnification from the Board for costs and expenses of defending a legal action brought against her by Thomas Stokes. The Board seeks her disqualification from service on the Board because of this legal action. The Board cites N.J.S.A. 18A:12-2 which provides that "No member of any board. . .shall be directly or indirectly in any. . .claim against the board." The C. notes that the relevant cases distinguish between those claims against a board which seek to uphold a public interest as opposed to those claims that support a private, personal interest. Ms. Walsh seeks to have the Board indemnify her so that she can protect what she maintains is the public interest in her ability to attend Board members "in safety and security." The C. grants summary decision to Ms. Walsh and dismisses the Board's Petition. The matter of her indemnification claim shall proceed to the OAL.

BONDS
CD James J. Adams, Petitioner, v.
10/99 Greenwich Board of Education, Warren County, Respondent.
ADA October 5, 1999 (#319-99)

Petitioner, a taxpayer, asserts that inaccurate and misleading information about the upcoming referendum to secure financing for a new school via a bond issue was issued to the public. The C. finds that Petitioner has failed to establish by a preponderance of credible evidence that the Board violated any case law in connection with the bond referendum. Petition dismissed.
Affirmed, State Board of Education, May 3, 2000.

CERTIFICATION
SBD In the Matter of the Denial of Standard Certification to Linda J.
5/99 Avellino.
AVE Decided by State Board of Examiners, November 30, 1998
Decided by State Board of Education, May 5, 1999 (SB #99-98)

The State Board of Examiners denied Avellino's request for standard certification as a teacher of elementary school, teacher of psychology, student personnel services, and substance awareness coordinator. The appeal is transferred to the C. for decision.

CERTIFICATION
CD Furqan Wasi Bilal, Petitioner, v.
9/99 New Jersey State Board of Examiners, Respondent.
BIL September 13, 1999 (#302-99)

The State Board of Examiners denied Petitioner's application for permanent certification as a teacher of skilled trades, based on his conviction for homicide in the course of a robbery. Petitioner received a life sentence, but was paroled in 1987. The ALJ concludes that Petitioner has failed to sustain his burden of proving that the State Board of Examiners abused its discretion. The Board has presented a reasonable basis for its determination based on its concern with the protection of children and the acknowledgment that a higher standard of conduct is expected from teachers. The C. affirms the ALJ's determination and dismisses the Petition.

CERTIFICATION
CD Nicholas Duva, Petitioner, v.
12/99 State-Operated School District of the City of Jersey City,
DUV Hudson County, Respondent.
December 3, 1999 (#392-99)

For case summary, see **POSITIONS, ABOLISHMENT.**

CERTIFICATION
CD Edward J. Flaherty, Petitioner, v.
6/99 New Jersey Department of Education, State Board of Examiners,
FLA Respondent.
June 30, 1999 (#211-99)

Petitioner's application for a school administrator's license was denied on two grounds. First, his undergraduate and graduate degrees from Stevens Institute of Technology are not equivalent to the required master's degree in one of the recognized fields of leadership and management. Secondly, his education and experience do not satisfy the requirement of study in the areas of communications and law. The C. upholds the State Board of Examiners' decision to deny Petitioner's application for issue of a school administrator certificate. Petition dismissed.

CERTIFICATION
SBD In the Matter of the Issuance of a County Substitute Certificate
11/99 to Karen Gaba.
GAB November 3, 1999

The State Board of Examiners blocked issuance of a new county substitute license to Petitioner. In February, 1994, Petitioner signed a statement admitting that she provided alcoholic beverages and marijuana to students. Given the gravity of this admission, the State Board of Education concludes that Petitioner has not shown an entitlement to receive a county substitute certificate. However, the procedure used in this case was not in accordance with regulations. The State Board of Examiners does not have the authority under N.J.A.C. 6:11-3.6(g) to consider Petitioner's application. It should have been submitted to the County Superintendent for review and approval. Petitioner's application is denied.

CERTIFICATION
SBD Guttenberg Education Association and Zenaida Franqui,
3/99 Appellants, v.
GUT Leo F. Kagholz, Commissioner of Education, Respondent, and
Guttenberg Board of Education, Hudson County, Respondent.
March 3, 1999

For case summary, see **SUBSTITUTE STAFF**.

CERTIFICATION
SBD In the Matter of the Certificates of Robert H. Kinzel.
7/99 July 7, 1999

Kinzel pled guilty to charges of second degree manslaughter and leaving the scene of an accident. He was sentenced to prison and fines. Kinzel states that he had ben an exemplary teacher for over 23 years and that the accident was non-school related. The State Board of Examiners revoked his certificates.
The State Board **affirmed** the decision of the State Board of Examiners.

CERTIFICATION
CD Pennsville Education Association, Petitioner, v.
9/99 Pennsville Board of Education, Salem County, Respondent.
PEN September 9, 1999 (#299-99)

For case summary, see **LIBRARIES.**

CERTIFICATION
CD Cota Possien-Kania, Petitioner, v.
8/99 Dunellen Board of Education, Middlesex County, Respondent.
POS August 9, 1999 (#260-99)

For case summary, see **POSITIONS, ASSIGNMENT TO.**

CERTIFICATION
CD Albert Ziegler, Petitioner, v.
11/99 Bayonne Board of Education, Hudson County, Respondent.
ZIE November 29, 1999 (#390-99)

For case summary, see **CONTRACT CANCELLATIONS.**

CERTIFICATION, REVOCATION OF

In the Matter of the Revocation of the Teaching Certificates of:
Sandi I. Tannen (SBD, February 3, 1999)

CERTIFICATION, SUSPENSION OF
CD In the Matter of the Suspension of the Teaching Certificate of
5/99 Robert Falco, Ramapo Indian Hills Regional High School District,
FAL Bergen County.
May 24, 1999 (#165-99)

xResignations xTimeliness

The Board asks that Respondent's teaching certificate be suspended for one year since he resigned from his teaching position without the requisite 60 days' notice. After receiving an unfavorable evaluation, Respondent resigned because of "the emotional stress that I would have to endure working under these conditions." The ALJ finds, and the C. affirms, that the Board's Order to Show Cause was timely filed. At any time before the Board's formally acting to refuse to accept his resignation, Respondent could have officially rescinded it. The C. finds that the Board acted without undue delay when it resolved to reject Respondent's resignation at its official meeting on March 23, 1998 and decided to pursue its rights to request suspension of his certificate. Therefore, the Board had 90 days from March 23rd to file its Order to Show Cause which it did. The C. finds that Respondent is guilty of unprofessional conduct. The C. determines that, while it is reasonable to conclude that an individual who experiences a negative evaluation would suffer emotional stress, immediate resignation is an unacceptable response. The C. orders Respondent's certificate suspended for a period of one year as of the date of this decision. The State Board of Examiners are to be notified.

CERTIFICATION, SUSPENSION OF
CD Lawnside Board of Education, Camden County, Petitioner, v.
7/99 Julia Hankerson, Respondent.
LAW July 16, 1999 (#226-99)

For case summary, see **CONTRACT CANCELLATIONS.**

CHARTER SCHOOLS
CD "A.J.G." on behalf of minor child, "M.G.," Petitioner, v.
12/99 Greater Egg Harbor Regional High School District Board of
"A.J.G." Education, Atlantic County, Respondent.
December 27, 1999 (#431-99 E)
For case summary, see **TRANSPORTATION OF STUDENTS.**

CHARTER SCHOOLS
SC-A In the Matter of the Grant of the Charter School Application
5/99 of the East Orange Community Charter School, Essex County.
EAS Superior Court, Appellate Division
May 17, 1999

The Respondent Charter School filed an August 1997 application to begin operating in the 1998-99 school year. The C. issued his contingent approval over the local school board's objects. The State Board of Education upheld that approval in April, 1998. In January, 1998, Appellant Board filed a notice of appeal which was denied by the State Board of Education. The East Orange Board of Education argues that the Charter School Program Act violates the Administrative Procedure Act or constitutional guarantees of procedural due process, because it does not provide for a hearing or findings and conclusions. The Board found shortcomings in the C.'s decision since it did not reconcile negative recommendations from the Department's evaluators regarding the financial plan, the goals and objects, the curriculum, the plans for disabled students and the facility's location. The Respondent and the State Board of Education counter that the Court must defer to the C. and State Board in matters involving educational experience. They aver that formalized fact findings and conclusions of law are not required in this type of case. Furthermore, they contend that even if the Court had jurisdiction to review the evidential sufficiency of the C.'s decision, the C.'s decision was amply supported. The Court rejects the first argument that the APA governs the charter granting process. APA applies only to "contested cases." In deciding charter school cases, the C. is acting in a legislative capacity, not an adjudicatory or quasi-judicial one. The C. need not provide "the kind of detailed, formalized findings and conclusions that are necessary in a contested agency case. And he need not analyze a local board's specific objections or each deficiency cited in the initial review, especially when the addenda presumably cured these deficiencies" in the C.'s opinion. The governing standard of review in charter school cases is the "arbitrary, capricious, or unreasonable" standard. The Court finds that the Department's review before approving the applications was ample to support the C.'s decision. The Court finds that the Act is not unconstitutional because it creates a conflict of interest in the C. who may feel compelled to approve a quota of charter schools in each county. The East Orange Board contends that the Act violates the equal protection clause of the New Jersey Constitution because charter schools "may adversely affect the students of the existing district with respect to quality of education, racial balance, and financial support." The Court finds this argument premature. The Board avers that the grant must be reversed because the application failed to promise a program that would meet the "different and innovative" mandate of the Act. The Board asserts that its "back to basics" theme is a program in effect in the existing schools. The Court notes that there are intended innovations: team teaching, parents in the classrooms, longer days and school year, participation by businesses, local government and other organizations, small class size, etc. The Board asserts that the ownership of the proposed school's facility by a private corporation creates the appearance of impropriety and violates the School Ethics Act. The Court notes that the Act governs the conduct of individual school officials, not the relationship between a school and a corporate body. The Court **affirms** the issuance of the grant.

CHARTER SCHOOLS
SBD In the Matter of the Denial of the Charter School Application
4/99 of the Galloway Educational Meridian Charter School, Atlantic
GAL County.
April 7, 1999

The C. rejected the application because it did not clearly address how the New Jersey Core Curriculum Content Standards will be met and because of concerns regarding the financial plan. The State Board of Education affirms the C.'s decision.

CHARTER SCHOOLS
SBD In the Matter of the Denial of the Charter School Application
3/99 of the Ibrahim Charter School, Passaic County.
IBR March 3, 1999

On January 28, 1999, the C. denied the application to establish a charter school since its application was lacking in detail. The financial data submitted by the Appellant was not relevant to the proposed school and a cash flow statement had not been provided. The State Board of Education affirms the C.'s decision to deny Appellant the grant of a charter.

CHARTER SCHOOLS
CD Tricia Mezzacappa, Petitioner, v.
11/99 Samuel DeWitt Proctor Academy Charter School, Mercer County,
MEZ Respondent.
November 15, 1999 (#356-99)
For case summary, see **CONTRACT CANCELLATIONS**.

CHARTER SCHOOLS
CD Teaneck Community Charter School, Petitioner, v.
3/99 Teaneck Board of Education, Bergen County, Respondent.
TEA March 30, 1999 (#99-99M)

The first issue is whether or not the statutes for the creation of charter schools and the regulations developed by the DOE to implement these statutes require a local board of education to pay funds directly to a charter school at the levels set for in N.J.S.A. 18A:36A-12. Secondly, is the board obligated to provide transportation to the charter school students who reside in the district over and above the level of funding required by N.J.S.A. 18A:36A-12. The C. agrees with Petitioner that the statutory and regularly framework does impose on districts this dual requirement. The Board is directed to pay the Charter School the difference between the amounts it already paid and those amounts due to the Charter School under in N.J.S.A. 18A:36A-12. Remanded to the OAL is the issue of whether Respondent Board acted in bad faith and/or deliberate violation of law unless Petitioner notifies the C. that it desires to withdraw this claim.

CHARTER SCHOOLS

The Superior Court, Appellate Division, **affirmed** the issuance of grants to the following charter schools on May 17, 1999:

Greater Brunswick Charter School
International Charter School of Trenton
Granville Charter School
Patrick Douglas Charter School
Red Bank Charter School

CHILD STUDY TEAMS
CD Arlene Miller, Petitioner, v.
1/99 Burlington County Educational Services Unit, Burlington
MIL County, Respondent.
January 19, 1999 (#11-99)

For case summary, see **POSITIONS, ABOLISHMENT**.

CONFIDENTIALITY
CD "M.N.," Petitioner, v.
8/99 Dumont Board of Education, Bergen County, Respondent.
"M.N." August 13, 1999 (#267-99)

For case summary, see **PARENTS AND SCHOOLS**.

CONSCIENTIOUS EMPLOYEE PROTECTION ACT
SC-A Louise Kolb, Plaintiff-Appellant, v.
4/99 Dr. Carol A. Burns, James Brocious, Lynn Ganz, Terry Johnson,
KOL Margaret Matlosz, Thomas Mazzola, James Momary, Sandra Pietraszkiewicz, William Read, Barbara Rogers, and the Mansfield Township Board of Education, Defendants-Respondents.
Superior Court, Appellate Division (320 N.J. Super. 467)
April 27, 1999

For case summary, see **INCREMENTS.**

CONSCIENTIOUS EMPLOYEE PROTECTION ACT
SC-A Rosemary Williams, Plaintiff-Appellant, v.
7/99 Pemberton Township Public Schools and Elmer R. Brown and
WIL Dr. Robert D. Elder, individually and in their official capacities, Defendants-Respondents.
July 27, 1999 (323 N.J. Super. 490)

For case summary, see **CONTRACT CANCELLATIONS**.

CONTRACT CANCELLATIONS

CD 10/99 ATL

Atlantic City Education Association, on behalf of itself and the members named herein, Reverend David Bell, Luis Carmona, Michael Davis, Ralph Monagas, Michael Moody, James Palin, Ray Rodriguez, Santos Vergara, Kenneth White, Richard Johnson, Jorge Cosme and William Smallwood, Petitioners, v.
Atlantic City Board of Education, Atlantic County, Respondent.
October 7, 1999 (#321-99)

xCustodial and Maintenance Staff xTenure Claims

Petitioners are former head custodians in the Board's employ. They allege that the Board's action transferring head custodians to regular custodial positions and reducing their salaries violates their tenure rights. The issues are: Have the Petitioners acquired tenure status with the Board? Were their individual tenure rights violated by the Board's action to change their positions? Did the Board's action reducing their salaries violate their tenure rights? All individual Petitioners have obtained tenure under N.J.S.A. 18A:17-3. The Board distinguishes the classes of custodians and head custodians, arguing that they are "radically different positions that require a separation of bargaining units in order to separate the supervisory and non-supervisory classes." The C. disagrees. In Reinertsen, he held that "the title 'head custodian' merely denotes a special assignment within the general classification of janitorial services and, therefore, it comes within the scope of the tenure statute. . . .petitioner's title can be changbed without violation of the statute, but as long as he remains within this category/class of employment he is afforded the protections of a tenured janitor." Therefore, the C. rules that the Board's attempt to create a "supervisory subclass of Head Custodians" without tenure must fail." The C. holds that Petitioners Bell, Carmona, Davis, Monagas, Moddy, Palin, Rodriguez, Vergara and White had all acquired tenure as custodians. The Board was not permitted to reduce their compensation when it abolished their positions as head custodians and reassigned them to other janitorial/custodial positions. The Board is directed to restore each of them to the salary level each had during the 1997-98 school year and reimburse each for the amount representing the difference between what each should have received in the 1998-99 school year and up to the date of restoration. The positions of Petitioners Johnson, Cosme and Smallwood were riffed for reasons of economy. The C. holds that the Board was obligated to respect their seniority rights. The C. finds that custodial employees with less seniority were retained. The C. finds that the Board was required under N.J.S.A. 18A:17-4 to dismiss the less senior custodial employees before it ended Petitioners' employment. The Board is directed to reinstate these Petitioners and compensate them with lost wage and emoluments, less mitigation, from the date of their respective terminations to the date of their reappointments. This decision does not preclude the Board from prospectively implementing a RIF in accordance with N.J.S.A. 18A:17-3 and 4.

Affirmed, State Board of Education, March 1, 2000.

CONTRACT CANCELLATIONS

CD 8/99 CAR

Frank Carney, Petitioner, v.
Union City Board of Education, Hudson County, Respondent.
August 30, 1999 (#283-99)

For case summary, see **SEXUAL HARASSMENT**.

CONTRACT CANCELLATIONS
CD Susana Fanego, Petitioner, v.
6/99 Jersey City School District, Hudson County, Respondent.
FAN June 14, 1999 (#184-99)

Petitioner alleges that she was entitled to sixty days pay when her employment contract was terminated after only one week of work. Petitioner signed a proposed written contract, but the District did not and the State-District Superintendent had not approved the issuance of the contract. Before the contract arrangements were finished, Petitioner was assigned to an Adult Education Center where she worked a week. As soon as the District learned that Fanego had previously been brought up on tenure charges, it withdrew its offer of employment. Since the takeover, the District policy has been not to rehire former employees "who left without an excellent record." The District paid her for one week's work. The C. finds that as the State District Superintendent never approved Petitioner's appointment to any position with the District, she was never an employee of the District and is not entitled to any relief. Petition dismissed.

CONTRACT CANCELLATIONS
CD Ruben Gonzalez, Paul J. O'Donohue, Claude Craig and Steven
6/99 G. Block, Petitioners, v.
GON Newark School District, Essex County, Respondent.
June 1, 1999 (#172-99)

Petitioners contest the termination of their employment after the State takeover of the District. They argue that they were terminated without notice contrary to N.J.S.A. 18A:7A-44 and N.J.S.A. 18A:27-4.1. The District argues that Petitioners were "at will employees" and were not entitled to notice. The ALJ finds, and the C. affirms, that Petitioners' positions were not abolished pursuant to the takeover statute. Their individual employment was terminated by the discretionary authority of the State superintendent. As at-will employees, they are not entitled to relief. Petition dismissed.
On May 3, 2000, the State Board of Education **affirmed** the C.'s conclusion that N.J.S.A. 18A:27-4.1 is not applicable to this matter. However, the State Board **reverses** the C.'s determination that Petitioners are not entitled to relief under N.J.S.A. 18A:7A-44. "The reorganization process was not intended to authorize group terminations for reorganizational purposes except upon effectuation of the statutorily prescribed reorganization. In this respect, it is abundantly clear from the record that the petitioners were not terminated for any individualized reason. Nor were the resignations submitted by the petitioners voluntary. Rather, we find that the petitioners were, in fact, terminated for purposes of reorganization, but that such terminations were effected outside of the statutorily mandated process. The statutes at issue do not confer to the State Superintendent carte blanche authority to effectuate blanket dismissals without regard to the statutory reorganization process. . . .Because their positions did not exist after they were terminated, and in view of our finding that such terminations were in fact part of the reorganization process, the petitioners are not entitled to reinstatement. Rather, they are entitled to their salaries from the effective date of their termination to the date of effectuation of the reorganization, plus 60 days' pay."

CONTRACT CANCELLATIONS
CD Lawnside Board of Education, Camden County, Petitioner, v.
7/99 Julia Hankerson, Respondent.
LAW July 16, 1999 (#226-99)

The Board seeks an order withholding the September 10-November 8, 1998 salary of Respondent for neglect of or failure to perform duties and an order suspending her teaching certificates for one year. On September 9, 1998, the Board approved the recommendation of its superintendent to terminate the Respondent's employment upon sixty days' notice pursuant to N.J.S.A. 18A:27-5. The Board required that she perform her duties during this period in order to receive her salary. Respondent refused to perform any duties and sat at her desk calling friends, doing personal business, disrupting the work of other members of the child study team by singing while at sitting her desk. She further disrupted the work of the child study team by shredding without authorization parts of student files that are needed for evaluations. Respondent has decided not to defend the case. The C. finds that Respondent has effectively abandoned or refused to perform her assigned work duties, thereby constructively abandoning her employment without the sixty days' notice. He orders her certificates suspended for one year for her unprofessional conduct. The Board is authorized to withhold from Respondent any unpaid compensation for service on and after September 10, 1998.

CONTRACT CANCELLATIONS
CD Philip Leong, Paul Johnson, Ermelinda Iosca, Iris Martinez-
6/99 Arroyo, Yvonne Goyins, Reginald Tate, Vera P. Allen, and
LEO Ramanand Durga, Petitioners, v.
Newark School District, Essex County, Respondent.
June 14, 1999 (#186-99)

Petitioners argue that they were entitled to a school-based supervisory position or teaching position when their central office administrative positions were abolished after the state takeover. The ALJ finds that when a central office supervisory position is abolished pursuant to N.J.S.A. 18A:7A-44, all tenure and seniority rights to and originating from that position are also abolished. Petitioners retain only tenure and seniority rights which were not attained in connection with the central office supervisory positions. Petitioners Johnson, Iosca and Allen and Goyins retain tenure rights as teachers. Petitioner Tate retains only his tenure rights as a school psychologist. The remaining Petitioners were properly terminated. The C. affirms.

CONTRACT CANCELLATIONS
CD Tricia Mezzacappa, Petitioner, v.
11/99 Samuel DeWitt Proctor Academy Charter School, Mercer County,
MEZ Respondent.
November 15, 1999 (#356-99)

xCharter Schools

Petitioner was hired by the charter school in September, 1998 to serve as its Business Manager/Board Secretary. Her employment was ended by the Board of Trustees on November 11, 1998 for reasons of insubordination. Petitioner states that she repeatedly questioned the business procedures used by the school in approving vouchers, handling petty cash, time sheets, preparing budgets, etc. The C. finds that Petitioner has failed to establish that the Board's action canceling her employment violated her constitutional or statutory rights. Therefore, such action may not be overturned by the C. Petition dismissed.

CONTRACT CANCELLATIONS
CD Patricia Osman, Petitioner, v.
12/99 Delran Board of Education, Burlington County, Respondent.
OSM December 20, 1999 (#417-99)

xTimeliness

Petitioner had a standard New Jersey Instructional Certificate with endorsements as elementary school teacher and teacher of reading when she began her employment with the Board at the beginning of the 1985-86 school year. From the 1985-86 through the 1987-88 school years, Petitioner was assigned to teach basic skills courses. Petitioner was requested to complete an application for the endorsement of Teacher of English and submit it to the State Board of Examiners. Despite not being issued a certificate, the Board assigned Petitioner to teach one class of English non-elementary level in September, 1988. The rest of her classes were designated as some type of writing. Beginning in 1991, Petitioner was assigned to teach all secondary English courses. On December 10, 1996, the Burlington County Superintendent of Schools "advised respondent that the certificate bearing an English endorsement for petitioner which had been faxed to the County Superintendent's office by one of Respondent's employees was fraudulent." The Board canceled Petitioner's employment on January 13, 1997. The State Board of Examiners issued a decision on September 24, 1998 stating that the Board "failed to establish by a preponderance of the competent and credible evidence any of the allegations in the order to show cause and accordingly the order to show cause is hereby Discharged and the within matter is Dismissed with Prejudice." On December 18, 1998, Petitioner filed a Petition to the C. asking for an order reinstating her to a teaching position consistent with her endorsements along with emoluments. The C. finds that the matter is time-barred. He holds that January 13, 1997, the date the Board ended her employment as a tenured teacher triggered the 90-day filing period.
Affirmed, State Board of Education, May 3, 2000.

CONTRACT CANCELLATIONS
CD Pamela C. Swallow, Petitioner, v.
9/99 Holland Board of Education, Hunterdon County, Respondent.
SWA September 21, 1999 (#307-99)

xPensions

Petitioner asserts that the termination of her employment at the end of the 1996-97 school year and the retention and/or employment of other teaching staff members violated her tenure and seniority rights. The C. rejects the parties' settlement. The agreement is contingent upon the Division of Pensions and Benefits' recognition of additional pension credit to be attributed to Petitioner for the 1997-98 and 1998-99 school years, as if she had been employed full time by the Board for these years. The C. cannot sanction a settlement which is contingent upon the satisfaction of conditions by another agency and which provides that if such conditions are not met, the agreement shall be deemed null and void, thereby reactivating the matter. The C. directs that this matter by remanded to the OAL and held in abeyance, pending review by the Division of Pensions and Benefits. If the parties obtain the necessary endorsement from the Division, this agreement may be modified to so reflect that approval and may be resubmitted to the C. for review. If the parties are unable to agree on the revised settlement terms, this matter shall proceed to a determination on Petitioner's claims.

CONTRACT CANCELLATIONS

SC-A 7/99 WIL

Rosemary Williams, Plaintiff-Appellant, v. Pemberton Township Public Schools and Elmer R. Brown and Dr. Robert D. Elder, individually and in their official capacities, Defendants-Respondents.
July 27, 1999 (323 N.J. Super. 490)

xConscientious Employee Protection Act xDiscriminatory Practices

Plaintiff, an African-American, was hired by the District as a guidance counselor for the 1995-96 school year. Defendant Brown, a white male, is the principal at the school to which she was primarily assigned. In a November memorandum, Brown directed Plaintiff to: (1) provide timely feedback to teachers; (2) pick up the children at their classrooms rather than expect the teacher to keep track of when a particular student was expected to report for counseling; and (3) improve her rapport with the staff. Plaintiff disagreed with a teacher because of the teacher's failure to send a student immediately for counseling. Plaintiff judged the student to be emotionally troubled and suicidal. Earlier, Brown told Plaintiff that she needed to "become more teachable," referring to her inability to receive directions or advice "without giving a retort." Plaintiff forwarded a five page memorandum to Brown in response to his memorandum. She complained about his use of the term "teachable" as derogatory and offensive. In December, Plaintiff was notified that she was being placed on a Plan of Assistance because of her unsatisfactory performance. The Director of Guidance and Counseling outlined six, specific steps Plaintiff was to take to improve her performance and provided a time frame for each step. In March, 1996, the Board voted not to renew her contract. She was afforded a statement of reasons and a hearing. Another African-American woman was hired to replace her as guidance counselor. The first issue is whether Plaintiff can establish a prima facie case of racial discrimination since she was replaced by another African-American woman. The Court finds that the there is no inference in the entire record that the Board did not renew Plaintiff's contract as a result of unlawful racial discrimination. Brown's employed the word "teachable" to describe a perceived characteristic of her personality. The word "teachable" does not connote racial animus. Secondly, Plaintiff charges that she was terminated in retaliation for her complaints regarding the teacher's failure to refer the student to counseling in a timely fashion. There is no support for Plaintiff's allegations that the boy's teacher was aware of a risk of suicide and ignored it for several months. The Court holds that the trial court properly granted summary judgment for the District and affirms it.

CONTRACT CANCELLATIONS
CD Albert Ziegler, Petitioner, v.
11/99 Bayonne Board of Education, Hudson County, Respondent.
ZIE November 29, 1999 (#390-99)

xCertification

Petitioner holds a standard certificate with an endorsement as a Teacher of Employment Orientation which is no longer issued. Petitioner taught employment orientation in the Alternative Education Program to students in grades five through eight from 1984-85 until the 1993-94 school year. In 1994, Petitioner was transferred to Bayonne High School where he taught students in grades nine through twelve. He taught shop and vocational trades. In the 1998-99 school year, he was assigned to teach shop and industrial technology and maintenance and repair. His contract was canceled in November, 1998. The Board maintains that Petitioner does not have the proper certification to teach these courses. Petitioner asserts that he is properly certified and has tenure and seniority rights. He contends that although the courses he taught were identified as "industrial arts," they were essentially employment orientation courses. The C. remands the matter to the OAL for further fact-finding to determine the actual duties of, and skills taught in the industrial arts course and to determine if Petitioner's endorsement as a Teacher of Employment Orientation permits him to teach any or all of these courses.

CORPORAL PUNISHMENT
CD In the Matter of the Tenure Hearing of Timothy Fitzpatrick,
6/99 New Jersey Department of Human Services.
FIT June 11, 1999 (#183-99)

For case summary, see **TENURE HEARINGS-TEACHERS**.

CORPORAL PUNISHMENT
CD In the Matter of the Tenure Hearing of Rogelio Hernandez,
5/99 Newark School District, Essex County.
HER May 10, 1999 (#150-99)

For case summary, see **TENURE HEARINGS-TEACHERS**.

CORPORAL PUNISHMENT
CD In the Matter of the Tenure Hearing of Mary Tyson, Newark
9/99 School District, Essex County.
TYS September 17, 1999 (#305-99)

For case summary, see **TENURE HEARINGS-TEACHERS**.

CRIMINAL CHARGES
CD In the Matter of the Tenure Hearing of David McHarris,
10/99 North Brunswick School District, Middlesex County.
MCH October 21, 1999 (#332-99L)

For case summary, see **TENURE HEARINGS-TEACHERS**.

CRIMINAL CHARGES
CD In the Matter of the Tenure Hearing of Kenneth Wilburn,
5/99 Atlantic City School District, Atlantic County.
WIL May 24, 1999 (#163-99)

For case summary, see **TENURE HEARINGS-TEACHERS**.

CRIMINAL HISTORY CHECKS

In the Matter of the Disqualification from School Employment of:

"J.A.R." (SBD, February 3, 1999)
"J.W." (#58-99 DHP-B, March 8, 1999, conviction for drug paraphernalia)

CURRICULUM
CD Pequannock Education Association and Robert Jones, on behalf of
6/99 minor child, "J.J.," Petitioners, v.
PEQ Pequannock Board of Education, Morris County, Respondent.
June 1, 1999 (#173-99)

xAssociation Rights and Duties

The Petition alleges that the Board's elimination of the woodshop course from its curriculum was made without compliance with statutes, regulations and Board policy. The ALJ finds that the Education Association has no independent standing to pursue an action before the C. unless it can demonstrate the "reasonable likelihood of direct harm threatened either to the association as an entity or to one of its members whom it represents." The Arbitrator finds that the elimination of the woodshop course causes no threat as such to the PEA even though the elimination of the course resulted in a teacher's reassignment to another position. Only a "substantial likelihood of harm threatened toward an association member would provide an adequate underpinning for the requisite standing." The ALJ finds that the process chosen by the Board regarding core curriculum changes was proper under the law. The C. affirms and dismisses the Petition.

CUSTODIAL AND MAINTENANCE STAFF
CD Atlantic City Education Association, on behalf of itself and the
10/99 members named herein, Reverend David Bell, Luis Carmona, Michael
ATL Davis, Ralph Monagas, Michael Moody, James Palin, Ray Rodriguez,
Santos Vergara, Kenneth White, Richard Johnson, Jorge Cosme
and William Smallwood, Petitioners, v.
Atlantic City Board of Education, Atlantic County, Respondent.
October 7, 1999 (#321-99)

For case summary, see **CONTRACT CANCELLATIONS**.

CUSTODIAL AND MAINTENANCE STAFF
CD Frank Carney, Petitioner, v.
8/99 Union City Board of Education, Hudson County, Respondent.
CAR August 30, 1999 (#283-99)

For case summary, see **SEXUAL HARASSMENT**.

CUSTODIAL AND MAINTENANCE STAFF

CD 12/99 BAL — John Balwierczak, Francis J. Dunne, John C. Johnson, Jr., Robert Kreig, James Lesak, Peter Martino, James Materia, Fred Melchior, Ramon Perez and Tommaso Pugliese, Petitioners, v. Berkeley Heights Board of Education, Respondent. December 8, 1999 (#407-99)

For case summary, see **SALARY PLACEMENT**.

DECLARATORY JUDGMENTS

Schreiner, Michael E., v. Berlin Board of Education et al. Transmitted to the OAL for further proceedings. (#354-99L, November 10, 1999)

DISCRIMINATORY PRACTICES

CD 1/99 RAD — In the Matter of the Tenure Hearing of Saad Radwan, Carteret School District, Middlesex County. January 14, 1999 (#8-99)

For case summary, see **TENURE HEARINGS-CUSTODIAL AND MAINTENANCE STAFF.**

DISCRIMINATORY PRACTICES

SC-A 7/99 WIL — Rosemary Williams, Plaintiff-Appellant, v. Pemberton Township Public Schools and Elmer R. Brown and Dr. Robert D. Elder, individually and in their official capacities, Defendants-Respondents. July 27, 1999 (323 N.J. Super. 490)

For case summary, see **CONTRACT CANCELLATIONS**.

DISMISSALS, SETTLEMENTS AND WITHDRAWALS

Alexander, Laura, South Plainfield School District, Middlesex County; In the Matter of the Suspension of the Teaching Certificate of (#379-99, November 22, 1999)

Alfieri, Theresa, Therese Mezak, Carole-Ann Schonberger, Joan Slywka and Marian Vico, Petitioners, v. Saddle Brook Board of Education, Bergen County, Respondent. (#382-99, November 22, 1999)

Amara, Joseph et al., Petitioners, v. West New York Board of Education, Hudson County, Respondent. (#9-99, January 14, 1999)

Anderson, Dr. Barbara, Assistant Commissioner, New Jersey Department of Education, Petitioner, v. Archway Programs, Inc., Camden and Gloucester Counties, Respondent. (#49-99, February 26, 1999)

Arrington, Henry, Newark School District; In the Matter of the Tenure Hearing of (#41-99, February 22, 1999)

Asbury Park Homeowners Association, Inc., Petitioner, and Catherine M. Mellina, Petitioner-Intervenor, v. Asbury Park Board of Education, Monmouth County, and Kim A. Fellenz, Board Attorney, Respondents. (#73-99, March 11, 1999)

"B.E.," on behalf of minor child, "H.E.," Petitioner, v. Linden Board of Education, Superintendent James Clarke, Principal Joseph Martino and Vice-Principal Paul Iozzi, Union County, Respondent. (#258-99, August 9, 1999)

"B.T.H.," on behalf of minor child, "S.T.," Petitioner, v. Lower Camden County Regional School District Board of Education, Camden County, Respondent. (#191-99, June 18, 1999)

Barnette, Venita, Petitioner, v. Manalapan-Englishtown Regional School District Board of Education, Monmouth County, Respondent. (#119-99, April 19, 1999)

Beatty, Donald, Petitioner, v. Chester Board of Education, Morris County, Respondent. (#396-99, December 6, 1999)

Berkebile, Telford, Petitioner, v. South River Board of Education, Middlesex County, Respondent. (#231-99, July 22, 1999)

Binowski, Leonard A., Petitioner, v. Chesilhurst Board of Education, Camden County, Respondent. (#377-99, November 22, 1999)

Blackwell, Alberta, Newark School District, Essex County; In the Matter of the Tenure Hearing of (#335-99, October 25, 1999)

Brower, Etzel, Petitioner, v. Salem County Board for Vocational Education et al., Salem County, Respondents. (#265-99, August 13, 1999)

Brown, Sylvia, Petitioner, v. Neptune Board of Education, Monmouth County, Respondent. (#36-99, February 18, 1999)

Brown, Thomasina E., Petitioner, v. State-Operated School District of the City of Newark, Essex County, Respondent. (#10-99, January 14, 1999)

Butler, Spurgeon, Petitioner, v. Greater Egg Harbor Regional School District Board of Education, Atlantic County, Respondent. (#255-99, August 9, 1999)

Byczkowski, Nicholas, Petitioner, v. South River Board of Education, Middlesex County, Respondent. (#233-99, July 23, 1999)

"C.P." and "L.P.," on behalf of minor child, "E.P.," Petitioners, v. South Orange-Maplewood School District Board of Education, Essex County, Respondent. (#403-99, December 9, 1999)

"C.T.," on behalf of minor child, "R.T.," Petitioner, v. Lower Camden County Regional School District No. 1 Board of Education, Camden County, Respondent. (#171-99, June 1, 1999)

Cedeno, Sara, Petitioner, v. Newark School District, Essex County, Respondent. (#74-99, March 11, 1999)

Chase, Cheryl, Petitioner, v. Newark School District, Essex County, Respondent. (#395-99, December 6, 1999)

Cherry Hills Organized for Integration Choice and Equity, Inc., Barclay Area Civic Association and Richard A. Burke and Yolanda C. Burke h/w, Petitioners, v. Cherry Hills Board of Education, Camden County, Respondent. (#18-99, January 27, 1999)

Cino, Guiseppe, Petitioner, v. Union County Regional School District Board of Education et al., Union County, Respondents. (#75-99, March 11, 1999)

Ciocci, Ron, Petitioner, v. Monmouth-Ocean Educational Services Commission, Monmouth County, Respondent. (#256-99, August 9, 1999)

Colantoni, Loretta, Petitioner, v. Long Hill Board of Education, Morris County, Respondent. (#369-99, November 22, 1999)

Connors, Eugene, Petitioner, v. Pascack Valley Regional School District Board of Education, Bergen County, Respondent. (#406-99, December 9, 1999)

Covello, Michael, Newark School District, Essex County; In the Matter of the Tenure Hearing of (#180-99, June 7, 1999)

Cranford Board of Education, Union County, Petitioner, v. Andre L. McGuire and Lisa C. McGuire, Respondents. (#114-99R, April 15, 1999)

"D.B." and "E.B.," on behalf of minor child, "I.B.," Petitioners, v. Greater Egg Harbor Regional School District Board of Education, Atlantic County, Respondent. (#429-99, December 27, 1999)

"D.C.C.," on behalf of minor child, "P.C.G.," and "P.C.G.," Petitioners, v. Lenape Regional High School District Board of Education, Burlington County, Respondent. (#344-99, October 28, 1999)

David Anthony Construction, Inc., Petitioner, v. Newark School District, Essex County, Respondent. (#380-99, November 22, 1999)

De Gloria, Dominick, Petitioner, v. Bergenfield Board of Education, Bergen County, Respondent. (#257-99, August 9, 1999)

Di Maggio, Peter, Petitioner, v. Trenton Board of Education, Mercer County, Respondent. (#87-99, March 23, 1999)

Dodd, Barbara, Petitioner, v. Neptune Board of Education, Monmouth County, Respondent. (#300-99, September 13, 1999).

Drewniany, Alexander J., Petitioner, v. Essex County Vocational School District Board of Education, Essex County, Respondent. (#98-99, March 26, 1999)

"E.M." and "J.M.," on behalf of "P.M.," Petitioners, v. Bloomfield Board of Education, Essex County, Respondent. (#195-99, June 21, 1999)

"E.W.," on behalf of minor, "S.W.," Petitioner, v. Haledon Board of Education, Passaic County, Respondent. (#188-99, June 17, 1999)

"E.W.," on behalf of minor, "S.W.," Petitioner, v. Passaic County Manchester Regional School District Board of Education, Passaic County, Respondent. (#188-99, June 17, 1999)

Eagle Rock Bus Company, Inc., Petitioner, v. Essex County Educational Services Commission, Respondent. (#273-99, August 19, 1999)

Earl, Cesarina, Petitioner, v. Hudson County Schools of Technology Board of Education, Hudson County, Respondent. (#81-99, March 17, 1999)

Edmondson, Sara Ann, Petitioner, v. Bridgeton Board of Education, Cumberland County, Donald D'Amico, Superintendent, and Victor Gilson, Assistant Superintendent, Respondents. (Consolidated with a tenure hearing)[#19-99, January 21, 1999]

Ellis, Brian, Petitioner, v. Spotswood Board of Education, Middlesex County, Respondent. (#80-99, March 17, 1999)

Eubanks, Emilia, Camden School District; In the Matter of the Tenure Hearing of (#204-99, June 25, 1999)

"F.S.G.," on behalf of minor child, "E.K.J.," Petitioner, v. South Orange-Maplewood School District Board of Education, Essex County, Respondent. (#259-99, August 9, 1999)

Farmingdale Board of Education, Monmouth County, Petitioner, v. Farmingdale Teachers' Association, Respondent. (#367-99, November 22, 1999)

Fidurski, Jacqueline, Petitioner, v. Newark School District, Essex County, Respondent. (#96-99, March 26, 1999)

Firoz, Fatemah, Petitioner, v. Newark School District, Essex County, Respondent. (#221-99, July 9, 1999)

Fort Lee Board of Education, Bergen County, Petitioner, v. Ramsey Board of Education, Bergen County, Respondent. (#408-99, December 13, 1999)

Fox, Susan, Petitioner, v. East Brunswick Board of Education, Middlesex County, Respondent. (#136-99, May 3, 1999)

Franco, Gina, Petitioner, v. East Hanover Board of Education, Morris County, Respondent. (#387-99, November 29, 1999)

"G.R.," on behalf of minor child, "R.B.," and "P.F.," on behalf of minor child, "M.H.," Petitioners, v. Lenape Valley Regional High School District Board of Education, Sussex County, Respondent. (#372-99, November 22, 1999)

Goodman, Sandra, Petitioner, v. Evesham Board of Education, Burlington County, Respondent. (#205-99, June 25, 1999)

"H.K.," on behalf of minor child, "S.K.," Petitioner, v. Point Pleasant Beach Board of Education, Ocean County, Respondent. (#306-99, September 21, 1999)

"H.K.S.," Petitioner, v. Demarest Board of Education, Bergen County, Respondent. (#66-99, March 10, 1999)

Hagen, Ann, Petitioner, v. Jersey City School District, Hudson County, Respondent. (#164-99, May 24, 1999)

Harris, Ernestine, East Orange School District; In the Matter of (#182-99, June 10, 1999)

Hayes, Callie, Petitioner, v. Jersey City School District, Hudson County, Respondent. (#100-99, March 31, 1999)

Hayes, Norman, Petitioner, v. Newark School District (#76-99, March 11, 1999)

Hildebrandt, Raymond, Petitioner, v. Elizabeth Board of Education, Union County, Respondent. Rejected. (#118-99, April 19, 1999)

Hi-Nella Board of Education, Camden County, Petitioner, v. Collingswood Board of Education and Oaklyn Board of Education, Camden County, Respondents. (#88-99, March 23, 1999)

Holmes, Olive, Petitioner, v. Burlington Board of Education, Burlington County, Respondent. (#63-99, March 10, 1999)

Howard, Ronald, Newark School District, Essex County; In the Matter of the Tenure Hearing of (#147-99, May 10, 1999)

"I.C.," on behalf of minor child, "M.C.," Petitioner, v. Union Township Board of Education, Union County, Respondent. (#383-99, November 22, 1999)

Iglesias, Juan, West New York School District, Hudson County; In the Matter of the Tenure Hearing of (#152-99, May 17, 1999).

Intveld, Patricia, Petitioner, v. Florham Park Board of Education, Morris County, Respondent. (#192-99, June 21, 1999)

Island Heights Board of Education, Ocean County, Petitioner, v. New Jersey Department of Education, Division of Finance and Point Pleasant Board of Education, Ocean County, Respondents. (#405-99, December 9, 1999)

Issacs, Laura, Paterson School District, Passaic County; In the Matter of the Tenure Hearing of (#427-99, December 27, 1999)

"J.I." and "M.I.," on behalf of minor child, "R.I.," Petitioners, v. Highland Park Board of Education, Middlesex County, Respondent. (#363-99, November 22, 1999)

"J.T." and "M.T.," on behalf of "S.T.," Petitioners, v. Hamilton Board of Education, Mercer County, Respondent. (#333-99, October 22, 1999)

James, Robert, Petitioner, v. Trenton Board of Education, Mercer County, Respondent. (#304-99, September 16, 1999)

Johnson, Anthony, Atlantic City School District; In the Matter of the Tenure Hearing of (#123-99, April 22, 1999)

"K.P.," on behalf of minor child, "J.P., Jr.," Petitioner, v. Hamilton Board of Education, Mercer County, Respondent. (#224-99, July 16, 1999)

Kamenitz, Lewis, Petitioner, v. Freehold Regional High School District Board of Education, Monmouth County, Respondent. (#193-99, June 21, 1999)

Kay, Jacinta, Petitioner, v. Scotch Plains-Fanwood School District Board of Education, Union County, Respondent. (#15-99, January 25, 1999)

King, Allen, Newark School District, Essex County; In the Matter of the Tenure Hearing of (#170-99, June 1, 1999)

Knause, Laura, Petitioner, v. Upper Freehold Regional School District Board of Education, Monmouth County, Respondent. (#97-99, March 26, 1999)

Krzyzkowski, Peter, Petitioner, v. South River Board of Education, Middlesex County, Respondent. (#234-99, July 23, 1999)

"L.S.," on behalf of minor children, "E.S." and "E.S.," Petitioner, v. Randolph Board of Education, Morris County, Respondent. (#94-99, March 26, 1999)

Lazzaro, Maria, Petitioner, v. Jersey City School District, Hudson County, Respondent. (#326-99, October 14, 1999)

Leibowitz, Mark, Petitioner, v. Newark School District, Essex County, Respondent. (#359-99, November 17, 1999)

Leskin, John, Petitioner, v. Elizabeth Board of Education, Union County, Respondent. (#194-99, June 21, 1999)

Lloyd, Barbara, Hudson County Schools of Technology School District, Hudson County; In the Matter of the Tenure Hearing of (#130-99, April 29, 1999)

"M.D.'A.," on behalf of minor son, "P.D.'A.," Petitioner, v. West Orange Board of Education, Essex County, Respondent. (#253-99, August 4, 1999)

McClay, Linda, Petitioner, v. Rahway Board of Education, Union County, Respondent. (#371-99, November 22, 1999)

Malach, Cheryle, Petitioner, v. Trenton Board of Education, Mercer County, Respondent. (#57-99, March 4, 1999)

Manville Education Association, Petitioner, v. Manville Board of Education, Somerset County, Respondent. (#212-99; June 30, 1999)

Mari, Charlotte, Petitioner, v. West Orange Board of Education, Essex County, Respondent. (#374-99, November 22, 1999)

Massey, Howard, Paulsboro School District, Gloucester County; In the Matter of the Tenure Hearing of (#109-99, April 12, 1999)

Masterson, Patricia, Petitioner, v. Ewing Board of Education, Mercer County, Respondent. (#270-99, August 18, 1999)

Miller, Jeffrey, Petitioner, v. Newton Board of Education, Sussex County, Respondent. (#178-99, June 7, 1999)

Millstone Township Education Association and Irene Pearson, Petitioners, v. Millstone Board of Education, Monmouth County, Respondent. (#268-99, August 18, 1999)

Mistretta, Anthony J., River Vale School District, Bergen County; In the Matter of the Tenure Hearing of (#320-99 L, October 6, 1999)

Moore, Natasha, Camden School District, Camden County; In the Matter of the Tenure Hearing of (#361-99, November 17, 1999)

Moreen, Ronald, Petitioner, v. New Brunswick Board of Education, Middlesex County, Respondent. (#177-99, June 7, 1999) Rejected.

Morgan, James, Petitioner, v. Essex County Vocational-Technical School District Board of Education, Essex County, Respondent. (#373-99, November 22, 1999)

Mosley, Connie, Logan School District, Gloucester County; In the Matter of the Tenure Hearing of (#129-99, April 27, 1999)
Mullane, Michele and Terence, Petitioners, v. New Providence Board of Education, Union County, Respondent. (#366-99, November 22, 1999)
Murray, Maureen, Petitioner, v. Jersey City School District (#426-99, December 27, 1999)
Mysko, Daniel, Garfield School District, Bergen County; In the Matter of the Tenure Hearing of (#128-99, April 25, 1999)

"N.B.," on behalf of minor child, "S.A.B.," Petitioner, v. Englewood Board of Education, Bergen County, Respondent. (#29-99, February 9, 1999)
"N.C.," on behalf of minor children, "M.P.," and "J.P.," Petitioner, v. South Orange-Maplewood School District, Essex County, Respondent. (#169-99, May 28, 1999)
Newark Nurses Association, Petitioner, v. Newark School District, Essex County, Respondent. (#167-99, May 24, 1999)
Novak, Arlene, Petitioner, v. South River Board of Education, Middlesex County, Respondent. (#236-99, July 23, 1999)

Oakland Board of Education, Bergen County, Petitioner, v. Pompton Lakes Board of Education and West Milford Board of Education, Passaic County, Respondents. (#60-99, March 8, 1999)
O'Neill, John, Petitioner, v. Cherry Hill Board of Education, Camden County, Respondent. (#303-99, September 13, 1999)

Paden, Sharon, Petitioner, v. Newark School District, Essex County, Respondent. (#210-99, June 30, 1999)
Palmyra, Board of Education, Burlington County, Petitioner, v. Dr. Dennis Hurley, Respondent. (#86-99, March 23, 1999)
Parker, Harry, Petitioner, v. Middlesex County Vocational-Technical School District Board of Education, Middlesex County, Respondent. (#410-99, December 13, 1999)
Parlevecchio, Chester, Petitioner, v. Passaic County Regional School District No. 1 Board of Education, Passaic County, Don Donadio and David Sayer, Board Members, Respondents. (#432-99, December 27, 1999)
Parsons, Earl John, Petitioner, v. Dover Board of Education, Morris County, Respondent. (#264-99, August 13, 1999)
Petchel, Robert, Petitioner, v. South River Board of Education, Middlesex County, Respondent. (#235-99, July 23, 1999)
Pettiford-Bugg, Tracy, v. Jersey City School District (#352-99 L, November 10, 1999)
Pinto, Mary Ann, Petitioner, v. Middletown Board of Education, Monmouth County, Respondent. (#166-99, May 24, 1999)
Platt, Robert, Petitioner, v. Jersey City School District, Hudson County, Respondent. (#106-99, April 8, 1999)
Pleasantville Board of Education, Atlantic County, Petitioner, v. New Jersey Department of Education, Respondent. (#370-99, November 22, 1999)
Puterman, Robert, Petitioner, v. Manchester Board of Education, Ocean County, Respondent. (64-99, March 10, 1999)

"R.A." and "M.A.A.," on behalf of minor child, "D.B.," Petitioners, v. Bergenfield Board of Education, Bergen County, Respondent. (#378-99, November 22, 1999)

"R.L.C.," on behalf of minor child, "K.S.," Petitioner, v. Mount Olive Board of Education, Morris County, Respondent. (#185-99, June 14, 1999)

Raff, Adrienne R., Petitioner, v. Newark School District, Essex County, Respondent. (#1-99, January 4, 1999)

Reid, John, Jr., North Bergen School District; In the Matter of the Tenure Hearing of (#229-99, July 22, 1999)

Romeo, Tisha, Petitioner, v. Bloomfield Board of Education, Essex County, Respondent. (#345-99, October 28, 1999)

Rosen, Laurie, Hoboken School District, Hudson County; In the Matter of the Tenure Hearing of (#358-99, November 17, 1999)

Ross, Alan, Bergenfield School District, Bergen County; In the Matter of the Tenure Hearing of (#38-99, February 18, 1999)

Rossi, Melvin, Petitioner, v. South River Board of Education, Middlesex County, Respondent. (#237-99, July 23, 1999)

Roszkowski, Linda, Petitioner, v. Neptune Board of Education, Monmouth Board of Education, Respondent. (#412-99, December 13, 1999)

Rutgers, the State University of New Jersey, Petitioner, v. New Jersey State Department of Education, Respondent. (#375-99, November 22, 1999)

"S.B." and "M.B.," on behalf of minor child, "A.B.," Petitioners, v. Hopewell Valley Regional School District Board of Education, Mercer County, Respondent. (#346-99, October 28, 1999)

"S.G.," on behalf of minor child, "A.G.," Petitioner, v. Vernon Board of Education, Sussex County, Respondent. (#13-99, January 19, 1999)

"S.M.," on behalf of minor children, "J.M." and "J.M.," Petitioner, v. Edison Board of Education, Middlesex County, Respondent. (#269-99, August 18, 1999)

"S.P.," on behalf of himself and his minor children, "K.P." and "L.P.," Petitioner, v. South Orange-Maplewood Board of Education, Essex County, Respondent-Counterclaimant. (#148-99, May 10, 1999)

Schaum, Frederick, Petitioner, v. South River Board of Education, Middlesex County, Respondent. (#232-99, July 23, 1999)

Sempervive, Monica, Petitioner, v. Galloway Board of Education, Atlantic County, Respondent. (#365-99, November 22, 1999)

Simon, Lillian, Petitioner, v. Wayne Board of Education, Passaic County, Respondent. (#364-99, November 22, 1999)

Smith, Donna, Petitioner, v. Sussex County Vocational-Technical High School District Board of Education, Sussex County, Respondent. (#95-99, March 26, 1999)

Smith, Elbert, Petitioner, v. Hudson County Area Vocational-Technical Schools Board of Education, Hudson County, Respondent. (#225-99, July 16, 1999)

Smith, Howard W., Petitioner, v. Atlantic City Board of Education, Atlantic County, Respondent. (#65-99, March 10, 1999)

Smith, Wesley M., Petitioner, v. Hazlet Board of Education, Monmouth County, Respondent. (#271-99, August 18, 1999)

Sorokofsky, Mira Ann, Petitioner, v. Linden Board of Education, Union County, Respondent. (#376-99, November 22, 1999)

South Orange-Maplewood Board of Education, Petitioner, v. Jonas Jean-Baptiste and Rachel Jean-Baptiste, Respondents. (#148-99, May 10, 1999)

Spagnola, Augustine, Petitioner, v. Trenton Board of Education, Mercer County, and Mercer County Vocational Technical School District Board of Education, Mercer County, Respondents. (#90-99, March 23, 1999)

Standridge, Ronnie, Petitioner, v. Roxbury Board of Education, Morris County, Respondent. (#338-99, October 25, 1999)

Sturm, Beverly J., Petitioner, v. Mount Arlington Board of Education, Morris County, Respondent. (#411-99, December 13, 1999; #415-99, December 13, 1999)

Taylor, Kevin, North Bergen School District, Hudson County; In the Matter of the Tenure Hearing of (#105-99, April 8, 1999; #360-99, November 17, 1999)

Tompkins, Leonard W., Jr. and Andrea L. Tompkins, Petitioners, v. Ridgefield Park Board of Education, Bergen County, Respondent. (#82-99, March 17, 1999)

Trenton Board of Education, Mercer County, Petitioner, v. New Jersey Department of Education, Respondent. (#401-99, December 9, 1999)

Trenton Education Association and Emerson Simmons, Petitioners, v. Trenton Board of Education, Mercer County and Sylvan Learning Systems, Respondents. (#402-99, December 9, 1999)

Tumolo, Edward, Gloucester School District; In the Matter of the Tenure Hearing of (#46-99, February 24, 1999)

Valles, Jude, Petitioner, v. Irvington Board of Education, Essex County, Respondent. (#77-99, March 11, 1999)

Van Dyke, Bruce, Lenape Regional High School District, Burlington County; In the Matter of the Tenure Hearing of (#342-99, October 28, 1999)

Walton, Mary, Petitioner, v. Spring lake Board of Education, Monmouth County, Respondent. (#189-99, June 17, 1999)

Watson, Ferdinand M., Jr., Petitioner, v. Cinnaminson Board of Education, Burlington County, Respondent. (#399-99, December 9, 1999)

West Milford Board of Education, Petitioner, v. New Jersey Department of Education, Division of Finance, Respondent. (#79-99, March 17, 1999)

West Paterson Board of Education, Passaic County, Petitioner, v. Raymond De Palma, Respondent. (#355-99, November 17, 1999)

Wicks, Douglas E., Petitioner, v. Newark School District, Essex County, Respondent. (#400-99, December 9, 1999)

Wilson, Karen, Petitioner, v. Union City Board of Education, Hudson County, Respondent. (#368-99, November 22, 1999)

Wright, Shirley, Petitioner, v. Newark School District, Essex County, Respondent. (#343-99, October 28, 1999)

Zdyb, Debborah, v. Jersey City School District (#353-99 L, November 10, 1999)

Zeichner, Charles, Petitioner, v. Chester Board of Education, Morris County, Respondent. (#362-99, November 22, 1999)

DRUG ABUSE

CD 10/99 "J.K." — "J.K.," on behalf of minor child, "L.K.," Petitioner, v. Hunterdon Central Regional High School District Board of Education, Respondent. October 4, 1999 (#317-99E)

Petitioner was attending a ceramics class. He molded an object in soft clay which has fired in a kiln. School authorities were given opinions from various individuals that this object was a "hash pipe" and was drug paraphernalia. On his return to school, "L.K.," was informed that he was to be drug tested. The result was negative. "L.K." asserts that the object was to be used as an incense holder. "L.K." was assigned to in-school suspension for three days, two days out of school suspension, loss of parking privileges, exclusion from extracurricular activities for 60 days and Saturday detention. He also was ordered to attend five drug education prevention programs. The C. grants emergent relief from penalties. The matter shall be directed to an expedited plenary hearing on the merits.

DRUG ABUSE

CD 10/99 "J.L." — "J.L." and "J.E.H.," on behalf of minor child, "T.H.L.," v. Hopewell Valley Regional School District Board of Education, Mercer County, Respondent. October 18, 1999 (#330-99)

For case summary, see **GRADES**.

DRUG ABUSE

CD 7/99 MOR — In the Matter of the Tenure Hearing of Robert G. Morton, Camden Board of Education, Camden County and Robert Morton, Petitioner, v. Camden Board of Education, Camden County, Respondent. July 30, 1999 (#246-99)

For case summary, see **TENURE HEARINGS-TEACHERS**.

EMERGENT RELIEF

"C.H.," on behalf of minor child, "S.H.," Petitioner, v. Spotswood Board of Education, Middlesex County, and East Brunswick Board of Education, Middlesex County, Respondent. [Denied, #327-99E, October 14, 1999]

"C.J." and "M.J.," on behalf of minor child, "C.M.J.," Petitioners, v. Lakewood Board of Education, Ocean County, Respondent. [Denied, #347-99E, October 29, 1999]

Castro, Eligio, Petitioner, v. Atlantic City Board of Education, Atlantic County, Respondent.

Mullane, Michele and Terence, Petitioners, v. New Providence Board of Education, Union County, Respondent. [Denied, #55-99E, March 4, 1999]

"S." and "M.B.," on behalf of minor child, "A.B.," Petitioners, v. Hopewell Valley Regional School District Board of Education, Mercer County, Respondent. [Denied, #54-99E, March 4, 1999]

EQUIVALENCIES
SBD Guttenberg Education Association and Zenaida Franqui,
3/99 Appellants, v.
GUT Leo F. Kagholz, Commissioner of Education, Respondent, and
Guttenberg Board of Education, Hudson County, Respondent.
March 3, 1999

For case summary, see **SUBSTITUTE STAFF**.

ETHICS
CD In the Matter of Douglas Adams, Buena Regional Board of
7/99 Education, Atlantic County.
ADA July 28, 1999 (#244-99 SEC)

The Commission recommends removal of Respondent for failure to attend the Board member training sessions. Since Respondent failed to attend a June, 1999 training session, he is suspended from office until he attends the required training program. Should he fail to do so by the end of October, 1999, he shall be removed from office effective November 1, 1999.
Respondent attended the June training session. Accordingly, the Commission's recommendation to suspend and/or remove him is declined as moot, September 27, 1999 (#244+99 SEC)

ETHICS
CD In the Matter of Edith Addison, Trenton Board of Education,
8/99 Mercer County.
ADD August 31, 1999 (#288-99 SEC)

The School Ethics Commission recommends removal of Respondent for failure to file a personal/relative disclosure statement and/or an annual financial disclosure statement. The C. admonishes the school official for her failure to file the requisite statement. Such inactivity has caused an inordinate amount of administrative and adjudicative time to be wasted by local, county and state education officials. It is ordered that Respondent be removed from office as of the date of this decision.

ETHICS
CD In the Matter of Margaret Cahill, Teterboro Board of Education,
7/99 Bergen County.
CAH July 28, 1999 (#240-99 SEC)

The School Ethics Commission recommends removal of Respondent from office for failure to attend the Board member training sessions. The C. permits her to remain on the Board pending her attendance at the October, 1999 training session since she is one of only two Board members serving a small, non operating school district. Her suspension would preclude the district from functioning as required by law. Should she fail to do so by the end of October, 1999, she shall be removed from office effective November 1, 1999.

ETHICS
CD In the Matter of Raymond Rodney Coleman, Willingboro
5/99 Board of Education, Burlington County.
COL May 24, 1999 (#162-99)

It is alleged that Respondent violated the School Ethics Act by participating in Board discussions concerning the Board's lease of school facilities in which he is a Deacon. The SEC concluded that his conduct violated the Act. The C. orders his censure.

ETHICS
CD 8/99 COR In the Matter of Janet Cornwall, Leap Academy Charter School, Camden County. August 31, 1999 (#286-99 SEC)

The School Ethics Commission recommends removal of Respondent for failure to file a personal/relative disclosure statement and/or an annual financial disclosure statement. The C. admonishes the school official for her failure to file the requisite statement. Such inactivity has caused an inordinate amount of administrative and adjudicative time to be wasted by local, county and state education officials. It is ordered that Respondent be removed from office as of the date of this decision.

ETHICS
CD 2/99 CHE In the Matter of Lawrence James, Chesilhurst Board of Education, Camden County. February 9, 1999 (#30-99 SEC)

It is claimed that Respondent, a Board member, violated the School Ethics Act by using his office to influence the hiring of an insurance broker owned by the Mayor of Haddonfield. It is alleged that Mr. James switched the Board's computer software contract from Edmunds to ICS, a company that is owned by a friend who sets on the Camden County Human Relations Commission. It is asserted that Mr. James transferred school funds from First Union Bank to Commerce Bank when First Union denied Mr. James a home equity loan. The last complaints allege sex discrimination against a District employee and a violation of the Sunshine Law. The Commission dismisses all charges, but one. The Commission finds that Mr. James violated the Act by asking the Board's Business Administrator to intercede for him in acquiring an unsecured loan from the bank that held the Board's accounts. The C. orders Mr. James censured as a school official found to have violated the School Ethics Act.

ETHICS
CD 8/99 FAI In the Matter of Ken Faigenbaum, Springfield Board of Education, Union County. August 27, 1999 (#281-99 SEC)

The School Ethics Commission recommends removal of Respondent for failure to file a personal/relative disclosure statement. The County Office did, in fact, receive the statement from the official and transmitted it to the Commission office. Since the requirement for filing a disclosure statement was met, the C. declines the Commission's recommendation for removal of the official.

ETHICS
CD 7/99 HAL In the Matter of James E. Hall, Teterboro Board of Education, Bergen County. July 28, 1999 (#241-99 SEC)

The School Ethics Commission recommends removal of Respondent from office for failure to attend the Board member training sessions. The C. permits him to remain on the Board pending his attendance at the October, 1999 training session since he is one of only two Board members serving a small, non operating school district. His suspension would preclude the district from functioning as required by law. Should he fail to do so by the end of October, 1999, he shall be removed from office effective November 1, 1999.

ETHICS
CD In the Matter of Dale A. Hanna, Delaware Valley Regional
7/99 Board of Education, Hunterdon County.
HAN July 28, 1999

The Commission recommends removal of Respondent for failure to attend the Board member training sessions. Since Respondent failed to attend a June, 1999 training session, he is suspended from office until he attends the required training program. Should he fail to do so by the end of October, 1999, he shall be removed from office effective November 1, 1999.

ETHICS
CD In the Matter of Richard Longo and Frank Sedaghi, Toms River
3/99 Board of Education, Ocean County.
LON March 4, 1999 (#56-99 SEC)

It is alleged that Respondents violated the School Ethics Act when they voted to reappoint the accounting firm of Cowan & Gunteski as Board Auditors in 1997 after having had an employee of that firm serve as their campaign treasurer and use the firm's address as the address of the campaign for reporting purposes. The Commission found that a violation of the Act occurred and recommended the penalty of reprimand against Respondents. The C. concurs, but the implementation of the penalty is stayed until the State Board of Education rules on Respondents' appeal.
Affirmed, State Board of Education, July 7, 1999.

ETHICS
CD In the Matter of Henry Ludwigsen, Camden's Promise Charter
8/99 School, Camden County.
LUD August 27, 1999 (#280-99 SEC)

The School Ethics Commission recommends removal of Respondent for failure to file a personal/relative disclosure statement. The County Office did, in fact, receive the statement from the official and transmitted it to the Commission office. Since the requirement for filing a disclosure statement was met, the C. declines the Commission's recommendation for removal of the official.

ETHICS
CD In the Matter of Katherine Mallette, Jackson Board of Education,
2/99 Ocean County.
MAL February 9, 1999 (#31-99 SEC)

It is alleged that Ms. Mallette participated in discussions and closed session meetings concerning the Board's purchase of property when one of the parcels was owned by her brother-in-law. It is further alleged that Board members Ted Koch and Stephen Chisholm violated the Act when they assisted Ms. Mallette in trying to persuade the Board to purchase that property. It is asserted that Ms. Mallette and Mr. Koch violated the Act when they met with the Transit Workers Union. The SEC found that Respondent violated N.J.S.A. 18A:12-24© when she participated in discussions in which her brother-in-law's property was discussed, but that she did not attempt to persuade the Board to purchase that property during the discussions. The C. orders Ms. Mallette reprimanded as a school official found to have violated the School Ethics Act.

ETHICS
CD In the Matter of Joseph Moore, Camden's Promise Charter School,
8/99 Camden County.
MOO August 27, 1999 (#282-99 SEC)

The School Ethics Commission recommends removal of Respondent for failure to file a personal/relative disclosure statement. The County Office did, in fact, receive the statement from the official and transmitted it to the Commission office. Since the requirement for filing a disclosure statement was met, the C. declines the Commission's recommendation for removal of the official.

ETHICS
CD In the Matter William Reed, Haddonfield Board of Education,
7/99 Camden County.
REE July 28, 1999 (#242-99 SEC)

The Commission recommends removal of Respondent for failure to attend the Board member training sessions. Since Respondent failed to attend a June, 1999 training session, he is suspended from office until he attends the required training program. Should he fail to do so by the end of October, 1999, he shall be removed from office effective November 1, 1999.

ETHICS
CD In the Matter of Sylvester Richardson, Camden's Promise
8/99 Charter School, Camden County.
RIC August 27, 1999 (#278-99 SEC)

The School Ethics Commission recommends removal of Respondent for failure to file a personal/relative disclosure statement. The County Office did, in fact, receive the statement from the official and transmitted it to the Commission office. Since the requirement for filing a disclosure statement was met, the C. declines the Commission's recommendation for removal of the official.

ETHICS
CD In the Matter of Ann Sekelsky, Sussex County Educational
8/99 Services Commission.
SEK August 31, 1999 (#285-99 SEC)

The School Ethics Commission recommends removal of Respondent for failure to file a personal/relative disclosure statement and/or an annual financial disclosure statement. The C. admonishes the school official for her failure to file the requisite statement. Such inactivity has caused an inordinate amount of administrative and adjudicative time to be wasted by local, county and state education officials. It is ordered that Respondent be removed from office as of the date of this decision.

ETHICS
CD In the Matter of Bruce Smith, Hackettstown Board of Education,
8/99 Warren County.
SMI August 31, 1999 (#287-99 SEC)

The School Ethics Commission recommends removal of Respondent for failure to file a personal/relative disclosure statement and/or an annual financial disclosure statement. The C. admonishes the school official for his failure to file the requisite statement. Such inactivity has caused an inordinate amount of administrative and adjudicative time to be wasted by local, county and state education officials. It is ordered that Respondent be removed from office as of the date of this decision.

ETHICS
CD In the Matter of Herman White, Montclair Board of Education,
8/99 Essex County.
WHI August 27, 1999 (#279-99 SEC)

The School Ethics Commission recommends removal of Respondent for failure to file a personal/relative disclosure statement. The County Office did, in fact, receive the statement from the official and transmitted it to the Commission office. Since the requirement for filing a disclosure statement was met, the C. declines the Commission's recommendation for removal of the official.

ETHICS
CD In the Matter of Patricianne G. Wilder, Victory Gardens
7/99 Board of Education, Morris County.
WIL July 7, 1999 (218-99 SEC)

The C. orders Respondent removed from office as of the date of this decision due to failure to attend the Board training sessions mandated by statute.

EXAMINATIONS, PSYCHIATRIC
CD In the Matter of the Tenure Hearing of Dianne Davis, State-
1/99 Operated School District of the City of Newark, Essex County.
DAV January 4, 1999 (#3-99)

For case summary, see **TENURE HEARINGS-TEACHERS**.

EXTRACURRICULAR ACTIVITIES

CD 11/99 "G.W.S." on behalf of minor child, "A.F.S.," Petitioner, v. William Petrino, Superintendent, and Rahway Board of Education, Union County, Respondents. November 29, 1999 (#389-99)

"A.F.S." attends ninth grade at the Union County Vocational-Technical Magnet School Program for Math, Science and Technology (Magnet School). The Respondent's policy on extracurricular activities allow students residing in Rahway in grades 10, 11 and 12 to participate in extracurricular and intramural athletic activities at the Rahway High School. Ninth grade students are excluded from this policy. The C. finds that to "create a blanket exclusion of a particular group or category of public school students from extracurricular activities or intramural athletic programs without a sound rational basis for exclusion is inherently arbitrary, capricious and unreasonable." The Board is directed to allow "A.F.S." and other similarly situated Rahway students who attend the Magnet School to participate in extracurricular activities and athletic programs at the high school, unless it can demonstrate that "such participation is not practicable or reasonable because of scheduling constraints, transportation costs or logistical difficulties or other valid considerations." The Board is directed to revise its extracurricular activities policy and submit it to the Union County Superintendent of Schools for review.

FREEDOM OF SPEECH

CD 10/99 "J.L." and "J.E.H.," on behalf of minor child, "T.H.L.," v. Hopewell Valley Regional School District Board of Education, "J.L." Mercer County, Respondent. October 18, 1999 (#330-99)

For case summary, see **GRADES**.

GIFTED

CD 10/99 "D.B." and "J.B.," on behalf of minor child, "A.B.," Lower Camden County Regional School District No. One "D.B." Board of Education, Camden County, Respondent. October 28, 1999 (#341-99)

Petitioners challenge the Board's decision denying their son participation in the District's gifted and talented program. "A.B." has a high I.Q., but has been classified as perceptually impaired because of language-based difficulties and motor coordination. The ALJ notes that the District has a written procedure for selection to the gifted and talented program. These procedures have a rational basis in that they are designed to identify those students who will attain success in the program. The ALJ finds that these requirements were correctly applied to "A.B." The ALJ concludes that Respondent's denial of selection of "A.B.' to the program was proper. The C. affirms the ALJ's decision.

GRADES
CD "J.L." and "J.E.H.," on behalf of minor child, "T.H.L.," v.
10/99 Hopewell Valley Regional School District Board of Education,
"J.L." Mercer County, Respondent.
October 18, 1999 (#330-99)

xDrug Abuse xFreedom of Speech

"T.L.' was a student in a honors biology class at the high school. The assignment was to design a brochure for the organism the pupil chose. "T.J.' selected the Psilocybe mushroom as the subject for his brochure. The teacher notified that unless "T.L.' removed references to illegal drug activity in his brochure, he would receive a grade of zero. "T.L." refused to change his brochure. "T.L." was given no credit for his project. Respondents contend that the school district has violated "T.L.'s" right to freedom of expression. The Assistant Commission points out that the Board's legitimate pedagogical concern is that the District is committed to the prevention of student substance use/abuse. The Assistant Commissioner finds that the Board need only be concerned that the text of "T.L.'s" brochure 'might reasonably be perceived' by anyone to advance a position contrary to Board interest in preventing substance abuse. Petition dismissed.
Affirmed, State Board of Education, February 2, 2000. The brochure was produced because of an assignment given as part of the educational curriculum. Judging the content of such assignments is part of the core of a school's educational mission.

GRADUATION
CD "E.S.H.," on behalf of minor child, "P.A.I.," Petitioner, v.
4/99 Buena Regional School District Board of Education, Atlantic
ESH County, Respondent.
April 22, 1999 (#122-99)

Petitioner challenges the Board's decisions regarding her son's placement in Honor's English, his failing grade, and the Board's denial of her son's privilege to graduate. Her son completed a summer school course in English and was given his diploma. The C. dismisses the matter as moot.

GRADUATION
CD "G.J.C." and "L.C.," on behalf of minor child, "N.C.,"
6/99 Petitioners, c.
GJC Somerville Board of Education, Somerset County, Respondent.
June 25, 1999 (206-99 E)

The Board barred "N.C." from graduation because he was absent for sixteen days during his first period class. The Assistant C. denies Motion for Emergent Relief and orders the matter continued at the OAL for consideration on its merits.
On October 6, 1999, the State Board of Education concludes that Emergent Relief was warranted in this instance. C.'s decision **reversed**.

GRADUATION
CD "P.A." and "N.A.," on behalf of minor child, "C.A.,"
6/99 Petitioners, v.
P.A. West Deptford Board of Education, Gloucester County, Respondent.
June 16, 1999 (#187-99 E)

"C.A." graduated from high school in three years as a junior. Petitioners ask that he be afforded all rights and privileges accrued to graduating fourth year students. The C. finds that the Board presents a rational basis for restricting students who graduate in three years from being eligible for honors and recognition based on their grade point averages. Petition dismissed.

HOME SCHOOLING
CD Jack Jacobs, Petitioner, v.
6/99 Northern Valley Regional School District Board of Education,
JAC Bergen County, Respondent.
June 24, 1999 (#201-99)

xVocational Education

Petitioner protests the Board's refusal to pay the tuition and transportation costs for his son to attend the Bergen County Vocational Technical School. He is home schooling his son. The C. approves the ALJ's holding that "all New Jersey pupils have an independent entitlement to a vocational education which is not limited to the pupils enrolled in the public schools." The Board is directed to reimburse Petitioner for transportation and tuition costs.
On December 1, 1999, the State Board of Education **affirmed** the C.'s determination that the District was obligated to pay tuition to the Technical School for "D.J." during the 1997-98 school year. Petitioner is entitled to reimbursement for the costs of his son's transportation.

INCREMENTS
CD Elizabeth Blazakis and Margaret Sullivan, Petitioners, v.
8/99 State-Operated School District of Jersey City, Hudson
BLA County, Respondent.
August 25, 1999 (#276-99)

Petitioners, tenured teachers, protest the withholding of their salary increments. Petitioner Blazakis withdrew her petition. Petitioner Sullivan teaches Spanish at the high school. Since 1988, her supervisors gave her negative evaluations regarding inadequate plan books and record keeping, especially inconsistencies in recording grades and attendance. Petitioner testified that there was nothing incorrect about her record keeping, that it was the evaluators fault for not being able to read her roll book and understand her lesson plans. The C. finds that Petitioner did not demonstrate by a preponderance of the credible evidence that the withholding of her salary increment was arbitrary, capricious or otherwise contrary to law. Petition dismissed.

INCREMENTS
CD Charles Freyberger, Petitioner, v.
2/99 Scotch Plains-Fanwood Board of Education, Union County,
FRE Respondent.
February 27, 1999 (#40-99)

xTimeliness

Petitioner is a teacher of the handicapped and tenured school social worker. He protests the Board's decision to withhold his 1997-98 increment. The Board moves to dismiss on the grounds that the Petition is time-barred under the ninety-day limitation set forth in N.J.A.C. 6:24-1.2©. The C. concurs and dismisses the Petition.

INCREMENTS
SC-A Louise Kolb, Plaintiff-Appellant, v.
4/99 Dr. Carol A. Burns, James Brocious, Lynn Ganz, Terry Johnson,
KOL Margaret Matlosz, Thomas Mazzola, James Momary, Sandra Pietraszkiewicz, William Read, Barbara Rogers, and the Mansfield Township Board of Education, Defendants-Respondents.
Superior Court, Appellate Division (320 N.J. Super. 467)
April 27, 1999

xConscientious Employee Protection Act

"W.B., the mother of a neurologically impaired child, petitioned the New Jersey Division of Special Education for changes in her child's Individualized Education Plan and for his placement in a private school. Plaintiff Kolb testified before the Office of Administrative Law in this matter. Her salary increment was withheld by the Board because she had violated a directive given by Dr. Burns prohibiting her from communicating with "W.B." without the presence of another district employee. The Superior Court, Law Division, Warren County granted summary judgment to the Board and its members concluding that Plaintiff had no cause of action under CEPA. The Superior Court, Appellate Division, reverses as "genuine issues of material fact exist concerning whether defendants' proffered reasons for withholding plaintiff's salary increment were legitimate and nondiscriminatory, rather than pretextual as retaliation against plaintiff for her testifying on "W.B.'s behalf." Plaintiff engaged in protected activities when testifying before a public body investigating whether Defendants had violated the Individuals with Disabilities Education Act. The matter is **reversed** and remanded for further proceedings.

INCREMENTS
CD Karen Natapoff, Petitioner, v.
1/99 State-Operated School District of the City of Jersey City,
NAT Hudson County, Respondent.
January 25, 1999 (#14-99)

Petitioner appeals the withholding of her salary increment for the 1996-97 school year. Petitioner was a special education teacher in the District for eight years. Petitioner was formally observed on two occasions during the 1995-96 school year. As the result of these observations and other contacts throughout the year, the District determined to withhold her employment and adjustment increments for "less than satisfactory performance" in classroom management, instructional techniques and assessment of student needs. The C. finds that Petitioner has failed to meet her burden to prove, by a preponderance of credible evidence, that the District's decision to withhold her increments was unreasonable, based on the facts.

INCREMENTS

CD 10/99 NOR — North Bergen Federation of Teachers, Local 1060, American Federation of Teachers, AFL-CIO, and Eileen Wende, Petitioners, v. North Bergen Board of Education, Hudson County, Respondent. October 28, 1999 (#339-99)

xAbsenteeism xSecretaries and Clerks

Petitioner was employed in data entry positions until her employment was terminated in July, 1991. In September, 1992, she was reinstated, but was transferred from the central office to work at Horace Mann as a clerk. She had no typing skills at that time and arrangements were made for her to do non typing work. Petitioner had accumulated 34 sick and personal days as of July 1, 1996. For the 1996-97 school year, she used 11.5 sick days, three personal days and 22 vacation days, mainly due to illness and death of her father. She has doctor's notes for eight and a half of the sick days. The Board decided not to give her an increment for the 1997-98 school year based on this record of absenteeism and poor work. The ALJ finds that when Petitioner's absences for her father's illness and funeral are subtracted, she did not have an extraordinary or unusual number of absences. The ALJ finds that to hold a three week period of absence against an employee when her father is suddenly taken ill and dies is arbitrary and unreasonable. The sudden demands for Petitioner to type when her job responsibilities to date had never called for her to type were an inappropriate measurement to use to evaluate the overall quality of her work. The ALJ also finds Petitioner to be more credible than the witnesses for the Board. The ALJ credits Petitioner when she stated that she was never told that there was anything wrong with her appearance and that she violated the dress code. The ALJ holds that the decision not to give Petitioner an increment in 1997-98 was arbitrary and capricious, not for good cause and is overturned. The C. is not persuaded that he has the jurisdiction to hear and determine this matter regarding increment withholding for noncertified employees. The C. remands the matter to the OAL for argument on the issue of jurisdiction and for additional fact-finding.

INDEMNIFICATION

SC-A 8/99 HOL — Beth Holstein, Plaintiff, v. Sussex County Vocational-Technical School Board of Education, Defendant-Appellant, and George A. Wilson, Robert Zeoli, and Dr. Hopkins, Defendants, and Cynthia Carney and Patricia Taranto, Defendants-Respondents. Superior Court, Appellate Division August 20, 1999

For case summary, see **STUDENT SEARCHES**.

INSURANCE FRAUD

CD 2/99 DYK — In the Matter of the Tenure Hearing of Jimmy Dykes, State Operated School District of the City of Newark, Essex County. February 11, 1999 (#32-99)

For case summary, see **TENURE HEARINGS-TEACHERS.**

INSURANCE FRAUD
CD In the Matter of the Tenure Hearing of Lucy Lester, State-
2/99 Operated School District of the City of Newark, Essex County.
LES February 25, 1999 (#48-99)

For case summary, see **TENURE HEARINGS-TEACHERS.**

JOB INJURIES
CD In the Matter of the Tenure Hearing of Thomas Jabour,
1/99 Delaware Valley Regional High School District, Hunterdon
JAB County.
January 8, 1999 (#5-99)

For case summary, see **TENURE HEARINGS-TEACHERS.**

JOB INJURIES
CD Nancy Mello, Petitioner, v.
12/99 State-Operated School District of the City of Jersey City,
MEL Hudson County, Respondent.
December 23, 1999 (#422-99)

For case summary, see **LEAVES, SICK.**

JOB INJURIES
CD Betty Shereshewsky, Petitioner, v.
9/99 Woodbridge Board of Education, Middlesex County, Respondent.
SHE September 7, 1999 (#295-99)

For case summary, see **SALARIES.**

JOB INJURIES
CD In the Matter of the Tenure Hearing of Gregory Vereen,
6/99 Lawrence School District, Mercer County.
VER In the Matter of the Tenure Hearing of Theodore
Prusakowski, Lawrence School District, Mercer County.
June 9, 1999 (#181-99)

For case summary, see **TENURE HEARINGS-CUSTODIAL AND MAINTENANCE STAFF.**

JOB INJURIES
CD Sally A. Yaffee, Petitioner, v.
9/99 Woodbridge Board of Education, Middlesex County, Respondent.
YAF September 7, 1999 (#294-99)

xLeaves, Sick

Petitioner states that she had been disabled as a result of a work related injury and that she had filed a workers' compensation claim. She alleges that during the period of her disability, the Board did not pay her the statutory sick leave salary she is entitled to pursuant to N.J.S.A. 18A:30-2.1 and improperly charged her accumulated sick leave for absences caused by the injury. This was once part of three consolidated cases which were placed on the inactive list pursuant to Vernet. Two of the matters have now been resolved while the third matter remains pending. Accordingly, the three cases are hereby severed from each other. Since the issue in this matter involving education laws has been resolved as a result of the decision in the companion workers compensation case, the C. dismisses the matter with prejudice.

JURISDICTION-COMMISSIONER OF EDUCATION
CD Patsy N. Marino, Jr., Petitioner, v.
4/99 Willingboro Board of Education, Burlington County, Respondent.
MAR April 13, 1999 (#111-99)

For case summary, see **WORKERS' COMPENSATION**.

JURISDICTION-COMMISSIONER OF EDUCATION
CD Carol Riegel, Petitioner, v.
2/99 Berkeley Heights Board of Education, Union County, Respondent.
RIE February 22, 1999 (#42-99)

For case summary, see **WORK YEAR**.

KINDERGARTEN
CD Lynn P. Sherman et al., Petitioners, v.
9/99 Beach Haven Board of Education, Ocean County, Respondent.
SHE September 2, 1999 (#290-99 E)

Petitioners ask the C. for emergent relief to nullify the Board's resolution to eliminate two half-day kindergarten programs in favor of a full day kindergarten program for five year old children. The C. denies such relief as Petitioners have not satisfied the requirements necessary for its granting. The matter shall move to hearing.

LEAVES, SICK
CD Nancy Mello, Petitioner, v.
12/99 State-Operated School District of the City of Jersey City,
MEL Hudson County, Respondent.
December 23, 1999 (#422-99)

xJob Injuries xTimeliness

Petitioner fell down the stairs at work on February 27, 1997. She continued working until October 5, 1997. She has been absent from work since then. She claims that these absences were due to her February injury. The Board counted Petitioner's absences as work related injuries from October 5, 1997 until March 4, 1998. Since then, her absences were credited against her sick leave. The C. dismisses the appeal as untimely. The 90-day filing requirement will not be relaxed.

LEAVES, SICK
CD Sally A. Yaffee, Petitioner, v.
9/99 Woodbridge Board of Education, Middlesex County, Respondent.
YAF September 7, 1999 (#294-99)

For case summary, see **JOB INJURIES.**

LEGAL FEES
SC-A Beth Holstein, Plaintiff, v.
8/99 Sussex County Vocational-Technical School Board of Education,
HOL Defendant-Appellant, and
George A. Wilson, Robert Zeoli, and Dr. Hopkins, Defendants, and
Cynthia Carney and Patricia Taranto, Defendants-Respondents.
Superior Court, Appellate Division
August 20, 1999

For case summary, see **STUDENT SEARCHES**.

LIBEL AND SLANDER
SC-A Ronnie Standridge, Plaintiff-Respondent, v.
7/99 Al Ramey, an individual and as agent of the New Jersey
STA Education Association, and New Jersey Education Association, Defendants-Appellants and Kristin Sieka, Jane Siems, Stacey Johnson, Barbara Reu, Janet Vignola, Angela Krass, Barbara Remick and Roxbury Education Association, Defendants.

Kristin Sieka, Jane Siems, Stacey Johnson, Barbara Reu, Plaintiffs, v.
Ronald Standridge and the Roxbury Board of Education, Defendants.
Superior Court, Appellate Division
July 12, 1999 (323 N.J. Super. 538)

xSexual Harassment

Standridge is the former athletic director of the Roxbury District. According to Ramey, NJEA field representative, Kristen Sieka, an athletic trainer at the high school, complained to him that Standridge was spreading rumors about her sex life and harassing her in the workplace. Ramey advised her to contact the local affirmative officer of the District and file a grievance with the Board. Subsequently, female coaches complained to the Roxbury Education Association that they were being subjected to harassment and discriminatory treatment by Standridge. Ramey sent letters to the high school principal and the superintendent about these complaints. Subsequently, the superintendent recommended to the Board that Standridge, who did not have tenure, not be reappointed for the following school year. The Board did not reappoint him. The issue is "whether Plaintiff's defamation claim is governed by the standard of 'actual malice,' i.e., whether Plaintiff must show by clear and convincing evidence that Defendants' alleged defamatory statements were made with 'knowledge' of their falsity or with 'reckless disregard' for their truth or falsity. . . . To establish the applicability of the actual malice standard, a defamation action defendant must show that the plaintiff is a 'public official.'" The Court holds that as a school athletic director, Standridge was a public official and must show actual malice to establish his defamation claims against Ramey and NJEA. The Court agrees with Defendants that Ramey's statements are evidence of his hostility towards Standridge and desire to see him removed from office, "it would not provide an adequate foundation for a finding that Ramey knew that the statements in his March 27th letters were false or that he acted in reckless disregard of the truth or falsity of these statements." The Court concludes that Plaintiff should be afforded an opportunity to complete discovery before his claim is subject to dismissal by a motion for summary judgment. The matter is remanded to the trial court.

LIBRARIES
CD Pennsville Education Association, Petitioner, v.
9/99 Pennsville Board of Education, Salem County, Respondent.
PEN September 9, 1999 (#299-99)

xCertification xParaprofessionals

The Association alleges that the Board violates N.J.A.C. 6:11-11.6 by operating its school library at the middle school without a properly certificated professional librarian. It maintains that the library aide is performing several professional functions without the education, experience or certification. The C. finds that the Board is not compelled to employ the services of an individual with a standard educational services certificate as an educational media specialist or an endorsement as an associate educational media specialist in order to operate its middle school media center. However, the Board may not assign duties which are professional in nature to a paraprofessional aide. The C. finds that the Association has demonstrated by a preponderance of credible evidence that the aide is not performing as an assistant to a properly certified professional, but is acting in a capacity which calls for independent initiative. The Board may not simply employ a paraprofessional holding a substitute certificate and then assign her tasks which are reserved for professional staff. The Board is directed to modify its job description for librarian aide to conform with applicable regulations and the parameters of this decision. A copy of the revised job description shall be submitted to the county superintendent for review and approval. The Board is directed to append to its proposed job description for the librarian aide the job description for the position of principal. This shall show the role of the principal in the delivery of educational media services in the middle school.

NONPUBLIC SCHOOLS
CD "M.J.K.D." and "A.W.D.," on behalf of minor child, "A.K.D.,"
9/99 Piscataway Board of Education, Middlesex County, Respondent.
MJKD September 29, 1999 (#312-99)

xTransportation of Students

The matter must be determined upon the wording of N.J.S.A. 18A:39-1.3 which permits subscription busing of pupils not remote from school. The C. finds that a board of education is not required to provide courtesy busing to private school students even when it provides such transportation to public school students. Petition dismissed.

PARAPROFESSIONALS
CD Pennsville Education Association, Petitioner, v.
9/99 Pennsville Board of Education, Salem County, Respondent.
PEN September 9, 1999 (#299-99)

For case summary, see **LIBRARIES.**

PARENTS AND SCHOOLS
CD "M.N.," Petitioner, v.
8/99 Dumont Board of Education, Bergen County, Respondent.
"M.N." August 13, 1999 (#267-99)

xConfidentiality xStudent Records xTimeliness
Petitioner seeks a ruling on the following issues: Is the school under a duty to notify parents/guardians or include them in a meeting regarding the questioning of a student? Is the school and/or guidance counselor under a duty to disclose to the parents discussions between the counselor and the student regarding the student's suicidal tendencies? Did the Board act appropriately when it destroyed the pupil records of Petitioner's son, "E.N.?" The vice principal questioned "E.N." about money missing from school vending machines. "E.N." told another student that he would "rather throw himself in front of the train than face the shame." The friend reported the threat to the vice principal. The vice principal did not inform Petitioner of "E.N.'s" state of mind. "E.N." did commit suicide. After his death, Petitioner discovered that her son had several conversations with the high school guidance counselor about suicide. A year after his death, Petitioner requested his records. His grades and SAT results were forwarded to her, the rest of the documents had been destroyed. The C. relaxes the 90-day filing limitation because he finds the circumstances to be sufficiently compelling and extraordinary. The C. finds that: "a school administrator may question minor students without parents' consent; a local board may not destroy, without parents' consent, mandated pupil records during the time of the student's enrollment, or any pupil records existing at the time of the student's graduation or permanent departure from the district, but may destroy, with no prior notice, permitted records during the time of the pupil's enrollment consistent with administrative regulations; and legal authority to render a determination as to a counselor's duty of care does not rest with the C."

PENSIONS
CD Pamela C. Swallow, Petitioner, v.
9/99 Holland Board of Education, Hunterdon County, Respondent.
SWA September 21, 1999 (#307-99)
For case summary, see **CONTRACT CANCELLATIONS**.

POSITIONS, ABOLISHMENT
CD Florence Adler, Petitioner, v.
11/99 Shamong Board of Education, Burlington County, Respondent.
ADL November 3, 1999 (#350-99)

Petitioner is a tenured teacher. Petitioner began employment with the Board as a part-time music teacher in November, 1983 until June, 1987. In September 1, 1987, she became a full-time music teacher. On May 8, 1997, she was informed that her full-time position was going to be abolished and replaced with a part-time position. Petitioner was appointed to the part-time position. She asserts that the Board retained nontenured teachers in full-time positions in which her certificate is appropriate, thereby violating her tenure and seniority rights. Petitioner also asserts that she has more seniority than Ms. T. Ms. T. taught music under her elementary certificate until 1992. Then, Ms. T. taught under her music teacher endorsement. The C. finds that Ms. T. has greater seniority. Ms. T. was asked to teach music because the administration was aware of her dual certification. The ALJ finds, and the C. affirms, that Petitioner was qualified for one of the full-time computer teaching positions for the 1997-98 and 1998-99 school years. The Board is directed to compensate Petitioner for lost wages and emoluments, including additional pension credit commensurate with her salary loss.

POSITIONS, ABOLISHMENT
CD Concetta B. Caponegro, Virginia Devane, Howard Johnson,
1/99 Norman Jeffries and Bessie White, Petitioners, v.
CAP State-Operated School District of the City of Newark, Essex County, Respondent.
January 4, 1999 (#4-99)

Petitioners were senior executives who served at the pleasure of the then executive superintendent, Eugene Campbell. If the senior staff did not receive letters of termination by the end of the school year, they were renewed for the forthcoming school year. The State took over the Newark School District on July 12, 1995. Petitioners aver that they did not receive proper compensation from the District when their positions were abolished after the state takeover. They maintain that they are entitled to their full salaries for the 1995-96 school year because of the existence of an implied employment contract between them and the Newark Board of Education. If the implied employment contracts do not exist, Petitioners aver that they are entitled to payment for 60 work days instead of 60 calendar days and payment for the sick, vacation and personal leave days they accumulated until the end of their employment. The C. finds that upon creation of the State-operated School District of Newark in July, 1995, all employment contracts of the chief executive officers of the District were ended. Therefore, none of the Petitioners has a viable claim to continued employment for the 1995-96 school year. Petitioner Johnson, an auditor, was not entitled to pay in lieu of the 60 days' notice of termination upon State operation pursuant to N.J.S.A. 18A:7A-42a(3). The remaining Petitioners are entitled to 60 calendar days' pay, prorated in accordance with the salaries each was receiving on July 11, 1995, just prior to State operation. Neither N.J.S.A. 18A:7A-42a(3) nor N.J.S.A. 18A:7A-44a supports Petitioners' claims for payment of accumulated sick, vacation and personal leave time. Petitioners Jeffries and Johnson are directed to reimburse the District for the amount each received as compensation for accumulated sick, vacation or personal leave time.
Affirmed, State Board of Education, April 7, 1999.
On April 14, 2000, the Superior Court, Appellate Division, **reversed** in part and **affirmed** in part. It reversed the State Board decision to the extent it denied Petitioners compensation for accumulated vacation and sick days and remanded for reconsideration and calculation of these benefits in accordance with the policy and procedure manual of the Board and, to the extent appropriate, the Board's past practices. The Court also remanded for a determination of whether Petitioner Johnson's accumulated vacation limit is forty or sixty days. In all other respects, the State Board decision is affirmed. [330 N.J. Super. 148]

POSITIONS, ABOLISHMENT
CD Nicholas Duva, Petitioner, v.
12/99 State-Operated School District of the City of Jersey City,
DUV Hudson County, Respondent.
December 3, 1999 (#392-99)

xCertification xSeniority

The District abolished Petitioner's position as Director of Research, Planning and Evaluation and transferred him to a school psychologist position. Petitioner believes that his tenure and seniority rights entitle him to a supervisory position. He holds certificates and endorsements as a school psychologist, supervisor and school administrator. In the District, he was first employed under an emergency certificate as an elementary teacher. His subsequent employment has been as school psychologist and Director. The C. determines that the endorsement required to serve as a director is that of school administrator or principal. The supervisor endorsement does not authorize service as a director. The positions of supervisor and director must be deemed to be separately tenurable. Petitioner has never served in the position of supervisor. Furthermore, a comparison of the job descriptions for the director position formerly held by Petitioner and those of the supervisor positions do not show similarities. Petition dismissed.

POSITIONS, ABOLISHMENT
CD William Marsh, Petitioner, v.
12/99 Atlantic City Board of Education, Atlantic County, Respondent.
MAR December 21, 1999 (#419-99)

Petitioner was employed by the Board on July 1, 1979 as the Neighborhood Facilities Coordinator. In the 1997-98 school year, he became the District Coordinator of Adult Education and Community Use of Schools. On the ballot of the annual school election was a CAP waiver question. One of the items included continuation of the community schools program. The budget and CAP waiver question were defeated by the voters. The Atlantic City Council restored some funding, but not for the community schools program. The Board submitted a budget "reflecting the actions of City Council" to the county superintendent. At its May 1998 meeting, the Board considered notification to Petitioner that his position would be abolished. The resolution failed. Even though the Board did not approve by roll call vote to abolish Petitioner's position, he was notified that his last day of work would be June 30, 1998. Petitioner maintains that in the absence of this resolution, the Board is required to continue his employment. The C. agrees that the Board did not act in accordance with its statutory responsibilities. However, "the C. cannot in good conscience find that the petitioner is entitled to the relief he seeks as a result of the Board's failure to act. . . .Petitioner was unequivocally on notice that his position in the District would be abolished if the underlying program were eliminated. . .where the administration took subsequent actions that left no doubt as to the reduction in force to take effect as of June 30, 1998, petitioner cannot claim to have been prejudiced by the Board's failure to take the technical action necessary to formally effectuate the abolishment of his position." The Board cannot be compelled to fill a position which it does not have the legal authority to fund. "However, the Board herein and all other boards of education in this State are cautioned that, notwithstanding that the funding for a program is eliminated pursuant to voter rejection and subsequent governing body or board of school estimate review, a board must nonetheless take affirmative action to formally abolish any positions which may be impacted by such elimination."

POSITIONS, ABOLISHMENT
CD Arlene Miller, Petitioner, v.
1/99 Burlington County Educational Services Unit, Burlington
MIL County, Respondent.
January 19, 1999 (#11-99)

xChild Study Teams xSubcontracting

Petitioner, a school psychologist, was employed by the New Hanover Board of Education until she was riffed on June 30, 1996. Petitioner contends that she has the right under N.J.S.A. 18A:28-16 AND N.J.S.A. 18A:6:31-3 to employment by the Educational Services Unit because it has undertaken the operation of the New Hanover child study team and must recognize the District's tenure and recall rights. The C. notes that contractual agreements for provision of child study team services are permitted by N.J.S.A. 18A:46-5.1. The New Hanover Board of Education at all times retains legal responsibility to provide child study team services. It may provide those services either separately/independently as it did prior to 1996 or through a joint agreement with another public entity, as it has with the BCESU since the 1997-98 school year. "In the Commissioner's judgment, such a joint agreement between the New Hanover Board of Education and the BCESU does not constitute a 'takeover' or assumption of operation of a school or educational program. . . ." Petition dismissed.
In 1996, Petitioner was advised that the Board was granted a waiver of N.J.A.C. 6:28-1.1(f) and 28:5.1(c) so as to provide all basic child study team services by contracting with a private vendor. Petitioner challenges this waiver. On May 3, 2000, the State Board of Education finds that the grant of the waiver was not a valid exercise of the authority delegated to the C. The waiver is invalid. The clear and unambiguous language of the applicable statutes precludes a district from providing basic child study team services solely by contracting with a private vendor.

POSITIONS, ASSIGNMENT TO
CD Mary McAleer, Petitioner, v.
10/99 Boonton Board of Education, Morris County, Respondent.
MCA October 1, 1999 (#314-99)

xSeniority xTenure Claims

Petitioner was assigned as a full-time teacher in the District before the 1995-96 school year. During the 1995-96, 1996-97 and 1997-98 school years, she was assigned as both a teacher and guidance counselor at the high school, the middle school and the elementary school. The Board reassigned her as a teacher for the 1998-99 school year. She asserts that she has seniority in her guidance position. The C. finds that Petitioner's assignment as a teacher violated her tenure rights as a guidance counselor. The Board must credit Petitioner with seniority as a guidance counselor for the period of teaching assignment during that school year.

POSITIONS, ASSIGNMENT TO
CD Cota Possien-Kania, Petitioner, v.
8/99 Dunellen Board of Education, Middlesex County, Respondent.
POS August 9, 1999 (#260-99)

xCertification
Petitioner holds certificates and has attained tenure as a substance abuse coordinator and school social worker. She contends that the Board's assignment of her as an in-class support instructor in the health program constitutes an assignment for which a teaching certificate is required which she does not possess. She requests an assignment to a position covered by her certification. The ALJ dismisses the matter as moot since Petitioner has been reassigned. The C. reverses the ALJ's decision. Petitioner's reassignment does not render moot her action challenging the Board's action since there is clearly a reasonable potential for recurrence of the alleged improper assignment. The matter is remanded to the OAL for a determination of Petitioner's underlying claim that the Board's assignment was improper.

PROFESSIONAL IMPROVEMENT PLANS
CD Education Association of Passaic, Petitioner, v.
4/99 Passaic Board of Education, Passaic County, Respondent.
PAS April 26, 1999 (#126-99)

The Association challenges Board practices regarding individual professional improvement plans for teaching staff members. It contends that Respondent's practices are inconsistent with N.J.A.C. 6:3-4(f)3, which requires that an individual professional improvement plan be developed by the supervisor and the teaching staff member, and with N.J.A.C. 6:3-4.3(h)3, which defines the individual professional improvement plan as a written statement which includes the responsibilities of the District for implementing the plan. The Association avers that the Board's practices limit the teacher to choose from a list of items selected by the principal, thus it does not provide an opportunity to address deficiencies on an individualized basis. The ALJ points out that the list of topics does not necessarily include all deficiencies of every teacher. Thus, the Board's practices unduly circumscribe the role of the teaching staff member regarding the development of a PIP. The ALJ concludes, and the C. affirms, that the Board's practices do not comply with the regulations. The Association also contends that the form does not provide for a statement of the responsibilities of the District. The ALJ and the C. agree that the Board's forms do not comply with the regulations. The Board is directed to determine PIPs based upon the individual teaching staff member's performance areas of strength and those needing improvement based upon the job description. All PIPs shall contain the responsibilities of the District for their implementation.

PROMOTION AND RETENTION
CD "J.C." and "C.C.," on behalf of minor child, "J.C.,"
9/99 Petitioners, v.
"J.C." Woodbine Board of Education, Cape May County, Respondent.
September 3, 1999 (#292-99 E)
Petitioners request that the C. reverse the decision of the Board to promote their daughter to the first grade. She is immature and has behavior problems. The parents request that she be retained in kindergarten so that her motor skills can catch up with other kindergartners. The Board does not believe in retention. The C. grants emergent relief. "J.C." may be harmed by her advancement into the first grade during the pending of this matter. This outweighs any harm which may be experienced by the Board in allowing her retention in kindergarten during this interim period. The matter shall proceed to the OAL for a hearing on merits.

REDUCTION IN FORCE

CD 10/99 ATL Atlantic City Education Association, on behalf of itself and the members named herein, Reverend David Bell, Luis Carmona, Michael Davis, Ralph Monagas, Michael Moody, James Palin, Ray Rodriguez, Santos Vergara, Kenneth White, Richard Johnson, Jorge Cosme and William Smallwood, Petitioners, v.
Atlantic City Board of Education, Atlantic County, Respondent.
October 7, 1999 (#321-99)
For case summary, see **CONTRACT CANCELLATIONS**.

REDUCTION IN FORCE

CD 9/99 MON Montclair Education Association on behalf of itself and Moira Palisits, Petitioners, v.
Montclair Board of Educ., Essex County, Montclair Depart. of Health and Township of Montclair, Essex County, Respondents.
Cynthia Samuel, Petitioner, v.
Montclair Board of Educ., Essex County, Montclair Department of Health and the Township of Montclair, Essex County,Respondents.
September 30, 1999 (#313-99)
xSchool Nurses xSubcontracting

Petitioners Palisits and Samuel assert that the Board violated their tenure rights by abolishing their positions as school nurses for reasons of economy and contracting with the Montclair Department of Health to provide certain nursing services. Petitioners contend that the Board is without legal authority to provide school-health related services through a contract with the Montclair Department of Health which it established prior to the RIF and has maintained since then. They argue that N.J.S.A. 18A:40-3.1 mandates that the Board "employ and manage" its own school nurses. The C. observes that this statute does not mandate that all nurses performing services in the District be employees of the Board. The law is to be interpreted as requiring each school district to employ at least one school nurse appropriately certified by the State Board of Examiners and "who is considered a teaching staff member for purposes of salary, tenure and evaluation, to perform duties expressly reserved to school nurses, and to oblige a local board to employ a sufficient number of school nurses to ensure the adequate provision of the duties specifically reserved for certified school nurses. . . .Other nursing services in the school setting may be provided by any qualified person, licensed and supervised, where the duties so require, in accordance with nursing law. . . .there is nothing in the controlling statute that would preclude a board from contracting for the services of noncertificated nurses, to perform other health-related services." The C. points out that each of the nurses provided by DOH is fully licensed and registered in accordance with the State Board of Nursing. Accordingly, each of these contracting nurses may perform services other than "school nursing services" and may assist certified school nurses in the performance of duties reserved by law to school nurses. Contracted nurses holding educational services certificates with endorsements as school nurses may not perform school nurse services nor may contract nurses holding county substitute's certifies substitute for certified school nurses as such substitutes must be employed by the District. The Board may not have noncertificated and/or certificated contracted nurses independently performing functions reserved to the school nurse and then simply have the school nurse review and approve the results. The role of noncertificated and contract nurses must be limited to assistance. The C. finds that no violation of the Interlocal Services Act occurred. The C. directs the Board to review its contract with DOH and its attendance job descriptions to ensure that the nursing duties do not conflict with duties specifically reserved for certificated school nurses employed by the District and to make such revisions as may be necessary in these documents and in the District staffing patterns. Within 120 days of the date of this decision, the revisions are to be submitted to the Essex County Superintendent of Schools for review and approval.

REDUCTION IN FORCE
CD Betsy Rieder, Petitioner, v.
3/99 Caldwell-West Caldwell Board of Education, Essex County,
RIE Respondent.
March 10, 1999 (#70-99)

xSeniority xTenure Claims xWaivers

Petitioner was employed as a teacher of Spanish from 1970-71 through the 1974-75 school years. She was on maternity leave from September 1, 1975 through August 31, 1976. Her teaching position was eliminated on April, 1976. In August, 1995, there was a vacancy for a teacher of Spanish. The Board did not notify Petitioner of the vacancy, but appointed a non-tenured person to fill the position. The issues are: Did the Board violate Petitioner's tenure and seniority rights by hiring a nontenured teacher for the position of teacher of Spanish? Did Petitioner waive her reemployment rights? Was the petition timely filed? The ALJ notes that "A waiver requires a clear, unequivocal and decisive act by a party." Petitioner was aware in September, 1995 that another individual had been appointed to the position of teacher of Spanish. "However, this circumstance standing alone does not warrant the inference that Petitioner intended to waive her right to remain on the preferred eligible list for the position of teacher of Spanish." Under these circumstances, the ALJ concludes that the Board violated Petitioner's reemployment rights under N.J.S.A. 18A:28-12. The C. concurs. Despite her lengthy absence from the profession, Petitioner holds the appropriate certification and endorsement for the position. The Board is directed to reinstate Petitioner as a teacher of Spanish with back pay and related emoluments from June 30, 1997.
Affirmed, State Board of Education, July 7, 1999.

REDUCTION IN FORCE
SC-A Warren County Vocational-Technical School Education Association
3/99 and Donald Picot, Plaintiffs-Appellants, v.
WAR Warren County Vocational-Technical School Board of Education and Frank Mancuso, Individually, and in his official capacity as superintendent of schools, Defendants-Respondents.
Superior Court, Appellate Division (320 N.J. Super. 1)

For case summary, see **SALARY PLACEMENTS**.

REDUCTION IN WORK YEAR
CD William Buckley, Petitioner, v.
7/99 Trenton Board of Education, Mercer County, Respondent.
BUC July 30, 1999 (#247-99)

xSalaries

Petitioner asserts that the Board violated his tenure and seniority rights when it reassigned him from a twelve-month position to a ten-month position. The Board prorated his twelve-month annual salary to reflect the new ten-month work schedule. Petitioner asserts that the Board is required to maintain his annual salary frozen at its former level until the annual salary on the guide for industrial arts teacher becomes equal to or greater than his last annual salary for the twelve month assignment as job developer. The C. determines that under the factual circumstances presented herein, Petitioner was the subject of a reduction in force, not a transfer as the Board avers. Because the Board acted pursuant to N.J.S.A. 18A:28-9 to abolish Petitioner's twelve month position and reassign him to a ten month position in accordance with his tenure and seniority entitlements, its action to reduce Petitioner's annual salary is permissible because his ten month salary is prorated based upon the salary for his prior twelve month position and his rate of salary has been maintained.
On September 16, 1999, the C. remanded the matter to the OAL for further proceedings limited to those issues specified in the record which have not been decided by this decision. (#247+99 Amended Decision)

REDUCTION IN WORK YEAR
CD Rocco DiMaggio, Petitioner, v.
7/99 Trenton Board of Education, Mercer County, Respondent.
DIM July 8, 1999 (#219-99)

xSalaries
Petitioner asserts that the Board violated his tenure and seniority rights when it reassigned him from a twelve-month position to a ten-month position. The Board prorated his twelve-month annual salary to reflect the new ten-month work schedule. Petitioner was formerly the job placement coordinator at the high school. After a RIF, Petitioner was assigned to the ten-month position as teacher of auto mechanics/small engines. The parties have agreed that the Board will assign Petitioner to the auto mechanics position at the high school and place him on a preferred eligible list for teacher specialist, CIE coordinator and job placement coordinator. The remaining issue concerns Petitioner's salary. The C. determines that Petitioner was subject to a RIF and not a transfer. A reduction in a tenured staff member's salary/compensation and benefits is permissible when it is a result of a board's action to effectuate a reduction in force pursuant to its authority under N.J.S.A. 18A:28-9. It was permissible for Respondent in this matter to reduce Petitioner's annual salary since the Board maintained Petitioner's rate of salary based on his prior twelve-month position.

RESIDENCY
CD "G.E.A.," on behalf of minor child, "J.G.A.," Petitioner, v.
3/99 Atlantic City Board of Education, Atlantic County, Respondent.
GEA March 10, 1999 (#71-99)
Petitioner appeals from the Board's decision which found that "J.G.A.," attended the Board's public schools for the 1997-98 school year while residing outside of the District. The Board asserts that "J.G.A>" is not entitled to a free public education in its District simply because his father is the owner of property and a taxpayer in the District. The C. concurs that tuition is owed for the 1997-98 school year and remands the matter to the OAL for calculation of tuition due.

RESIDENCY
CD "K.O." and "O.O.," on behalf of minor child, "W.O.,"
7/99 Petitioners, v.
"K.O." South-Orange-Maplewood Board of Education, Essex County, Respondent.
July 30, 1999 (#248-99)

The Board declared "W.O." ineligible for free public education within the school district. Petitioners failed to comply with the discovery order of May 17, 1999. Pursuant to N.J.A.C. 6:1-1-14.14, the ALJ dismisses the Petition and orders Petitioners to pay tuition to the Board for the 1997-98 school year and pre and post-judgment interest. The C. does not accept that pre-judgment interest should be awarded to the Board since the record is insufficient to persuade him that the actions of Petitioners are ascribable to bad faith or a deliberate violation of law or regulation. An award of post-judgment interest is inappropriate since a claim for such interest would only arise if the Petitioners fail to satisfy the judgment awarded in this decision within 60 days of its award.

RESIDENCY
CD Lower Camden County Regional School District No. 1 Board of
8/99 Education, Petitioner, v.
LOW New Jersey Department of Education, Division of School Finance, Respondent.
August 13, 1999 (#266-99)
The Board protests tuition responsibility for "T.J." and "A.B.," pursuant to the State Facilities Education Act of 1979. "A.B.'s" custodial parent lives in Philadelphia. The C. finds that the State has fiscal responsibility for tuition of a student placed in a state facility when the district of residence is outside of New Jersey. Therefore, the State has responsibility for "A.B.'s" tuition. The Petitioner Board has fiscal responsibility for "T.J.".

RESIDENCY
CD State-Operated School District of the City of Newark, Essex
3/99 County, Petitioner, v.,
NEW New Jersey State Department of Education, Division of Finance, Respondent.
March 22, 1999 (#83-99)

The District challenges the Department's determination that it is the responsible district for the educational cost of placement of "D.W.," for the 1996-97 school year. "D.W." was placed with a center in Pennsylvania by DYFS. The C. upholds the Department's decision.

RESIDENCY
SC-A Woodbury Heights Board of Education, Plaintiff-Respondent, v.
3/99 Sarkis J. Starr, Defendant-Appellant.
WOO Superior Court, Appellate Division
March 25, 1999
On April 28, 1995, the C. awarded tuition to the Board for attendance by Defendant's grandson at a Woodbury Heights public school. Defendant kept appeals pending, thus allowing his grandson to spend three years in Woodbury Heights. Now, the Defendant appeals the Law Division judgment against him awarding tuition for three years' attendance by his grandson at the District high school. The Law Division concluded that James and his mother lived in another municipality. The Superior Court, Appellant Division, holds Defendant liable for tuition for the 1994-95 school year and reverses the tuition liability for the 1992-93 and 1993-94 school years.

RESIDENCY DISMISSALS AND SETTLEMENTS

"A.W.," on behalf of minor child, "H.D.," Petitioner, v. Mullica Board of Education, Atlantic County, Respondent. (#284-99, August 30, 1999)

"D.H.," on behalf of minor children, "K.G.," and "K.G.," Petitioners, v. Hi-Nella Board of Education, Camden County, Respondent. (#301-99, September 13, 1999)

"D.K.S." and "K.S.S.," on behalf of minor child, "H.I.L.," Petitioners, v. Fort Lee Board of Education, Bergen County, Respondent. (#275-99, August 25, 1999)

"D.R.," on behalf of minor children, "J.R." and "J.R.," Petitioner, v. Ewing Board of Education, Mercer County, Respondent. (#69-99, March 10, 1999; Dismissed, State Board of Education, July 7, 1999)

"D.W.," on behalf of minor child, "T.N.," Petitioner, v. West Orange Board of Education, Essex County, Respondent. (#316-99, October 4, 1999)

"E.M." and "J.M.," on behalf of minor child, "K.G.," Petitioners, v. Lincoln Park Board of Education, Morris County, Respondent. (#108-99, April 9, 1999)

"F.B.," on behalf of minor child, "M.K.G.," Petitioner, v. Cumberland Regional School District Board of Education, Cumberland County, Respondent. (#104-99, April 8, 1999)

"F.P.," on behalf of "N.P.," and "S.P.," Petitioner, v. Point Pleasant Beach Board of Education, Ocean County, Respondent. (#110-99, April 13, 1999; #263-99, August 12, 1999)

"H.C.," on behalf of minor children, "J.C." and "P.C.," Petitioner, v. Nutley Board of Education, Essex Counyt, Respondent. (#156-99, May 24, 1999)

"H.S.," on behalf of minor children, Petitioner, v. Bayonne Board of Education, Hudson County, Respondent. (#357-99, November 17, 1999; **Affirmed**, State Board of Education, May 3, 2000.)

"J.B.," on behalf of minor children, "C.B.," and "E.B.," Petitioners, v. Hopewell Valley Regional School District Board of Education, Mercer County, Respondent. (#310-99, September 23, 1999)

"J.F.A.," on behalf of minor son, "S.A.," Petitioner, v. Westfield Board of Education, Union County, Respondent. (#250-99, July 30, 1999)

"J.M.," on behalf of minor child, "J.A.M.," Petitioner, v. Pennsauken Board of Education, Camden County, Respondent. (#249-99, July 30, 1999)

"M.J.," on behalf of minor child, "N.J.," Petitioner, v. Belleville Board of Education, Essex County, Respondent. (#26-99, February 5, 1999)

"R.D.F.," on behalf of his minor children, Petitioner, v. Westwood Regional School District Board of Education, Bergen County, Respondent. (#85-99, March 23, 1999; Dismissed, State Board of Education, July 7, 1999)

"R. McP.," on behalf of minor child, "H.McP.," Petitioner, v. Bayonne Board of Education, Hudson County, Respondent. (#197-99, June 21, 1999)

"R.S.," on behalf of minor child, "C.S.," Petitioner, v. North Brunswick Board of Education, Middlesex County, Respondent. May 28, 1999 (#168-99)

"S.C.," on behalf of minor child, "B.W.," Petitioner, v. Deptford Board of Education, Gloucester County, Respondent. (#202-99, June 25, 1999)

"U.S.K.," on behalf of minor child, "J.W.Y.," Petitioner, v. Fort Lee Board of Education, Bergen County, Respondent. (#340-99, October 28, 1999)

Warren Hills Regional School District Board of Education, Warren County, Petitioner, v. Donald E. Matlock, Jr. And Robin L. Mathlock, Respondents. (#78-99, March 12, 1999)

Woodlynne Board of Education, Camden County, Petitioner, v. Lindenwold Board of Education, Camden County, and "A.S." and "S.S.," as parents of "A.S.," Respondents. (#196-99, June 21, 1999)

RESIGNATIONS

CD 5/99 FAL — In the Matter of the Suspension of the Teaching Certificate of Robert Falco, Ramapo Indian Hills Regional High School District, Bergen County. May 24, 1999 (#165-99)

For case summary, see **CERTIFICATION, SUSPENSION OF**.

RETIREMENT

CD 3/99 FUG — In the Matter of the Tenure Hearing of Erlene Fugua, Orange School District, Essex County. March 3, 1999 (#53-99)

For case summary, see **TENURE HEARINGS-TEACHERS**.

SALARIES

CD 7/99 BUC — William Buckley, Petitioner, v. Trenton Board of Education, Mercer County, Respondent. July 30, 1999 (#247-99)

For case summary, see **REDUCTION IN WORK YEAR**.

SALARIES

CD 7/99 DIM — Rocco DiMaggio, Petitioner, v. Trenton Board of Education, Mercer County, Respondent. July 8, 1999 (#219-99)

For case summary, see **REDUCTION IN WORK YEAR**.

SALARIES
CD In the Matter of the Tenure Hearing of Robert G. Morton, Camden
7/99 Board of Education, Camden County and
MOR Robert Morton, Petitioner, v.
Camden Board of Education, Camden County, Respondent.
July 30, 1999 (#246-99)

For case summary, see **TENURE HEARINGS-TEACHERS**.

SALARIES
CD Carol Riegel, Petitioner, v.
2/99 Berkeley Heights Board of Education, Union County, Respondent.
RIE February 22, 1999 (#42-99)

For case summary, see **WORK YEAR**.

SALARIES
CD Betty Shereshewsky, Petitioner, v.
9/99 Woodbridge Board of Education, Middlesex County, Respondent.
SHE September 7, 1999 (#295-99)

xJob Injuries xWorkers' Compensation

Petitioner asserts that she had been disabled due to a work related injury. She filed a workers' compensation claim. Petitioner alleges that the Board did not pay her the statutory sick leave salary she is entitled to pursuant to N.J.S.A. 18A:30-2.1. She maintains that the Board improperly charged her accumulated sick leave for absences caused by her injury. Petitioner's workers' compensation case was resolved and the Board reinstated days which it had deducted from her sick leave account. Since the issue involving the education laws has been resolved as a result of the decision in the workers' compensation case, the C. dismisses the matter with prejudice.

SALARY PLACEMENTS

CD 12/99 BAL — John Balwierczak, Francis J. Dunne, John C. Johnson, Jr., Robert Kreig, James Lesak, Peter Martino, James Materia, Fred Melchior, Ramon Perez and Tommaso Pugliese, Petitioners, v. Berkeley Heights Board of Education, Respondent. December 8, 1999 (#407-99)

xCustodial and Maintenance Staff xTimeliness

Petitioners, school custodians, became employees of the Respondent Board after the breakup of the Union County Regional High School District in 1996. Petitioners contend that Respondent Board failed to recognize their appropriate level of salary when they transferred. The Board seeks to dismiss the Petition as untimely under the ninety day rule, N.J.A.C. 6:24-1.2c. The Board points out that when Petitioners were placed on its negotiated salary guide, each received a salary increase from their prior year's compensation as employees of the dissolved district. It maintains that what Petitioners are objecting to is that there are existing District custodians with less seniority who are making more money than they are. The Board asserts that the past practice in the District has been to fix custodians' salary on factors other than seniority. The C. dismisses the Petition as untimely. Any right or benefit to be afforded Petitioners is wholly predicated upon services they previously rendered as regional district employees and does not fall within the narrow prescriptions delineated in Lavin which might entitle them to a waiver of the mandatory filing timelines. The C. finds no compelling or exceptional circumstances to warrant relaxation or waiver of the 90-day rule. Petitioners received no loss, in either salary or benefits, to contravene the protection guaranteed by N.J.S.A. 18A:13-64. Petition dismissed.
Affirmed, State Board of Education, May 3, 2000.

SALARY PLACEMENTS

SC-A 3/99 WAR — Warren County Vocational-Technical School Education Association and Donald Picot, Plaintiffs-Appellants, v. Warren County Vocational-Technical School Board of Education and Frank Mancuso, Individually, and in his official capacity as superintendent of schools, Defendants-Respondents. Superior Court, Appellate Division (320 N.J. Super. 1)

xReduction in Force

Plaintiff Picot was riffed in December, 1986. At this time, he had twenty-one years of service in the District including credit for work experience and was placed at the top of the salary guide. In August, 1993, the Board offered employment to Picot for the 1993-94 school year at a salary corresponding to the highest level of the Board's salary guide and a longevity allowance. Picot contends that he was also entitled to the three "off guide" increases that were granted to teaching staff during the time of his hiatus from school employment. The Court points out that no provision in the Agreement obligates the Board to grant "off guide" increases to reinstated teachers when the teacher was employed outside of the employment of the Board. The decision by the Superior Court, Law Division Warren County which entered summary judgment for the Board is **affirmed**.

SCHOOL ATTENDANCE
CD "C.H.," on behalf of minor child, "S.H.," Petitioner, v.
12/99 Spotswood Board of Education, Middlesex County, Respondent.
"C.H." December 27, 1999 (#425-99)

Petitioner alleges her son is abused and discriminated against by staff and students in his school. She asserts that she is a resident of Helmetta which is in a sending-receiving relationship with Spotswood District. Therefore, she requests that Helmetta Board pays her son's tuition in another school district. Petitioner has been unable to find any school willing to take her son. He is still attending school in Spotswood. The C. dismisses the Action Based Upon Failure to Name an Indispensable Party.

SCHOOL ATTENDANCE
CD Cheryl B. Piccoli and Robert Piccoli, Petitioners, v.
3/99 Ramapo-Indian Hills Regional High School District Board of
PIC Education, Bergen County, Respondent.
March 10, 1999 (#68-99)

The District operates two high schools: Ramapo High School and Indian Hills High School. Petitioners argue that the District's revised attendance policy will result in an enrollment shift between the two high schools. They maintain that this will jeopardize the delivery of a thorough and efficient education for all students. The C. finds that the Board's decision was not arbitrary, capricious or unreasonable. There is no clear and convincing evidence that would warrant reversal of the Board's lawful action. Petition dismissed.

SCHOOL DISTRICT REORGANIZATION
CD Carol Riegel, Petitioner, v.
2/99 Berkeley Heights Board of Education, Union County, Respondent.
RIE February 22, 1999 (#42-99)

For case summary, see **WORK YEAR**.

SCHOOL NURSES
CD Montclair Education Association on behalf of itself and
9/99 Moira Palisits, Petitioners, v.
MON Montclair Board of Education, Essex County, Montclair Department of Health and the Township of Montclair, Essex County, Respondents.
Cynthia Samuel, Petitioner, v.
Montclair Board of Education, Essex County, Montclair Department of Health and the Township of Montclair, Essex County, Respondents.
September 30, 1999 (#313-99)

For case summary, see **REDUCTION IN FORCE.**

SCHOOL NURSES
CD Old Bridge Education Association et al., Petitioner, v.
5/99 Old Bridge Board of Education, Middlesex County, Respondent.
OLD May 6, 1999 (#144-99)

The Association alleges that the Board has retained unqualified and uncertified nurses in violation of statute and regulation. The C. holds that the fundamental principles of res judicata and collateral estoppel preclude further litigation of this matter since the issues and facts presented are essentially the same as those litigated in two prior cases involving the same parties. Petition dismissed.

SCHOOL PLACEMENT
CD Andrea D. Wicker, Petitioner, v.
12/99 Oaklyn Board of Education, Camden County, Respondent.
WIC December 27, 1999 (#428-99)

Petitioner's son attended Oaklyn Junior High School in the 9th grade. She contends that he should have taken Chemistry II at the Collingswood High School for the 1998-99 school year. She asserts that his placement in Honors General Science at the junior high school was based on lack of transportation to the high school. Chemistry II is an 11th grade class offered at 3rd period. The superintendent concluded that the class level was inappropriate for the student and that transporting him to one class was impracticable. The matter is moot since the student graduated from 9th grade.

SECRETARIES AND CLERKS
CD In the Matter of the Tenure Hearing of Barbara Dirk,
10/99 Manchester Regional High School District, Passaic County.
DIR Manchester Regional High School District, Passaic County, Respondent and
Manchester Regional High School District Educational Secretaries Association, Charging Party.
Commissioner's Decision #336-99
PERC Dkt. No. CO-H-99-325
October 25, 1999

For case summary, see **TENURE HEARINGS-SECRETARIES AND CLERKS.**

SECRETARIES AND CLERKS
CD North Bergen Federation of Teachers, Local 1060, American
10/99 Federation of Teachers, AFL-CIO, and Eileen Wende,
NOR Petitioners, v.
North Bergen Board of Education, Hudson County, Respondent.
October 28, 1999 (#339-99)

For case summary, see **INCREMENTS.**

SENIORITY
CD Nicholas Duva, Petitioner, v.
12/99 State-Operated School District of the City of Jersey City,
DUV Hudson County, Respondent.
December 3, 1999 (#392-99)

For case summary, see **POSITIONS, ABOLISHMENT.**

SENIORITY
CD Mary McAleer, Petitioner, v.
10/99 Boonton Board of Education, Morris County, Respondent.
MCA October 1, 1999 (#314-99)

For case summary, see **POSITIONS, ASSIGNMENT TO.**

SENIORITY
CD Betsy Rieder, Petitioner, v.
3/99 Caldwell-West Caldwell Board of Education, Essex County,
RIE Respondent.
March 10, 1999 (#70-99)

For case summary, see **REDUCTION IN FORCE.**

SEXUAL HARASSMENT
CD In the Matter of the Tenure Hearing of Henry Allegretti,
7/99 Trenton School District, Mercer County.
ALL July 7, 1999 (#216-99)

For case summary, see **TENURE HEARINGS-TEACHERS.**

SEXUAL HARASSMENT
CD Frank Carney, Petitioner, v.
8/99 Union City Board of Education, Hudson County, Respondent.
CAR August 30, 1999 (#283-99)

xContract Cancellations xCustodial and Maintenance Staff

Petitioner was a tenured custodian. He seeks to have the Board's attempt to consider his employment forfeited after he was found guilty of harassment of a fellow employee at their work site, N.J.S.A. 2C:33-4C, a petty disorderly persons offense. The judge declined to issue an order of forfeiture of Respondent's employment. The Board seeks forfeiture of employment under N.J.S.A. 2C:51-2. Because of a recent amendment to this statute, Respondent asserts that tenure charges must be filed against him if he is to be terminated from his employment. Since the Board has not brought such charges, Respondent asserts that he is entitled to be reinstated to his position with recovery of full salary and benefits. The C. finds that if a court declines to act to order forfeiture of public employment, then the only means for a board to seek removal of that individual from its employment is through the certifying of tenure charges. Back pay and benefits owed to Petitioner must be paid by the board in a reasonable period of time.

SEXUAL HARASSMENT
SC Davis, as next friend of LaShonda D., v.
5/99 Monroe County Board of Education et al.
DAV Supreme Court of the United States
May 24, 1999

Petitioner filed suit against Respondents seeking damages for the sexual harassment of her daughter by "G.F.," a fifth-grade classmate at a public elementary school. Petitioner alleges that the Respondents' indifference to "G.F.'s" persistent sexual advances towards LaShonda creating an "intimidating, hostile, offensive, and abuse school environment that violated Title IX of the Education Amendments of 1972. The Supreme Court concludes that private damages action may be filed against a school board in cases of student-on-student harassment "only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities. Moreover, we conclude that such an action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."

SEXUAL HARASSMENT
SC-A Cecelia Hamel and Diane Hamel, an infant, by her guardian
5/99 ad litem, Cecelia Hamel, Plaintiffs-Appellants, v.
HAM State of New Jersey, Bergenfield Board of Education et al,
Defendants-Respondents.
Superior Court, Appellate Division [321 N.J. Super. 67]
May 4, 1999

Plaintiffs complain that the Board and the school official defendants were negligent in failing to protect Diane Hamel, a student, from psychological injuries due to harassment from fellow students. Plaintiffs allege that students habitually teased and physically assaulted Diane because she was a good student. They claim that the harassment consisted of daily pushing, shoving and kicking. Plaintiffs state that they informed the superintendent of the harassment and met with the principal. After collapsing in class, Diane was diagnosed as suffering from permanent post-traumatic stress disorder. Plaintiffs seek damages against the Board defendants based on negligence, tortious conduct and negligent supervision. The Superior Court, Appellate Division, finds "no authority for the proposition embraced by the trial court that a local board of education, a public entity, is entitled to the statutory immunity simply because it is a not-for-profit entity and has exclusive educational purposes." The Court holds that the Charitable Immunity Act is not intended to provide immunity to public entitles, such as local school boards. **Reversed and remanded.**

SEXUAL HARASSMENT
SC-A Ronnie Standridge, Plaintiff-Respondent, v.
7/99 Al Ramey, an individual and as agent of the New Jersey
STA Education Association, and New Jersey Education Association,
Defendants-Appellants and Kristin Sieka, Jane Siems, Stacey Johnson, Barbara Reu, Janet Vignola, Angela Krass, Barbara Remick and Roxbury Education Association, Defendants.

Kristin Sieka, Jane Siems, Stacey Johnson, Barbara Reu,
Plaintiffs, v.
Ronald Standridge and the Roxbury Board of Education,
Defendants.
Superior Court, Appellate Division
July 12, 1999 (323 N.J. Super. 538)

For case summary, see **LIBEL AND SLANDER**.

SPECIAL EDUCATION
SC-US Cedar Rapids Community School District, v.
3/99 Garret F., a minor, by his mother and next friend, Charlene F.
CED March 3, 1999

The Individuals with Disabilities Education Act was enacted to "assure that all children with disabilities have available to them. . .a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." The issue in this case is "whether the definition of 'related services' in Section 1401(a)(17) requires a public school district in a participating State to provide a ventilator-dependent student with certain nursing services during school hours." Respondent Garret F. is a ventilator-dependent quadriplegic who is a high school sophomore, attending regular school classes. He requires a responsible individual nearby to attend to certain physical needs while he attends school. Until 1993, Garret's family employed a licensed practical nurse. In 1993, Garret's mother requested the District to pay for the health care services that Garret requires during the school day. The District believes that it is not legally obligated to provide continuous one-on-one nursing services. The Court quotes a "related services" definition determined in Irving Independent School District v. Tatro. The requested services are supportive services since Garret cannot attend school unless they are provided. Secondly, the services were not excluded as "medical services." Services provided by a physician, except for diagnostic and evaluation purposes, are subject to the medical services exclusion. Services provided by a nurse or qualified lay person are not. "Continuous services may be more costly and may require additional school personnel, but they are not thereby more 'medical.'" The District contends that the existing school health staff cannot meet all of their responsibilities and also provide for Garret. The Court agrees that the District has legitimate financial concerns, but contends that cost is not included in the definition of "related services." The Court orders the "District to fund necessary "related services" in order to help guarantee that students like Garret are integrated into the public schools."

SPECIAL EDUCATION
CD Highlands Board of Education, Petitioner, v.
12/99 Middletown Board of Education, Monmouth County, and the
HIG State of New Jersey, Department of Education, Division of Finance, Respondents.
December 23, 1999 (#421-99)

"M.M.C." is a child classified for special education. The Division asserts that the Highlands Board is his district of residency and the Board is financially responsible for his placement. Except in 1990 when he resided with his mother, "M.M.C." has been placed in foster homes and institutions outside the District. DYFS has been ordered by the court to assume his custody. Therefore, the Board avers that the State must assume financial responsibility. The C. finds that the Highlands District was the district of residency for 1997-98. However, the C. remands the matter to the OAL in light of the repeal of N.J.A.C. 6:28-7.4(b)511 in July, 1998 and the C.'s decision in Prospect Park.

STATE AID
CD Lakewood Board of Education, Ocean County, Petitioner, v.
5/99 New Jersey Department of Education, Division of Finance,
LAK Respondent.
May 19, 1999 (#154-99M)

The Board challenged the calculation of its District income that was used to determine State Aid entitlement for the 1998-99 school year. The C. finds that N.J.S.A. 18A:7F-15 provides Petitioner with the right of appeal. "Parameters of such appeals have not, as yet, been further explicated through rule or decisional law. Moreover, nowhere in the record is there any indication of what type or source petitioner might have relied upon to buttress with facts the claim of its petition that the district income wealth data relied upon by the Department were inaccurate." The C. orders the matter continued at the OAL for further proceedings as a contested case.

STATE AID
CD Middlesex County Educational Services Commission,
2/99 Petitioner, v.
MID New Jersey State Department of Education, Respondent.
February 5, 1999 (#24-99)

Petitioner seeks recalculation of a sum determined by audit to be due and returnable to the Department. The audit concluded that fraudulent activities by an employee occurred between July, 1986 and December, 1995. The Commission argues that because it recovered only fifty-seven percent of the funds embezzled, the recovery should be limited to that percentage of the amount the Department demands. The Department maintains that the Commission must refund the full amount because it was fraudulently charged to State and Federal sources by a Commission employee and the Commission has no legal basis for retaining any of these funds. Also, educational services commissions may not be profit making entities. The C. concurs and directs Petitioner to refund the monies.

STATE AID
CD Middlesex County Educational Services Commission, Petitioner, v.
4/99 New Jersey Department of Education, Respondent.
MID April 16, 1999 (#115-99)

The Teacher Quality Employment Act established a minimum salary of $18,500 for teachers. Chapter 9 of the Laws of 1986 amended the statute to include full-time teachers employed by the educational services commission. The Department argues that the receipt of TQEA monies limited the amount of money placed in the reserve account to any funds left over after the teachers' salary differentials were made. The law does not provide any authority for a district of ESC, to make the teachers' salary differential payments using other available funds and moving the TQEA funds to a reserve account. Therefore, the C. holds that if any Chapter 192-193 funds used by the Commission for teachers' salary differential payments, the funds were borrowed for this purpose and the Chapter 192-193 account had to be repaid once TQEA funds were received from the State. The $90,709 in Chapter 192-193 unused funds is to be returned to the Department as well as any interest earned on this amount.

STATE HEALTH BENEFITS PROGRAM
CD In the Matter of the Tenure Hearing of Paula Yancy-Dykes,
11/99 Newark School District, Essex County.
YAN November 22, 1999 (#381-99)

For case summary, see **TENURE HEARINGS-TEACHERS**.

STUDENT FEES
CD In the Matter of the Tenure Hearing of Roberta Johnson, State-
2/99 Operated School District of the City of Newark, Essex County.
JOH February 18, 1999 (#37-99)

Charges of unbecoming conduct were certified by the District against Respondent, a tenured teacher. The District alleges that Respondent failed to properly account for monies collected from students for the purpose of ordering class rings and caps and gowns during the 1996-97 school year. The investigation showed that Respondent was guilty of careless bookkeeping and sloppy money management, but not criminal intent to misappropriate money belonging to students. The parties have proposed a settlement whereby Respondent will lose pay for 120 days and make full restitution of all monies collected from students. The C. approves the parties' settlement.

STUDENT RECORDS
CD Clinton Barlow, Petitioner, v.
6/99 Lambertville Board of Education and Hunterdon Regional School
BAR District Board of Education, Hunterdon County, Respondents.
June 25, 1999 (#293-99)

Petitioner demands that the Boards amend their records for his daughter to include his surname in addition to her mother's surname. The matter is dismissed as this is part of a larger issue to be pursued under the jurisdiction of the Superior Court, Family Division.

STUDENT RECORDS
CD "M.N.," Petitioner, v.
8/99 Dumont Board of Education, Bergen County, Respondent.
"M.N." August 13, 1999 (#267-99)

For case summary, see **PARENTS AND SCHOOLS**.

STUDENT SEARCHES

SC-A Beth Holstein, Plaintiff, v.
8/99 Sussex County Vocational-Technical School Board of Education,
HOL Defendant-Appellant, and
George A. Wilson, Robert Zeoli, and Dr. Hopkins, Defendants, and
Cynthia Carney and Patricia Taranto, Defendants-Respondents.
Superior Court, Appellate Division
August 20, 1999

xIndemnification xLegal Fees

Cynthia Carney, a gym teacher observed Plaintiff, a student, in a locker room with her hand in another person's purse clenching money. Several students, including the owner of the purse, complained of missing money. Robert Zeoli, the school disciplinarian at the Sussex County Voational-Technical School, ordered Patricia Taranto, the school nurse, to conduct a body search on Plaintiff. Nothing was found. Plaintiff seeks both compensatory and punitive damages on allegations of constitutional and privacy violations, false imprisonment, assault and battery, negligence, slander and intentional infliction of emotional distress. Carney and Taranto cross-claimed against the Board for indemnification against any sums, including costs and counsel fees, to which they might be subjected by reason of the litigation under N.J.S.A. 18A:16-6. On May 2, 1997, summary judgment was entered in favor of Respondents on Plaintiff's claims. A further order was entered against the Board on application by Respondents' separate counsel that granted fees and costs under the statute for successfully defending against the portions of the complaint which sought punitive damages. On appeal, the Board contends that it fulfilled its obligation to defray all costs of Respondents' defense of the civil action when it arranged for defense by Selective Insurance Company of America, the Board's insurer. The Company provided Carney and Taranto with counsel to defend against the compensatory damages claims, the insurer issued a reservation of rights letter declining to represent them to the extent claims for punitive damages were asserted. The Board contends that the "damages, losses and expenses" contemplated by the statute do not include separate attorneys' fees. The Court disagrees. "The legislative language clearly includes not only 'damages' but 'expenses'. . . .If costs of a successful defense against a criminal action (which necessitates purposeful conduct) will be indemnified, surely the Legislature no less intended that a successful defense in a civil action alleging an intentional tort would be embraced by N.J.S.A. 18A:16-6. If the insurance coverage secured by the Board is inadequate to discharge its statutory obligation, that is a problem which must be met by the Board, not by respondents." The Board also contends that since the New Jersey Education Association's advanced Respondents' legal fees and costs, they incurred no attorney's fees requiring reimbursement. The Court notes that Respondents are required to reimburse NJEA for any expenditure, including reasonable attorneys' fees and court costs, provided by it if they recover legal defense costs. The Court sees no indication that the statutory intent was to transfer the Board's legal obligations to Respondents' labor organization.

SUBCONTRACTING

SBD Guttenberg Education Association and Zenaida Franqui,
3/99 Appellants, v.
GUT Leo F. Kagholz, Commissioner of Education, Respondent, and
Guttenberg Board of Education, Hudson County, Respondent.
March 3, 1999

For case summary, see **SUBSTITUTE STAFF**.

SUBCONTRACTING
CD Arlene Miller, Petitioner, v.
1/99 Burlington County Educational Services Unit, Burlington
MIL County, Respondent.
January 19, 1999 (#11-99)

For case summary, see **POSITIONS, ABOLISHMENT**.

SUBCONTRACTING
CD Montclair Education Association on behalf of itself and
9/99 Moira Palisits, Petitioners, v.
MON Montclair Board of Education, Essex County, Montclair Department of Health and the Township of Montclair, Essex County, Respondents.
Cynthia Samuel, Petitioner, v.
Montclair Board of Education, Essex County, Montclair Department of Health and the Township of Montclair, Essex County, Respondents.
September 30, 1999 (#313-99)

For case summary, see **REDUCTION IN FORCE.**

SUBSTITUTE STAFF
SBD Guttenberg Education Association and Zenaida Franqui,
3/99 Appellants, v.
GUT Leo F. Kagholz, Commissioner of Education, Respondent, and Guttenberg Board of Education, Hudson County, Respondent.
March 3, 1999

xCertification xEquivalencies xSubcontracting xWaivers

This is an appeal from an equivalency granted to the Board by the C. on January 9, 1998, pursuant to N.J.A.C. 6:3A-1.1 et seq. The equivalency was "to permit persons with a county substitute certificate and subject matter expertise to provide world language instruction." The Board had approved Berlitz International as its "World Language teacher." Appellants challenge the legality of the Board's proposal to subcontract with Berlitz to engage the services of individuals possessing only substitute certificates. The State Board notes that since "a county substitute certificate is not a teaching certificate and doesn't constitute appropriate certification issued by the State Board of Examiners . . .the equivalency granted by the C. operates to set aside the certification requirements for service as a foreign language teacher. . . .certification requirements establish the threshold qualifications for teaching staff members employed in the public school system throughout the state." The State Board of Education invalidates the equivalency granted by the C. in this case.

SUSPENSIONS AND EXPULSIONS
CD "A.B.," on behalf of minor child, "S.B.," Petitioner, v.
4/99 Deptford Board of Education, Gloucester County, Respondent.
"A.B." April 7, 1999 (#102-99)
Following an altercation, "S.B." was expelled from school on November 17, 1998. Despite a long history of discipline, including fifteen suspensions, "S.B." was not referred for evaluation and classification under IDEA. No home schooling has been provided "S.B." The matter is transferred to the Division of Special Education for such proceedings as are necessary to hear and determine the IDEA issue. The reasonableness of his suspension shall be held in abeyance under the IDEA claim has been resolved. The Board is ordered to begin providing home-based instructional services to "S.B."

SUSPENSIONS AND EXPULSIONS
CD "D.B." and "E.B.," on behalf of minor child, "I.B.,"
10/99 Petitioners, v.
"D.B." Greater Egg Harbor Regional School District Board of Education, Atlantic County, Respondent.
October 5, 1999 (#318-99E)

The Board expelled Petitioner's daughter after it found her guilty of having assaulted another student on school property and during school hours. The C. accepts the Board's offer to pay for the cost of tuition of "I.B." at an alternative school located on the campus of the Atlantic County Community College on a temporary basis, pending outcome of the appeal on merits. The matter is returned to the OAL for further proceedings as may be necessary to conclude this case on its merits.

SUSPENSIONS AND EXPULSIONS
SC-A Marcus Hernandez, individually and by his guardian ad litem,
6/99 Peter Hernandez, Peter Hernandez and Emily Hernandez,
HER Plaintiffs-Respondents, v.
Don Bosco Preparatory High, Charles O' Sullivan, Father John Grinsell, and James M. Scanlon, Defendants-Appellants.
Superior Court, Appellate Division
June 8, 1999

This is the first decision on the procedural rights of a student expelled from a private high school. During his junior year at the private Roman Catholic boys school, Marcus received five detentions for misconduct. During the summer following his junior year, the assistant principal sent a letter to the Hernandez family stating that Marcus was going to be placed on disciplinary probation for the fall semester of his senior year because of his disciplinary problems. They signed the letter and returned it to the school and met with the assistant principal to review the matter. During the fall semester, Marcus was suspended for one day for arguing with a freshman student on the bus. During the spring semester, Marcus was summoned by the assistant principal on several occasions and questioned about prank calls to a teacher. He was also accused of using and selling steroids. The assistant principal again met with the Hernandez family and placed Marcus on indefinite suspension. The Disciplinary Committee and the School Director agreed that Marcus should be dismissed. He was denied a hearing to determine the nature of the charges against him and the grounds for dismissal. Appeals to the School Director and the Provincial Director were denied. The Student and Parent Handbook for the school provides that the school reserves the right to "suspend and, when circumstances warrant, to dismiss students whose behavior is disrespectful, recalcitrant, disruptive, immoral, illegal or which is at odds with promoting our school environment or is detrimental to the reputation of the school with regard to behavior occurring inside or outside the school." Plaintiff filed a complaint alleging improper dismissal that prevented him from securing scholarships and admission to certain colleges. The Court holds that "a private high school, when expelling a student for misconduct, must follow a two-prong process. First, the private high school must adhere to its own established procedures for dismissal. Second, in executing the dismissal, the school must follow a procedure that is fundamentally fair." In this matter, the student handbook sets forth the procedure for expulsion which the school followed before dismissing Marcus. The procedure followed was fundamentally fair. The Court dismisses the complaint against the school with prejudice.

SUSPENSIONS AND EXPULSIONS
CD "J.O.," Petitioner, v.
3/99 Sterling High School District Board of Education, Camden County,
"J.O." Respondent.
March 23, 1999 (#89-99)

Petitioner is accused of planning a retaliatory attack on another student. He claims that the Board imposed penalties upon him greater than those imposed on others for similar violations based upon his race. He claims that his suspension was unduly harsh because "it deprived him not only of the opportunity to attend class but also because it prevented him from being Captain of Sterling's basketball team." The ALJ finds that the Board did not act unreasonably in finding Petitioner responsible for the attack on "J.C." or in disciplining him for his actions. The C. concurs and dismisses the Petition.

SUSPENSIONS AND EXPULSIONS
CD "P.S.," on behalf of minor child, "B.S.," Petitioner, v.
8/99 Atlantic City Board of Education, Atlantic County, Respondent.
"P.S." August 4, 1999 (#254-99)

xTimeliness

Petitioner appeals the Board's expulsion of her son from its public school. She contends that the Board's action was arbitrary, capricious and/or unreasonable and seeks his reinstatement. The C. finds that the matter was untimely filed. Granting that, the C. agrees with the ALJ that Petitioner has failed to satisfy her burden of proving that the Board's decision to expel her son was taken in bad faith. Petition dismissed.

SUSPENSIONS AND EXPULSIONS
CD "S.E.," on behalf of minor child, "J.E." and "L.F.," on
12/99 behalf of minor child, "J.T.," Petitioners, v.
"S.E." Morris Hills Regional School District Board of Education,
Morris County, Respondent.
December 27, 1999 (#430-99E)

The C. grants emergent relief. He concurs with the ALJ's determination that the Board's imposition of a two day in-school suspension must be stayed under a hearing on merits.

SUSPENSIONS AND EXPULSIONS
CD "V.A.," on behalf of minor child, "K.M.A.," Petitioner, v.
6/99 Collingswood Board of Education, Camden County, Respondent.
"V.A." June 29, 1999 (#209-99E)

"K.M.A." changed the message on the computer shut down screen in the computer lab to read "if you turn me off I will blow up." He was arrested and suspended for ten days. An expulsion hearing was conducted by the Board. Petitioner argues that her son did not receive a preliminary hearing and did not have a full hearing before the Board within twenty-one days of suspension. She also alleges various improprieties in the conduct of the Board's hearing. The C. dismisses the claim of delay on the part of the Board. The procedural errors at the hearing are insignificant since "K.M.A.'s" conduct was admitted and the hearing was conducted solely to determine the appropriate penalty. Home instruction is being supplied to the student. Emergent relief is denied. The matter is remanded to the OAL for further proceedings on the allegation that the Board's action to expel "K.M.A." was an abuse of its discretionary authority.

TARDINESS
CD In the Matter of the Tenure Hearing of Linda Pais, State-
2/99 Operated School District of the City of Newark, Essex County.
PAI February 16, 1999 (#34-99)

For case summary, see **TENURE HEARINGS-TEACHERS**.

TENURE CHARGES
CD Dr. H. Benjamin Williams, Petitioner, v.
3/99 Atlantic City Board of Education, Atlantic County, Respondent.
WIL March 1, 1999 (#50-99 E)

Petitioner, the school superintendent, avers that the Board's certification of tenure charges against him at a public meeting constituted a technical violation of the laws governing the tenure process sufficient to warrant dismissal of the charges. The Board maintains that it was merely memorializing in public an action that it had duly taken in private session in accordance with law. The C. finds that this action was a clear violation of the Tenure Employees Hearing Act and its implementing regulations, as well as a violation of the consent order between the parties. However, dismissal of the tenure charges is not an appropriate relief in the present context. Petitioner's motion to appeal denied, State Board of Education, May 5, 1999.

TENURE CLAIMS
CD Atlantic City Education Association, on behalf of itself and the
10/99 members named herein, Reverend David Bell, Luis Carmona, Michael
ATL Davis, Ralph Monagas, Michael Moody, James Palin, Ray Rodriguez, Santos Vergara, Kenneth White, Richard Johnson, Jorge Cosme and William Smallwood, Petitioners, v.
Atlantic City Board of Education, Atlantic County, Respondent.
October 7, 1999 (#321-99)

For case summary, see **CONTRACT CANCELLATIONS**.

TENURE CLAIMS
CD Gregory T. Donahue, Petitioner, v.
8/99 Ocean City Board of Education, Cape May County, Respondent.
DON August 12, 1999 (#262-99)

Petitioner asserts that the Board failed to recognize his tenure rights as a principal with the District and his entitlement to the vacant position of principal in the high school. Petitioner was principal of the intermediate school from 1989 until 1992 when another staff member with greater seniority was appointed principal after the abolishment of his title. The Board wanted to retain another staff member in Petitioner's previous title as Director of Special Education. Therefore, the Board appointed Petitioner, with his concurrence, to the position of assistant principal of the intermediate school. The parties agreed that Petitioner would continue to be paid as a principal and retain his tenure rights. The retirement of the high school principal resulted in the first vacancy of the title of principal in the District since the reorganization. The C. grants summary decision to Petitioner based upon his tenure rights as a principal in light of the court's holding in Schienholz et al.

TENURE CLAIMS
CD Mary McAleer, Petitioner, v.
10/99 Boonton Board of Education, Morris County, Respondent.
MCA October 1, 1999 (#314-99)

For case summary, see **POSITIONS, ASSIGNMENT TO**.

TENURE CLAIMS
CD Betsy Rieder, Petitioner, v.
3/99 Caldwell-West Caldwell Board of Education, Essex County,
RIE Respondent.
March 10, 1999 (#70-99)

For case summary, see **REDUCTION IN FORCE.**

TENURE HEARINGS
CD In the Matter of the Tenure Hearing of Joseph Graceffo,
10/99 Wayne School District, Passaic County.
GRA October 20, 1999 (#331-99L)

In the course of the tenure hearing in process, counsel for Respondent objected to questions asked by the Board's counsel in the direct examination of the human resource specialist for the Board. These questions concerned Respondent's alleged "pattern of conduct of not drug testing students at Wayne Valley High School prior to the 1995-96 school year." Respondent argued that such evidence is outside the scope of the tenure charges. The ALJ sustained Respondent's objection, thereby precluding the Board from brining to the record any evidence of these prior incidents which took place in 1991 and 1994. The C. overturns the ALJ's order. Respondent cannot credibly claim that he has been prejudiced by the Board's introduction of the evidence.

TENURE HEARINGS-CUSTODIAL AND MAINTENANCE STAFF
CD In the Matter of the Tenure Hearing of Darryl Crossland, Trenton
3/99 School District, Mercer County.
CRO March 10, 1999 (#67-99)

Tenure charges of abandonment of position were filed against Respondent, a tenured custodian. Respondent has failed to report to work since September 30, 1997, submit to a medical examination or provide any medical documentation to justify his absence from work. Respondent has not replied to the allegations. The C. grants summary judgment to the Board and orders Respondent dismissed from his tenured custodial position as a heavy cleaner in the Board's employ as of the date of this order.

TENURE HEARINGS-CUSTODIAL AND MAINTENANCE STAFF
CD In the Matter of the Tenure Hearing of Regis Idec, Roselle
6/99 School District, Union County.
IDE June 7, 1999 (#175-99)

The District certified tenure charges of conduct unbecoming a custodian, insubordination and other just cause against Respondent. Respondent has signed and tendered an irrevocable and permanent letter of resignation in return for a settlement. The C. is unable to accept the settlement agreement. The settlement was signed by the Board President and Board Secretary. However, the language in the settlement states that it must be ratified by the entire Board. The matter is remanded to the OAL.

TENURE HEARINGS-CUSTODIAL AND MAINTENANCE STAFF
CD In the Matter of the Tenure Hearing of Timothy Kasony,
4/99 Lawrence Township School District, Mercer County.
KAS April 22, 1999 (#121-99)

xAbsenteeism

The Board certified tenure charges of excessive absenteeism and incapacity against Respondent, a tenured custodian. Respondent has agreed to apply for disability retirement. The parties have settled. The C. rejects the settlement. The C. remands the matter to the OAL for revision of the settlement or, if the parties concur, for an abeyance of proceedings pending a determination by PERS on Respondent's disability retirement application.
On remand, the C. noted that Respondent has been out of work for three years due to a work related injury. The Board has demonstrated a negative effect from Respondent's prolonged absence. There is no indication when or whether Respondent will be able to resume his duties. The C. rules that the appropriate penalty under such circumstances is dismissal, notwithstanding that Respondent's absenteeism constituted a legitimate use of sick leave and the possibility remains that he might ultimately become physically capable of performing his duties. Respondent is dismissed from his position as a tenured custodian as of the date of this decision, July 22, 1999 (#230-99).
Affirmed, State Board of Education, January 5, 2000.

TENURE HEARINGS-CUSTODIAL AND MAINTENANCE STAFF
CD In the Matter of the Tenure Hearing of Thomas Lynch,
12/99 Manville School District, Somerset County.
LYN December 13, 1999 (#413-99)

The District certified tenure charges against Respondent, a tenured custodian (Supervisor of Buildings and Grounds). Charges involve his accepting from a subordinate employee monies extorted by him from other employees of the District who were under Respondent's direct supervision. Respondent did not submit a reply to the Board's charges against him nor communicated with the C. to request an extension of time within which to file a response. The C. determines that these charges constitute unbecoming conduct and are sufficient to warrant Respondent's dismissal from his tenured position. The C. notes that the Board's suspension of Respondent without pay on August 12, 1999 contravened N.J.S.A. 18A:6-8.3 and N.J.S.A. 18A:6-14 since Respondent was neither under indictment nor had tenure charges been certified against him as of that date. Therefore, summary judgment is granted to the District that Respondent is dismissed from his tenured position as a custodian as of the date of this order. The Board is directed to pay Respondent his full salary and emoluments from August 12 until September 29, 1999, the date of its certification of tenure charges against him.

TENURE HEARINGS-CUSTODIAL AND MAINTENANCE STAFF
CD In the Matter of the Tenure Hearing of Saad Radwan, Carteret
1/99 School District, Middlesex County.
RAD January 14, 1999 (#8-99)

xDiscriminatory Practices

The District filed tenure charges against Respondent, a tenured custodian. It claims that he was insubordinate and/or failed to carry out his assigned duties to the extent that his dismissal is warranted. Respondent maintains that the charges are a subterfuge for discrimination based on religion (Islam) and national origin (Egyptian). In September, 1996, Respondent filed a complaint with the Division on Civil Rights. He was suspended on May 6, 1997. There were complaints of inadequately cleaned areas by the principals of the schools to which he was assigned. Respondent was in two altercations with another janitor. The principal complained that he frequently had to mediate between Respondent and other custodians as Respondent felt that everyone was against him. He questioned every assignment. He was disgruntled wherever he was assigned and always measured his work load against the duties of other custodians. Respondent was in two altercations with another janitor. Respondent injured his back on March 11, 1996 and was in and out of work for a few months. Respondent claims that the administrators hampered his ability to attend physical therapy. His work schedule was adjusted to permit him to attend physical therapy. The ALJ finds that this is not an issue. The ALJ also finds that the principal neither said nor did anything to suggest religious or ethnic intolerance. The C. concurs that the Board has demonstrated by a preponderance of credible evidence that Respondent is guilty of conduct unbecoming a tenured custodian because of his hostile and inappropriate behavior toward his coworkers, his supervisors and other District staff as well as his repeated insubordination. The C. dismisses Respondent from his position as a tenure custodian as of the date of this decision. The State Board of Education directs Appellant to file a brief in support of his appeal within 20 days from the date of this decision, January 5, 2000.
Affirmed, State Board of Education, May 3, 2000.

TENURE HEARINGS-CUSTODIAL AND MAINTENANCE STAFF
CD In the Matter of the Tenure Hearing of Alan P. Tighe, Old
5/99 Bridge School District, Middlesex County.
TIG May 3, 1999 (#135-99)

The Board certified tenure charges of unbecoming conduct against Respondent, a tenured custodian. He admitted that he took money from the student activities fund which is kept in a locked cabinet in the guidance office at the middle school. Criminal charges were filed against him. Respondent pled guilty to a disorderly persons offense. The C. holds that summary disposition in favor of the Board is appropriate since Respondent has failed to show that there is a genuine issue which can only be determined in an evidentiary hearing. Respondent's action constitutes conduct unbecoming a tenured employee and dismissal is the appropriate penalty.

TENURE HEARINGS-CUSTODIAL AND MAINTENANCE STAFF
CD In the Matter of the Tenure Hearing of Gregory Vereen,
6/99 Lawrence School District, Mercer County.
VER In the Matter of the Tenure Hearing of Theodore Prusakowski, Lawrence School District, Mercer County. June 9, 1999 (#181-99)

xAbsenteeism xJob Injuries
The Board preferred tenure charges against Respondents, tenured custodians. The charges allege incapacity and excessive absenteeism. In June, 1996, Respondent Vereen suffered injuries to both knees while on the job. He is back at work on a modified schedule. Respondent Prusakowski has injured in December, 1994 and has not returned to work since. The Board argues that Respondents' absences have had a negative effect on its ability to provide sanitary and secure facilities. The C. finds that the Board has demonstrated a negative effect and orders their dismissal "notwithstanding that their absenteeism constituted a legitimate use of sick leave and the possibility remains that one, or both, of them might ultimately, at some point not presently foreseeable, once again become physically capable of performing their duties."

TENURE HEARINGS-CUSTODIAL AND MAINTENANCE STAFF
CD In the Matter of the Tenure Hearing of William Wenisch,
6/99 Union City School District, Hudson County.
WEN June 29, 1999 (#208-99)

The District certified to the C. eight charges against Respondent, a tenured custodian who was also suspended without pay. C. approves the parties' settlement.

TENURE HEARINGS-CUSTODIAL AND MAINTENANCE STAFF
CD In the Matter of the Tenure Hearing of Anthony Williams,
8/99 Atlantic City School District, Atlantic County.
WIL August 19, 1999 (#272-99)
The Board brought charges against Respondent, a tenured custodian, for misuse of school funds and official misconduct. Respondent has resigned his position and abandoned his tenure. The matter is dismissed.

TENURE HEARINGS-LIBRARIANS
CD In the Matter of the Tenure Hearing of Victoria Jakubiak,
2/99 Newark School District, Essex County.
JAK February 11, 1999 (#33-99)
xCorporal Punishment
The first charge alleges that Respondent, a tenured educational media specialist, committed acts of corporal punishment "with the intent to discipline, harm, injure, punish, intimidate, or otherwise embarrass pupils under her charge." It is asserted that on October 23, 1996, Respondent grabbed and forced "Z.L.," a fifth grade student, into a small, secluded area behind the circulation desk and made her stand there for forty minutes. Respondent is also accused of slapping "Z.L." The second charge avers that Respondent failed to observe or prevent a pupil, "L.G.," from leaving the classroom on October 9, 1996. This charge was dismissed. After examining the evidence, the C. notes substantive inconsistencies among the testimony of student witnesses which raise substantial questions regarding the veracity and accuracy of their renditions of what occurred in the library between Respondent and "Z.L." Also, the manner in which the incident was investigated by administrators raises questions regarding the credibility of the witnesses. The C. finds that evidence shows only that Respondent left "Z.L." unsupervised for five minutes. The C. imposes the penalty of one month's loss of salary for leaving "Z.L." unsupervised.

TENURE HEARINGS-SCHOOL NURSES
CD In the Matter of the Tenure Hearing of Eileen Brogan,
10/99 Belmar School District, Monmouth County.
BRO October 12, 1999 (#325-99)

The Board certified tenure charges alleging misrepresentation of credentials against Respondent, a tenured school nurse. The C. approves the parties' settlement. Due to the nature of the charges, the record of the matter will be transmitted to the State Board of Examiners for action as it deems appropriate.

TENURE HEARINGS-SECRETARIES AND CLERKS.
CD In the Matter of the Tenure Hearing of Barbara Dirk,
10/99 Manchester Regional High School District, Passaic County.
DIR Manchester Regional High School District, Passaic County, Respondent and
Manchester Regional High School District Educational Secretaries Association, Charging Party.
Commissioner's Decision #336-99
PERC Dkt. No. CO-H-99-325
October 25, 1999

xAnti-Union Animus xUnfair Labor Practices

The Board certified tenure charges against Respondent and suspended her without pay. The C. referred the matter to the OAL for disposition. The Association filed an unfair labor practice charge with PERC alleging that the tenure charges were filed to interfere with Dirk's role as Association president and to discriminate against her because of protected activity. The Board denied Respondent her 1999-2000 salary increments. The Association amended the ULP charge to include the increment withholding. An appeal of the increment withholding was filed with the C. The C. and Chair of the PERC Commission agreed to consolidate the unfair practice charge and the tenure charges. The Commission will consider all issues regarding the unfair practice charge concerning the increment withholding, including whether legitimate business reasons motivated the withholding and whether it would have occurred for such reasons without Respondent's protected activities. The same analysis will be made by the Commission regarding the tenure charges and increment withholding. The matter will then be sent to the C. to determine whether the tenure charges were warranted under education law. The increment withholding petition filed before the C. will be dismissed because the C. does not have jurisdiction over withholdings of increments for persons who are not teaching staff members. The parties' settlement was approved before the matters were heard.

TENURE HEARINGS-SECRETARIES AND CLERKS
CD In the Matter of the Tenure Hearing of Arlene Harder, Washington
7/99 Township School District, Gloucester County.
HAR July 30, 1999 (#245-99)

The Board filed tenure charges of unbecoming conduct, specifically abandonment of employment and incapacity against Respondent, a tenured secretary. Respondent has decided not to contest the termination of her employment. Therefore, the C. finds and determines that each count of the tenure charges set forth by the Board shall be deemed admitted by Respondent. The C. orders Respondent dismissed from her tenured employment.

TENURE HEARINGS-SECRETARIES AND CLERKS.
CD 12/99 MAR — In the Matter of the Tenure Hearing of Myrna Marrero, Bayonne School District, Hudson County. December 3, 1999 (#393-99)

The Board certified a charge of unbecoming conduct against Respondent, a tenured secretary, and suspended her from her employment pending disposition of the charge. The charge involves theft of school funds. She was criminally charged and convicted. The conviction was reversed in the New Jersey Superior Court, Law Division. The C. finds that the Board has established, by a preponderance of credible evidence, its charge of unbecoming conduct and such conduct warrants Respondent's dismissal from her tenured position.
Affirmed, State Board of Education, May 3, 2000.

TENURE HEARINGS-TEACHERS
CD 7/99 ALL — In the Matter of the Tenure Hearing of Henry Allegretti, Trenton School District, Mercer County. July 7, 1999 (#216-99)

xSexual Harassment

The Board certified tenure charges of unbecoming conduct and other just cause against Respondent, a tenured teacher. It alleges that Respondent used inappropriate language of a sexual nature during his French class, made inappropriate sexual comments to certain students, and made inappropriate physical contact with a minor student. Respondent has not replied to these specific allegations. Therefore, the C. finds that Respondent's actions constitute unbecoming conduct and other just cause sufficient to warrant the penalty of dismissal from his tenured employ. The matter shall be referred to the State Board of Examiners for action as deemed appropriate against Respondent's teaching certificates.

TENURE HEARINGS-TEACHERS
CD 2/99 CER — In the Matter of the Tenure Hearing of John Cerutti, New Jersey State Department of Human Services. February 9, 1999 (#27-99)

Tenured teachers and other certificated staff employed by the Department hold employment "during good behavior and efficiency." The New Jersey Commission for the Blind and Visually Impaired is an agency within the Department. It charges that Respondent had sexual relations with his client while he was supposed to be providing instruction to her and that he falsified work records, including client itineraries, time sheets and travel vouchers. It is alleged that he threatened and intimidated the client when she became pregnant. Respondent claims that the relationship was between consenting adults and he never had falsified his work records. The C. finds that Respondent's actions constitute conduct unbecoming a teacher necessitating his removal from his tenured position. The matter shall be transmitted to the State Board of Examiners for action as deemed appropriate.

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of Sandra Connors, Camden
4/99 School District, Camden County.
CON April 8, 1999 (#107-99)

The parties have settled. The Board found no fraudulent actions on the part of Respondent. The C. does not understand why the Board did not investigate the relevant facts prior to the filing of the tenure charges. He emphasizes to this Board and all others that a failure to investigate fully alleged serious misconduct of an employee before the filing and certification of tenure charges can result, as is apparently the case herein, in a board's inability to prosecute fully the charges it certifies to the C. Such a failure carries the major consequence of needless expenditure of large amounts of taxpayer money, to say nothing of the potential impact on the personal and professional reputation of the person who has been charged with serious misconduct. The C. approves the parties' settlement and dismisses the matter.

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of Dianne Davis, State-
1/99 Operated School District of the City of Newark, Essex County.
DAV January 4, 1999 (#3-99)

xExaminations, Psychiatric

Tenure charges of unbecoming conduct and gross insubordination were certified by the District against Respondent. The charges also allege that Respondent refused to undergo a psychiatric examination. The C. approves the parties' settlement. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate. Respondent does not oppose the revocation of her instructional certificate.

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of Anita Day, Newark
12/99 School District, Essex County.
DAY December 9, 1999 (#404-99)

This matter was erroneously withdrawn on the basis of Respondent's notice to the court that she was withdrawing as a party to any further proceedings in this tenure matter. However, since the Respondent has resigned her tenured position with the District, there is no basis on which this matter can move forward. Therefore, the matter is no longer deemed to be a contested matter before the C. and is dismissed. Since Respondent resigned from her position prior to the conclusion of the tenure proceedings against her and due to the serious nature of the charges, the State Board of Examiners is notified of this matter and the file is forwarded to that body for action as it deems appropriate.

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of Robert A. Dombloski,
6/99 Belvidere School District, Warren County.
DOM June 23, 1999 (#198-99)

The Board filed tenure charges of unbecoming conduct and other just cause against Respondent, a high school business education teacher. The ALJ denied a request that the matter be consolidated with separate tenure charges previously filed against Respondent. Respondent entered a plea of guilty to one count of Criminal contempt, 4th degree. He disobeyed a restraining order of the court by making harassing phone calls and engaging in other harassing behavior against "L.S." Furthermore, "L.S.'s" daughter had to be removed from Respondent's class which had a negative educational impact upon her since there was no other accounting class to which she could have been reassigned. Respondent ascribed his conduct to psychological problems over which he had little or no control. The C. concurs with the ALJ that Respondent's behavior regarding the incidents listed in the Board's tenure charges constitutes conduct unbecoming a teaching staff member. The C. points out that dismissal may be imposed upon a tenured employee for unbecoming conduct "even if such conduct did not occur in the course of a teacher's employment." The C. notes that Respondent does not appreciate the significance of his behavior. The C. affirms the ALJ's findings that Respondent's conduct is sufficient to warrant his dismissal, "even where his behavior is viewed independently of the prior finding of unbecoming conduct, and even where his psychological condition may, as respondent alleges, have contributed to his behavior." The C. finds that "respondent's actions in this matter evidence a lack of self-restraint and controlled behavior which are compelled by his position as a professional employee in a public school system holding great influence over the lives of children." Respondent is dismissed from his tenured position as a tenured teaching staff member as of the date of this decision. The matter is referred to the State Board of Examiners for action against his certificate if deemed appropriate.

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of Robert Barnes Driscoll,
11/99 Cape May County Vocational Technical School District
DRI Board of Education, Cape May County.
Robert Barnes Driscoll, Petitioner, v.
Cape May County Vocational Technical School District
Board of Education, Cape May County.
November 10, 1999 (#351-99R)

Respondent, a tenured teacher, was suspended without pay by the Board based on his indictment by the Cape May County Grand Jury. Tenure charges were filed. The parties have settled. The C. does not approve the parties' settlement. "Having once taken up the burden of tenure charges, the Board may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges need no longer be pursued or why it is now in the public interest not to pursue them." Neither the initial decision nor the Settlement Agreement sufficiently explains to the C. how it meets the Cardonick standards. The matter is remanded to the OAL for reconsideration of and revision to the terms of the Settlement Agreement. If the parties are unwilling to agree to a settlement consistent with this decision, the matter shall proceed to plenary hearing.

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of Jimmy Dykes, State
2/99 Operated School District of the City of Newark, Essex County.
DYK February 11, 1999 (#32-99)

xInsurance Fraud

District brought tenure charges against Respondent, alleging conduct unbecoming a teacher based on his participation in a scheme to defraud the State Health Benefits Program by conspiring with Dr. Carl Lichtman. Respondent allegedly provided information used to submit fraudulent claims to the insurance carrier for payment for psychological services in return for a share of the fees collected. Respondent denies participating in the scheme. The C. concludes that the credible evidence establishes that: Respondent made a conscious decision to involve himself in what he knew or should have known was a questionable enterprise; Respondent actively pursued contact with Lichtman; and Respondent had his wife participate in the scheme. The C. orders Respondent dismissed from his tenured teaching position as of the date of this decision. The matter shall be transmitted to the State Board of Examiners for action as it deems appropriate.
On June 2, 1999, the State Board of Education dismissed the appeal for failure to perfect.

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of Salvatore Ferrugia,
5/99 Newark School District, Essex County.
FER May 3, 1999 (#134-99, May 3, 1999)

It is alleged that Respondent engaged in conduct which defrauded the District, resulting in the theft of federally received Title I monies. Respondent avers that any failure on his part to instruct was due to the assignment of other duties or cancellation of basic skills classes by the principal. However, the investigation of the charges does not support a claim of fraudulent conduct since Respondent was performing duties assigned by his building principal. The C. does not understand why the District did not engage in a full investigation of the relevant facts prior to the certification of the tenure charges. The C. approves the parties' settlement.

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of Timothy Fitzpatrick,
6/99 New Jersey Department of Human Services.
FIT June 11, 1999 (#183-99)

xCorporal Punishment

The Department filed tenure charges of unbecoming conduct against Respondent, a tenured Community Facilitation Teacher at a school for severely developmentally disabled children. He is accused of hitting a student by another staff member. Witnesses testified that the student would frequently flail his arms about in an effort to hit others. Standard procedure was to grasp and hold his wrist. The ALJ notes that the staff member who accuses Respondent is antagonistic towards him. The C. agrees with the ALJ that the record does not support a conclusion that Respondent was guilty of conduct unbecoming a teacher. The tenure charges are dismissed.

TENURE HEARINGS-TEACHERS
CD 3/99 FUG — In the Matter of the Tenure Hearing of Erlene Fugua, Orange School District, Essex County. March 3, 1999 (#53-99)

xRetirement

Tenure charges of unbecoming conduct, insubordination, inefficiency and/or other just cause were brought against Respondent, a tenured teaching staff member. The Board asserts that Respondent has been chronically absent or tardy from her teaching duties, disrupting the instructional process and resulting in a detrimental impact on the educational environment. The Board alleges that Respondent took a group of students on an unauthorized field trip during the school day, took an unapproved conference day for the trip and refused to cancel it upon direction from the superintendent. Respondent's application for Ordinary Disability Retirement was approved by the Board of Trustees of TPAF, effective September 1, 1998. This matter is dismissed due to Respondent's retirement. A copy of this decision shall be forwarded to the State Board of Examiners for action as it deems appropriate.

TENURE HEARINGS-TEACHERS
CD 3/99 GEV — In the Matter of the Tenure Hearing of Claire Geveke, Orange School District, Essex County. March 3, 1999 (#52-99)

xTimeliness

Tenure charges of unbecoming conduct, insubordination, inefficiency and/or other just cause were brought against Respondent, a tenured teaching staff member. Respondent has been consistently absent from or late to her class, adversely affecting instruction to students. It is alleged that Respondent failed to provide effective classroom instruction. She is accused of inappropriate behavior by sending recalcitrant, combative memos to her supervisors in response to evaluations and constructive criticism by her supervisors. The Board asserts that she failed to follow administrative policies and allowed students who were not registered in her class to remain in her class for entire periods. It alleges that she used inappropriate language in front of students. The C. concluded that Respondent's response had not been submitted within the 15 day period required by N.J.S.A. 18A:6-16 and deemed each count of the charges to have been admitted. The C. grants summary judgment to the Board, upholds the tenure charges and orders her dismissal from her tenured position. The matter shall be referred to the State Board of Examiners for action against her certificate as it deems appropriate.
Respondent contends that her response to the tenure charges was filed in a timely manner. She mailed it on the fifteenth day following certification of charges. On October 6, 1999, the State Board of Education finds that the language of N.J.S.A. 18A:6-16 as amended in 1998 did not provide the Respondent with clear notice that a written response to the tenure charges was required to have been received by the C. within 15 days following certification of the charges. Therefore, the State Board of Education finds that it would be inequitable to hold Respondent to the knowledge that mailing her response within 15 days after certification of the charges would not be sufficient to satisfy the statutory deadline. Accordingly, the State Board of Education **reverses** the C.'s determination and remands the matter to him for further proceedings on the merits of the charges.

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of Rogelio Hernandez,
5/99 Newark School District, Essex County.
HER May 10, 1999 (#150-99)

xAnti-Union Animus xCorporal Punishment

The District filed tenure charges of conduct unbecoming a teacher because of physical abuse of students against Respondent, a tenured teacher. Three incidents involving three students were cited. The first two incidents were found to be unsubstantiated by DYFS. DYFS substantiated the third allegation of physical abuse and placed Respondent's name into its Central Registry of child abusers. Respondent and the student were arguing and cursing at each other. The student, "A.F.," tripped and fell to the floor. While on the floor, he yelled threats at Respondent. Respondent leaned over and pressed down on "A.F.'s" neck for five seconds while "A.F." continued to scream at him. The security guard came up and took "A.F." into the office. Respondent is accused of shoving "R.R." out into the hall with such force as to cause the student to strike his head against the opposite wall of the hall. Respondent avers that the District seeks to remove him from his position because of anti-union animus. He is the teachers' union representative and has complained about the physical condition of the school. Respondent was not permitted to introduce any evidence regarding this claim. The charges against him were not based upon any protected activity in which he was engaged. Furthermore, the nature of the charges are such that, removal would be required if he were found guilty and the presence or absence of anti-union animus is irrelevant. The ALJ finds, and the C. concurs, that Respondent's employment records show that there were aspects of Respondent's dealing with student disciplinary problems that were troubling to the school administration from 1994 and that recommendations were made to him on how to improve his performance in this area. The C. finds that the District has proven, by a preponderance of credible evidence that Respondent's actions towards "A.F." and "R.R." constitute corporal punishment and conduct unbecoming a teaching staff member. The Board is ordered to dismiss Respondent as of the date of this decision. The matter is referred to the State Board of Examiners for action against his certificate, as it deems appropriate.
Affirmed, State Board of Education, October 6, 1999.

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of Thomas Jabour,
1/99 Delaware Valley Regional High School District, Hunterdon
JAB County.
January 8, 1999 (#5-99)

xJob Injuries

The District filed a tenure charge with the C. alleging that Respondent, a tenured teacher, was incapacitated from performing his duties. Respondent contends that the Board failed to comply with its obligations under N.J.S.A. 18A:30-2.1 which provides that he is entitled to receive up to one year of salary if he is absent from his employment as a result of a personal injury "caused by an accident arising out of and in the course of his employment." Respondent claims that his disability is related to a work connected injury which occurred when he witnessed an accident in class in which a student lost three fingers while using power equipment. He claims that the Board has illegally charged his absence against his accumulated sick leave. The C. determines that Respondent is incapacitated from performing his responsibilities as a teacher of industrial arts. The C. dismisses Respondent from his tenured position as of the date of this decision and refers the matter to the State Board of Examiners.

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of Cecilia James,
5/99 Newark School District, Essex County.
JAM May 24, 1999 (#159-99)

xAbsenteeism

Tenure charges alleging chronic absenteeism, incapacity and insubordination where filed against Respondent, a tenured teacher in November, 1996. Respondent was suspended without pay. Subsequent to the certification of the charges, further investigation determined that the charges were unsubstantiated. The parties have settled. The C. rejects the parties' settlement. The record does not provide the C. with the newly discovered information which prevents the District from proceeding on the charges. "To approve such a settlement without further explication as to why the charges are now unsubstantiated would be extremely difficult in light of the allegation that respondent was absent from her teaching position for approximately 302 days over a four-year period." The matter is remanded to the OAL for supplementation of the record.

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of James Johnson, Jersey
12/99 City School District, Hudson County.
JOH December 23, 1999 (#424-99)

xAbsenteeism

Tenure charges of excessive absenteeism and unbecoming conduct against a tenured crisis intervention teacher were certified to the C. The record shows that Respondent has been absent 311 days from the start of the 1993-94 school year through the end of the 1989-99 school year. Respondent was advised that this attendance was unsatisfactory. His increments were held for the 1997-98 and 1999-2000 school years. Respondent failed to report to work for the 1999-2000 school year. Respondent failed to submit a timely Answer. Therefore, the C. finds both counts of the charges deemed admitted. The C. orders Respondent dismissed from his tenured position as of the date of this order. The matter shall be referred to the State Board of Examiners.

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of Sandra Joyner,
7/99 Newark School District, Essex County.
JOY July 7, 1999 (#217-99)

xAbsenteeism

Tenure charges of chronic and excessive absenteeism, unbecoming conduct and abandonment of position were filed against Respondent, a tenured teacher, by the District. From January, 1997 to March, 1999, Respondent was absent from her duties 265 days, thereby disrupting the delivery of education and continuity of instruction to the pupils of the District. She is accused of unbecoming conduct. Respondent submitted Sick Day Donor Program Request Forms to the Division of Health Services, pursuant to which certain staff members had purported to give Respondent use of their sick days. She was credited with and received payment for these sick days. It was later determined that these forms were either altered or contained forged signatures, resulting in a theft and improper payment of public funds. Respondent stated that she would return to work on March 1, 1999, but has not done so. The Board charges that this constitutes abandonment of position. Respondent has not applied to these allegations. Therefore, the C. upholds the charges and orders Respondent's dismissal as of the date of this decision. The matter shall be referred to the State Board of Examiners for action as deemed appropriate against Respondent's teaching certificates.

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of Lucy Lester, State-
2/99 Operated School District of the City of Newark, Essex County.
LES February 25, 1999 (#48-99)

xInsurance Fraud

The District filed charges alleging conduct unbecoming a teaching staff member against Respondent. Respondent provided personal information about herself and son to Carl H. Lichtman, a psychologist. Lichtman admitted to involvement in a scheme to defraud insurance carriers, including the State Health Benefits Program by submitting false claims for psychological services purportedly rendered to insureds and/or their dependents. Lichtman submitted false claims for services rendered under Respondent's name and her son's. Respondent received checks totaling over $5,585 from Lichtman which represented 25% of the total fees collected by him from SHBP. Part of this money represented a finder's fee for other employees to whom Respondent referred Lichtman. Respondent protests that the District has not satisfied its burden of proving the charges against her by a preponderance of the believable evidence. The C. is in full accord with the ALJ that it "defies credulity to believe that a professional person who provided personal information to a person whom she had never met would simply accept substantial sums of money without questioning why she was receiving them." The C. concludes that Respondent "engaged in knowing and intentional participation in conduct with a purpose to defraud and introduced others to the fraudulent scheme." The C. determines that the charges are "sufficiently flagrant" to warrant's Respondent's dismissal from her employment. The matter shall be transmitted to the State Board of Examiners for action, if deemed appropriate, against Respondent's certificate.
Affirmed, State Board of Education, July 7, 1999.
Affirmed, Superior Court, Appellate Division, May 19, 2000.

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of David McHarris,
10/99 North Brunswick School District, Middlesex County.
MCH October 21, 1999 (#332-99L)

xCriminal Charges

The C. determines that the Board's action to approve certification of the charges prior to the expiration of the 15-day period afforded by law to the employee to respond to such charges constituted a substantial failure to comply with the procedural mandates governing the institution of tenure charges, necessitating the dismissal, without prejudice, of these charges. The C. notes that the tenure charges alleging six counts of unbecoming conduct are serious in nature. He had been arrested and charted with criminal sexual contact involving two female students and official misconduct. This determination does not serve to preclude the Board from reconsidering them following proper compliance with the applicable statutory and regulatory mandates. Since the Respondent has not been indicted nor has the Board validly certified tenure charges against him, Respondent is entitled to full salary and emoluments for the school year until such time as either of these events may occur. After the C.'s decision to dismiss the tenure charges, the Board served Respondent with a second set of charges. After giving him 15 days to respond, the Board certified those charges to the C. and once again suspended Respondent without pay. On November 18, 1999, the c. denied the Board's motion for a stay of his October 21st decision. The Board filed a motion for a stay of the C.'s decision with the State Board. On April 5, 2000, the State Board of Education reversed the C.'s determination to dismiss the August, 1999 tenure charges, but restrained the Board from completing certification of those charges pending disposition of the criminal charges filed against Respondent. Given the Respondent's assertion of his Ott rights, the State Board of Education upholds his suspension without pay as of September 7, 1999. The Board must provide the Respondent with the opportunity to respond to the tenure charges following the conclusion of the criminal proceedings. After consideration of the Respondent's response, the Board may then determine to complete certification of the charges by transmitting them to the C.

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of Michael McKenty,
1/99 Atlantic City School District, Atlantic County.
MCK January 25, 1999 (#16-99)

The C. approves the parties' settlement. However, since the charges assert inappropriate interactions with students, the C. refers a copy of this decision to the State Board of Examiners for action as it deems appropriate. The C. clarifies that no term of the settlement shall be interpreted so as to preclude the Board from cooperating in any proceeding undertaken by the State Board of Examiners.

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of Robert G. Morton, Camden
7/99 Board of Education, Camden County and
MOR Robert Morton, Petitioner, v.
Camden Board of Education, Camden County, Respondent.
July 30, 1999 (#246-99)

xDrug Abuse xSalaries

Respondent was arrested for possession of cocaine and drug related paraphernalia and driving with a suspended license. On November 4, 1996, the superintendent suspended Respondent without pay, effective November 1st, as a result of his guilty plea and pending the filing of tenure charges against him. Mr. Morton is challenging the Board's action in suspending him without pay. He asserts that his suspension should have been with pay from November 1st until December 16, 1996, when the Board voted to certify tenure charges against him. Mr. Morton further asserts that he is entitled to continuation of his full salary effective April 16, 1997 pursuant to N.J.S.A. 18A:6-8.3 and 6-14. The C. finds that the Board has proven the charges of unbecoming conduct. Respondent is ordered dismissed from his tenured position as of the date of this decision. The Board is directed to pay Respondent's salary from November 1st until December 16, 1996 when the tenure charges were certified to the C. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of Charles Motley, Newark
8/99 School District, Essex County.
MOT August 4, 1999 (#252-99)

The District brought charges of unbecoming conduct and neglect of duty against Respondent based on a series of incidents in February, 1996 and during the 1996-97 school year. The District accuses Respondent of exhibiting disrespectful behavior toward other teachers and students and failing to provide instruction to his class on numerous occasions. Respondent has been a teacher in the District for nearly twenty-six years. He actively participated in union activities as an officer of the Newark Teacher's Union and a trustee of the supplemental fringe-benefit fund. He participated in a counseling program whereby teachers would adopt a student and work with him or her after school. He has a master's degree and is certified both as an elementary teacher and a supervisor. During the 1995-96 school year, he was assigned as a Title I or basic skills teacher for the first and fourth grades at the Alexander Street School. His duties were to provide remedial instruction in reading, writing and mathematics to children identified as deficient in these areas. Title I teachers go into the regular classrooms to assist selected students. In order for this in-class model to work, the classroom teacher and the Title I teacher must coordinate their activities and agree on the objectives of the lesson. Transition to the in-class model did not go smoothly in the District because the school administration failed to provide adequate training to classroom teachers expected to implement it. Staff members at the Alexander Street School complained about Respondent's conduct and he was transferred to the 13th Avenue School where he performed similar duties for the fourth, seventh and eighth grades. Teachers at this school also complained about his conduct in their classrooms. The District suspended him without pay and instituted these charges. The ALJ finds that Respondent "exhibited his contempt for other teachers in the presence of their students." The ALJ holds that Respondent undermined the authority of the classroom teachers and "sapped the self-confidence of students who looked to him for support." The ALJ notes that Respondent was particularly rude and disrespectful to younger and less experienced teachers. The ALJ determines that "such a gross distortion of his appropriate teaching function represents unfitness to discharge his duties and responsibilities amounting to 'unbecoming conduct.'" The ALJ finds that Respondent is also guilty of neglect of duty constituting "other just cause for dismissal." "A teacher who does not teach is worse than useless, because funds used to pay his salary could be put to better use for the benefit of the children. In addition, the children in his class are deprived of educational services to which they are legally entitled." Other teachers testified in Respondent's behalf. Because of this and his many years of satisfactory service, his willingness to volunteer for extracurricular duties and his prior disciplinary record, the ALJ recommends a permanent reduction of one step on the salary guide and forfeiture of all salary and benefits during the first 120 days of his suspension. The C. concurs. However, because of Respondent's unprofessional, uncooperative and defiant conduct, he orders the increased penalty of forfeiture of an additional two months' salary and benefits. The C. is without authority to compel Respondent to attend training classes, but the District may elect to do so within the confines of Respondent's tenure and contractual rights. **Affirmed**, State Board of Education, December 1, 1999.

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of Linda Pais, State-
2/99 Operated School District of the City of Newark, Essex County.
PAI February 16, 1999 (#34-99)

xTardiness

The District seeks dismissal of Respondent based upon charges of chronic and excessive tardiness and inefficiency. Respondent requests that the charge of inefficiency be dismissed for failure to comply with procedural requirements. Her motion was granted by Order dated October 5, 1998. The charge of chronic and excessive tardiness remained. Respondent maintains that there were reasons for her tardiness, that her lateness had negligible impact on her students and that she has shown significant improvement in recent years. The C. finds that the District has carried its burden of proving that Respondent's tardiness was excessive and disruptive to its operations and educational program. The appropriate penalty is for Respondent to forfeit the 120 days' salary already withheld.

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of Cynthia Pullen,
4/99 Camden School District, Camden County.
PUL April 19, 1999 (#117-99)

The Board certified charges of abandonment of position and incapacity against Respondent, a tenured teacher. Respondent testified that her problems were due to her addiction to crack and cocaine. She has participated in an eight-month drug rehabilitation program and has remained drug free. Respondent has resigned from her position. The parties have settled. The C. rejects the parties' settlement. The Agreement provides that, upon Respondent's resignation, all of the Board's official records will reflect that she resigned "in good standing" and the Board will provide Respondent with a letter of reference. However, the C. cannot sanction the characterization of Respondent's resignation since the terms do not adequately protect the public interest. Also, the C. states that it is his duty to refer tenure determinations to the State Board of Examiners. The C. remands the matter to the OAL for revision consistent with the concerns set forth in this decision.
On September 27, 1999, the C. approved the parties' settlement.

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of Ronald Shaw, Teaneck
2/99 School District, Bergen County.
TEA February 9, 1999 (#28-99)

The District certified tenure charges of inefficiency against Respondent, a tenured teacher on October 27, 1995. Thereafter, Shaw began an extended unpaid leave of absence from the District and returned on February 2, 1998. On July 6, 1998, the Board revived the earlier tenure charges and added additional charges of inefficiency relating to his performance after his return to work. The charges allege that Shaw has failed to use positive and effective teaching techniques in his classroom; failed to properly organize, manage and control his classroom; failed to demonstrate effective lesson planning; failed to implement administrative directives; and engaged in unprofessional and insubordinate conduct. He was suspended without pay. The C. approves the parties' settlement.

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of Robert R. Thomas,
1/99 Passaic County Technical Vocational High School District,
THO Passaic County.
January 19, 1999 (#12-99)

The District brought charges against Respondent, a tenured teacher, for unbecoming conduct and conduct threatening the well-being of students. The charges are based on an incident where Respondent made racially and ethnically based insulting remarks to a fellow teacher in a lunchroom filled with students. The teacher was Rosa Astacio-Borja who filed a petition before the C. requesting that he order the Board to certify tenure charges against Respondent. In a decision dated March 30, 1998, the C. ordered the charges be certified and forwarded to the C. The C. rejects the parties' settlement since there is no indication that the Respondent was advised of the C.'s duty to refer tenure determinations for possible revocation of certificate.
The C. approves the parties' settlement, June 23, 1999. In view of the nature of the charges, the matter is referred to the State Board of Examiners for action against Respondent's certificate if deemed appropriate.

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of Mary Tyson, Newark
9/99 School District, Essex County.
TYS September 17, 1999 (#305-99)

xCorporal Punishment

The C. rejects the parties' settlement. The record contains no copies of the tenure charges which were initially certified to the C., but indicates that they were based upon allegations of physical abuse. Therefore, the C. cannot be assured that a settlement in this matter is in the public interest. The C. remands the matter to the OAL for further proceedings.
On September 23, 1999, the Asst. C. did not approve the settlement in a related matter because it was predicated upon the C.'s approval of the proposed settlement in the tenure hearing. This matter is also remanded to the OAL until such time as it is withdrawn upon the C.'s approval of a settlement in the tenure matter or for further proceedings should the settlement not be reached on that issue. (#308-99)

TENURE HEARINGS-TEACHERS

CD 12/99 WAN — In the Matter of the Tenure Hearing of Christopher Wannemacher, Manchester Regional High School District, Passaic County.
Christopher Wannemacher, Petitioner, v.
Manchester Regional High School District Board of Education, Passaic County.
December 13, 1999 (#559-99)

The Board filed tenure charges with C. against Respondent, a tenured teacher. Subsequently, he filed a petition with the C. regarding the withholding of his increment for the 1999-2000 school year. The two matters were consolidated for hearing. The C. rejects the parties' settlement as not meeting the Cardonick standards. The record does not contain a reasonably specific explanation of why the tenure charges can no longer be pursued or why it is now in the public interest to drop them. The C. cannot sanction a settlement which fails to explain why it is in the public's interest to continue to pay this teacher for almost one full year as a condition of settlement and to offer him multiple reimbursements which amount to the outlay of considerable public funds. Furthermore, the C. rejects the settlement term that the Board shall indicate that the reason for the end of his employment was "voluntary resignation." The settlement is also contingent upon this matter not being referred to the State Board of Examiners. It is the C.'s duty to refer tenure determinations for possible revocation of certificate. The matter is remanded to the OAL for revision of the settlement agreement and expansion of the record. If the parties are unable to settle consistent with the C.'s determinations, the matter may move to plenary hearing on merits.

TENURE HEARINGS-TEACHERS

CD 5/99 WIL — In the Matter of the Tenure Hearing of Kenneth Wilburn, Atlantic City School District, Atlantic County.
May 24, 1999 (#163-99)

Respondent, a tenured teacher, entered a guilty plea to two counts of misconduct in office. They were second-degree crimes which involved or touched on his position of employment with the Board within the meaning of N.J.S.A. 2C:51-2d. On January 25, 1999, Superior Court Judge Arthur V. Guerrera ordered Respondent's forfeit of his position and his disqualification from holding any office or position in any administrative or political subdivision of the State. The C. finds that it is unnecessary to proceed with a hearing on these tenure charges as they have been rendered moot by such forfeiture. Dismissed.

TENURE HEARINGS-TEACHERS

CD 10/99 WIL — In the Matter of the Tenure Hearing of Danita Wilson, Elizabeth School District, Union County.
October 16, 1999 (#328-99)

xAbsenteeism

The District certified charges of incapacity, incompetency, excessive absenteeism and unbecoming conduct due to unauthorized absence, and abandonment of position against Respondent, a tenured instructional enhancement teacher. The C. rejects the parties' settlement since he cannot be satisfied by the record that the settlement meets the Cardonick standards. There is no indication that the Respondent was advised of the C.'s duty to refer tenure determinations for possible revocation of certificate. The matter is remanded to the OAL for revision of the documents. If the parties cannot reach accord on a modified agreement for submission to the C., the matter shall proceed to a hearing on the merits.

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of Paula Yancy-Dykes,
11/99 Newark School District, Essex County.
YAN November 22, 1999 (#381-99)

Respondent has resigned her position. However, due to the serious nature of the charges which allege Respondent's participation in conduct intended to defraud the State Health Benefits Program, the State Board of Examiners is notified of this matter and the file is being forwarded to that body for action as it deems appropriate.

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of Brian Yatauro,
3/99 Lacey School District, Ocean County.
YAT March 1, 1999 (#51-99)

Until his suspension, Respondent served as band director and music instructor at the high school. The tenure charges allege an improper, sexual relationship with a student, "E.K." Respondent was acquitted of criminal charges following a jury trial. The Board also asserts that Respondent failed to comply with directives issued to him to avoid contact with students after his suspension. Respondent acknowledges that he and "E.K." are friends and that he served as her mentor. He denies that the relationship was ever romantic and/or sexual in nature. The C. finds that the Board has established its charges of unbecoming conduct against Respondent by a preponderance of credible evidence. The C. orders his dismissal from his tenured position as of the date of this decision. The issue of monies which may be due to Respondent is severed from the tenure matter and remanded to the OAL. This decision will be transmitted to the State Board of Examiners for action, as it deems appropriate, against Respondent's teaching certificate.
On October 13, 1999, the C. denied Respondent's claim for salary payment for the period of his suspension while under indictment. Respondent is entitled to salary payments, pursuant to N.J.S.A. 18A:6-14 for the period of his suspension during the pendency of tenure charges against him up to March 1, 1999, the date of the C.'s decision on the tenure matter, mitigated by substituted employment and less the 120 day suspension period without pay. The matter is remanded to the OAL for expansion of the record to resolve the exact amount of set off the Board may deduct from those monies owed for compensation Respondent received from substituted employment. (#322-99R)

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of Corey Younger,
9/99 Jersey City School District, Hudson County.
YOU September 7, 1999 (#293-99)

The District certified tenure charges of unbecoming conduct against Respondent, a tenured teacher. The C. rejects the parties' settlement. The tenure charges allege very serious instances of unbecoming conduct involving students. The matter is remanded to the OAL for further explication of how this settlement is in accord with the Cardonick standards and the concerns the C. has.

TIMELINESS
CD 12/99 BAL — John Balwierczak, Francis J. Dunne, John C. Johnson, Jr., Robert Kreig, James Lesak, Peter Martino, James Materia, Fred Melchior, Ramon Perez and Tommaso Pugliese, Petitioners, v. Berkeley Heights Board of Education, Respondent. December 8, 1999 (#407-99)

For case summary, see **SALARY PLACEMENTS**.

TIMELINESS
CD 5/99 FAL — In the Matter of the Suspension of the Teaching Certificate of Robert Falco, Ramapo Indian Hills Regional High School District, Bergen County. May 24, 1999 (#165-99)

For case summary, see **CERTIFICATION, SUSPENSION OF**.

TIMELINESS
CD 2/99 FRE — Charles Freyberger, Petitioner, v. Scotch Plains-Fanwood Board of Education, Union County, Respondent. February 27, 1999 (#40-99)

For case summary, see **INCREMENTS**.

TIMELINESS
CD 3/99 GEV — In the Matter of the Tenure Hearing of Claire Geveke, Orange School District, Essex County. March 3, 1999 (#52-99)

For case summary, see **TENURE HEARINGS-TEACHERS**.

TIMELINESS
CD 8/99 "M.N." — "M.N.," Petitioner, v. Dumont Board of Education, Bergen County, Respondent. August 13, 1999 (#267-99)

For case summary, see **PARENTS AND SCHOOLS**.

TIMELINESS
CD 12/99 MEL — Nancy Mello, Petitioner, v. State-Operated School District of the City of Jersey City, Hudson County, Respondent. December 23, 1999 (#422-99)

For case summary, see **LEAVES, SICK**.

TIMELINESS
CD 12/99 OSM — Patricia Osman, Petitioner, v. Delran Board of Education, Burlington County, Respondent. December 20, 1999 (#417-99)

For case summary, see **CONTRACT CANCELLATIONS**.

TIMELINESS
CD "P.S.," on behalf of minor child, "B.S.," Petitioner, v.
8/99 Atlantic City Board of Education, Atlantic County, Respondent.
"P.S." August 4, 1999 (#254-99)

For case summary, see **SUSPENSIONS AND EXPULSIONS.**

TRANSFERS
CD "E.A., Sr." and "D.A.," on behalf of minor child, "E.A., Jr.,"
12/99 Petitioners, v.
"E.A." Jersey City School District, Hudson County, Marie Morrissey and Richard DiPatri, Respondents.
December 23, 1999 (#423-99)

"E.A., Jr." was enrolled in the seventh grade at the James F. Murray School, School No. 38, in the District. The principal terminated his enrollment and transferred him to P.S. 15, his local neighborhood school in the District for disciplinary reasons. The principal concluded that "E.A., Jr." signed his father's name on a math test. Petitioners aver that this transfer violated their son's due process rights since he was not granted a hearing. "E.A., Jr.'s" attendance at P.S. No. 38 was under the Open Enrollment program. The District maintains that the principal has the option to rescind approval for a student to attend the program. The ALJ finds, and the C. affirms, that due process is not applicable in this matter since "E.A., Jr." is still attending a district school. The Respondents did not act in an arbitrary, capricious or unreasonable matter regarding his transfer. Petition dismissed.
Affirmed, State Board of Education, April 5, 2000.

TRANSPORTATION OF STUDENTS
CD "A.J.G." on behalf of minor child, "M.G.," Petitioner, v.
12/99 Greater Egg Harbor Regional High School District Board of
"A.J.G." Education, Atlantic County, Respondent.
December 27, 1999 (#431-99 E)

xCharter Schools

The C. grants emergent relief and orders the Board to provide continued transportation of "M.G." to the charter school until the case has been decided.

TRANSPORTATION OF STUDENTS
CD "M.J.K.D." and "A.W.D.," on behalf of minor child, "A.K.D.,"
9/99 Piscataway Board of Education, Middlesex County, Respondent.
M.J.K.D. September 29, 1999 (#312-99)

For case summary, see **NONPUBLIC SCHOOLS**.

TRANSPORTATION OF STUDENTS
CD "S.V." and "B.V.," Petitioners, v.
11/99 Lincoln Park Board of Education, Morris County, Respondent.
"S.V." "R.P." and "J.P.," Petitioners, v.
Lincoln Park Board of Education, Morris County, Respondent.
November 29, 1999 (#386-99)
Petitioners' children spend part of the school day at a private school and part at the county vocational school. They ask that the Board pay transportation costs to their county vocational school. The C. finds that under N.J.S.A. 18A:54-20.1 and 39-1, the Board is responsible for transmitting the children to the county vocational school.

TUITION
CD Gloucester County Institute of Technology Board of Education,
12/99 Gloucester County, Petitioner, v.
GLO Lenape Regional High School District Board of Education,
Burlington County, Respondent.
December 16, 1999 (#416-99)

Petitioner Board asserts that Lenape is obligated to pay for its students in attendance at the Institute's Southern New Jersey Academy of Performing Arts. The C. orders Lenape to remit the tuition owed the Institute for attendance of its students at the Academy from the 1997-8 school year and thereafter. The Gloucester County Superintendent of Schools is directed to review the Institute's student acceptance practices.

TUITION
CD "J.S." and "L.S.," on behalf of minor child, "A.S.,"
9/99 Petitioners, v.
"J.S." Mountain Lakes Board of Education, Morris County,
Respondent.
September 3, 1999 (#291-99)

Petitioner seeks a C.'s order compelling the Board to admit their daughter as a non-resident tuition student. The C. finds that the Board had the right to change its policy regarding nonresident students so that it no longer accepts tuition students at the elementary level. Petition dismissed.
Affirmed, State Board of Education, January 5, 2000.

TUITION
CD Passaic County Elks Cerebral Palsy Treatment Center Board of
7/99 Trustees, Petitioner, v.
PAS New Jersey State Department of Education, Division of Finance,
Respondent.
July 6, 1999 (#214-99)

Petitioner operates a private school which provides education and related services to handicapped pupils sent from various public school districts. Petitioner leases the primary school premises from the Passaic County Elks Crippled Children's Committee, Inc. and the high school program from another party. The Petitioner appeals the audit decision from the Division of Finance which found that the lease agreement between it and the Committee are between related parties and are not "arms length transactions". The Department concluded that the rental costs that Petitioner paid to the Committee was improperly included as an allowable cost in the school's tuition rate. The ALJ finds, and the C. concurs, that Petitioner and the Committee are related parties. Notwithstanding both corporations efforts to divest themselves of common control, the fact remains that they are both divisions of the Elks. Members in both corporations must be Elks and are drawn from the membership of six lodges. Petition dismissed.
Affirmed, State Board of Education, December 1, 1999.

TUITION
CD Somerset County Educational Services Commission, Petitioner, v.
9/99 North Plainfield Board of Education, Somerset County, Respondent.
SOM September 7, 1999 (#296-99)

The Commission alleges that the Board failed to pay tuition payments for educational services for "L.G.," a child under the age of 16 residing in the Board's district. These services were provided after "L.G." was enrolled in the Commission's Alternative to Incarceration Program pursuant to the order of Family Court. The Board asserts that its action to expel "L.G." terminated any obligation to provide him educational services or to pay his tuition. The C. holds that a board is still responsible for educational services to a student after expulsion when a court of appropriate jurisdiction has ordered the student's school placement or there exists a statutory or regulatory provision mandating such an obligation. The C. orders the Board to pay the Commission tuition.

TUITION
CD Spotswood Board of Education, Middlesex County, Petitioner, v.
6/99 Milltown Board of Education, Middlesex County, Respondent.
SPO June 7, 1999 (#179-99)

Petitioner Board alleges that Respondent Board failed to make tuition payments in accordance with their sending-receiving relationship. The ALJ notes that the terms of the contract are dictated by law and the provisions are on a form prepared by the C. and required to be used by the parties. Petitioner Board seeks only to be compensated for the services it provided in an amount equal to its actual per pupil costs. Respondent has suffered no prejudice from the omission of the building use charge in the estimated calculation as it had the time value of the additional monies. The C. affirms.

UNFAIR LABOR PRACTICES
CD In the Matter of the Tenure Hearing of Barbara Dirk,
10/99 Manchester Regional High School District, Passaic County.
DIR Manchester Regional High School District, Passaic County,
Respondent and
Manchester Regional High School District Educational
Secretaries Association, Charging Party.
Commissioner's Decision #336-99
PERC Dkt. No. CO-H-99-325
October 25, 1999

For case summary, see **TENURE HEARINGS-SECRETARIES AND CLERKS.**

VOCATIONAL EDUCATION
CD "D.F.," on behalf of minor child, "E.F.," Petitioner, v.
7/99 Roselle Park Board of Education, Union County, Respondent.
"D.F." Union County Vocational-Technical Schools Board of Education, Union County, Intervenor,
"J.S." and "E.S.," on behalf of minor child, "C.S.;" and
"K.K." and "E.K.," on behalf of minor child, "C.K.;" and
"J.N." and "M.N.," on behalf of minor child, "C.N.;" and
"A.C." and "J.C.," on behalf of minor child, "A.C.,"
Intervenors.
July 9, 1999 (#220-99)

Respondent Board asserts that it offers a comparable program to that of the magnet high school. The C. finds that there is no evidence that such a program has been approved. Respondent is ordered to pay the tuition and transportation costs for "E.F." and the minor children of Intervenors for the periods of their attendance at the magnet school.

VOCATIONAL EDUCATION
CD Jack Jacobs, Petitioner, v.
6/99 Northern Valley Regional School District Board of Education,
JAC Bergen County, Respondent.
June 24, 1999 (#201-99)

For case summary, see **HOME SCHOOLING**.

WAIVERS
SBD Guttenberg Education Association and Zenaida Franqui,
3/99 Appellants, v.
GUT Leo F. Kagholz, Commissioner of Education, Respondent, and
Guttenberg Board of Education, Hudson County, Respondent.
March 3, 1999

For case summary, see **SUBSTITUTE STAFF**.

WAIVERS
CD Betsy Rieder, Petitioner, v.
3/99 Caldwell-West Caldwell Board of Education, Essex County,
RIE Respondent.
March 10, 1999 (#70-99)

For case summary, see **REDUCTION IN FORCE.**

WORK YEAR
CD Carol Riegel, Petitioner, v.
2/99 Berkeley Heights Board of Education, Union County, Respondent.
RIE February 22, 1999 (#42-99)

xJurisdiction-C. xSalaries
xSchool District Reorganization

Petitioner was employed by the Union County Regional High School District as a full-time school psychologist. Berkeley Heights was a constituent district of the Union County Regional District. The Regional District was dissolved in 1997. As a result of the dissolution, Petitioner was transferred to the employ of Respondent District. For the 1996-97 school year, Petitioner was paid an annual salary of $75,825 and worked 185 days, the same number of days as the regular teaching staff members. Her salary included a $2,000 stipend as compensation for working a longer school day than the teachers. For the 1997-98 school year as a member of Respondent's staff, Petitioner was paid an annual salary of $76,321 and was required to work 189 days, six days longer than the regular teaching staff members. Petitioner seeks re-establishment of her school year to the 1996-97 level and/or the restoration of her 1997-98 salary to at least the same per diem rate she received during the same school year. Petitioner avers that the Board is statutorily prohibited from reducing her rate of compensation without instituting proceedings under the Tenure Act. The Respondent asserts that Petitioner is paid the salary lawfully negotiated with the Berkeley Heights Education Association. It contends that the C. does not have jurisdiction over this matter. The C. has jurisdiction since, given the factual circumstances of this matter, a violation of the Tenure Act occurred. While Petitioner's annual salary and monthly salary were not reduced, the C. finds that Petitioner's salary was reduced because the per diem rate was less than she had earned the previous school year as an employee of the Regional District. The ALJ determines, and the C. affirms, that the appropriate remedy is restoration of the per diem rate to $409.86 and retroactive reimbursement of the difference between the two rates.

WORKERS' COMPENSATION
CD Patsy N. Marino, Jr., Petitioner, v.
4/99 Willingboro Board of Education, Burlington County, Respondent.
MAR April 13, 1999 (#111-99)

xJurisdiction-Commissioner of Education

Petitioner has a petition for benefits under N.J.S.A. 18A:30-2.1 before the C. which was held in abeyance pending his pursuit of remedies under the Workers' Compensation Act. Petitioner has settled the Workers' Compensation matter. The Board argues that Petitioner has thus waived his right to any claim for benefits under N.J.S.A. 18A:30-2.1. The Assistant C. finds and determines that the circumstances here establish that, although it is conceded that Petitioner's accident occurred in the course of his employment, his entitlement to relief under N.J.S.A. 18A:30-2.1 is dependent upon resolution of the contested issue as to whether such accident was the cause of his injury. The Division of Workers' Compensation, not the C., is the forum with the expertise to decide this issue. The Petitioner cannot be allowed to come before the C. seeking to find a jurisdiction which provides him a more favorable outcome. Petition dismissed.
On March 1, 2000, the State Board of Education **reversed** the Asst. C.'s decision to dismiss the Petition and remanded the matter to the C. for further proceedings. The Petitioner expressly reserved the claim to sick leave benefits under N.J.S.A. 18A:30-2.1.

WORKERS' COMPENSATION
CD Betty Shereshewsky, Petitioner, v.
9/99 Woodbridge Board of Education, Middlesex County, Respondent.
SHE September 7, 1999 (#295-99)

For case summary, see **SALARIES**.

WORKERS' COMPENSATION
CD In the Matter of Richard Tullo, Pinelands Regional School
4/99 District Board of Education, Ocean County.
TUL April 26, 1999 (#127-99)

For case summary, see **BOARD MEMBERS**.

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ABSENTEEISM
CD David Michael Buckley, Petitioner, v.
8/2000 Ewing Board of Education, Mercer County, Respondent.
BUC August 18, 2000 (#268-00)

For case summary, see **GRADUATION**.

ABSENTEEISM
CD In the Matter of the Tenure Hearing of Grace Folger,
5/2000 Orange School District, Essex County.
FOL May 15, 2000 (#147-2000)

For case summary, see **TENURE HEARINGS-TEACHERS**.

ABSENTEEISM
CD In the Matter of the Tenure Hearing of James Johnson,
5/2000 State-Operated School District of the City of Jersey
JOH City, Hudson County.
May 19, 2000 (#158-00)

For case summary, see **TENURE HEARINGS-TEACHERS**.

ABSENTEEISM
CD Paul Medeiros, Petitioner, v.
1/2000 Jersey City School District, Hudson County, Respondent.
MED January 24, 2000 (#42-00)

xBonuses xJob Injuries

Petitioner protests the withholding of his bonus for perfect attendance. Petitioner was injured while conducting a class and was absent the next day. He asserts that this absence was a work related injury and should not prevent him from receiving the bonus for perfect attendance for the September 1995 to January 1996 semester. The ALJ concludes that work related injuries are not considered excused absences in the perfect attendance policy. The C. affirms this finding. Petitioner was charged with assaulting a student during gym class on November 8, 1996. He was reassigned away from the classroom until November 20, 1996. He became ill on November 21, 1996 and has not returned to work. He exhausted his accumulated sick leave as of January 15, 1997. He asserts that his accumulated sick leave was wrongfully applied and depleted because his absences were work related. The C. notes that there is no record that Petitioner has sought or received a determination from the Division of Workers' Compensation that his absences beginning on November 21, 1996 were the result of a work-related injury. Therefore, he has not sustained his burden of proof that such absences were improperly charged to his sick leave bank. Petition dismissed.

ABSENTEEISM
CD In the Matter of the Tenure Hearing of Celese Segall,
4/2000 Elizabeth School District, Union County.
SEG April 17, 2000 (#128-00)

For case summary, see **TENURE HEARINGS-TEACHERS**.

ALCOHOL ABUSE
CD In the Matter of the Tenure Hearing of Randall Dunham,
4/2000 Point Pleasant Borough School District, Ocean County.
DUN April 17, 2000 (#124-00)

For case summary, see **TENURE HEARINGS-TEACHERS**.

ALTERNATIVE ROUTE PROGRAM
CD Linda J. Avellino, Petitioner, v.
10/2000 New Jersey State Board of Examiners, Respondent.
AVE October 2, 2000 (#332-00)

Petitioner holds a B.A. degree and a Master of Science in Education degree issued by St. John's University. She applied to the Department for Alternate Route certification through the Provisional Teacher Program. The State Board of Examiners issued Petitioner certificates of eligibility for provisional certification as an elementary school teacher, teacher of psychology and substance awareness coordinator. Petitioner is running an After-School Enrichment Program. The ALJ finds, and the C. affirms, that this program does not constitute substantial compliance with the intensive teacher training program contemplated by the regulations. Therefore, Petitioner has failed to prove that she is entitled to the certificates/endorsements which she seeks. Petitioner may still complete an approved provisional teacher program. Petition dismissed.

ATHLETIC POSITIONS
CD Steven Cohen, Petitioner, v.
3/2000 Jackson Board of Education, Ocean County, Respondent.
COH March 6, 2000 (#79-00)

Petitioner protests the non-renewal of his contract as head soccer coach for the 1999-2000 school year. His evaluation as soccer coach was not completely positive and several points were raised during the formulation of his PIP. The Director of Athletics, Director of Personnel, the high school principal and the superintendent decided that a new soccer coach was needed. Petitioner was advised of the decision and offered an opportunity to appear before the Board. The Board decided not to renew Petitioner's coaching contract. Petitioner avers that the decision was made because of trivial parental complaints. Petitioner asserts that while coaching positions do not accrue tenure, a coach may not be removed for arbitrary or capricious reasons. The ALJ agrees. However, he holds that the Board accepted the recommendation of its administrators who had sufficient information from which to conclude that the soccer program needed a new coach. The C. affirms and dismisses the Petition.
See also the arbitration award, PERC Docket No. AR-99-650, decided November 22, 2000.

ATHLETIC POSITIONS
CD Barry Staton, Petitioner, v.
7/2000 Cape-Atlantic League and New Jersey State Interscholastic
STA Athletic Association, Respondents.
July 10, 2000 (#223-00)

Petitioner is a track and field coach at the Pleasantville High School. He seeks a reversal of the decision by the NJSIAA that Petitioner violated the CAL Constitution and NJSIAA rules by terminating a track meet prematurely. It imposed a penalty of suspension for the 1999-2000 spring track season. The C. upholds the suspension.

ATHLETIC PROGRAMS
CD In the Matter of the Divisional Realignment by the Northern
6/2000 New Jersey Interscholastic League.
NOR June 23, 2000 (#209-00)

Petitioners are six parochial schools of the Northern New Jersey Interscholastic League. They seek a reversal of the decision by the New Jersey State Interscholastic Athletic Association regarding a divisional realignment by the NJIL which established two public school divisions and one nonpublic school division. The C. finds that due process was granted Petitioners. He finds no basis under the appropriate standard of review on which to overturn the NJSIAA's decision. Dismissed.

ATHLETIC PROGRAMS
CD Wildwood Board of Education, Cape May County, Petitioner, v.
7/2000 Cape-Atlantic League and the New Jersey State Interscholastic
WIL Athletic Association, Respondents.
July 28, 2000 (#245-00)

The NJSIAA affirmed the determination of the Cape-Atlantic League to deny Petitioner permission to implement an independent football schedule or to leave CAL immediately, rather than comply with the two-year waiting period. Petitioner avers that the Respondents have placed the health and safety of its students at risk by forcing it to play football against much larger schools. The C. "may not substitute his judgment for that of the NJSIAA, even if he believed an erroneous conclusion had been reached by the NJSIAA, because the record establishes that respondents did not take willful or unreasonable action, without consideration and in disregard to the circumstances." Wildwood has improved its football program after four years of independent scheduling and had a winning 1999 season so a return to the CAL was reasonable. Petition dismissed.

BIDS
CD H.A. DeHart and Son, Petitioner, v.
10/2000 Salem County Special Services School District Board of
DEH Education, Wolfington Body Company and Sheppard Bus Service,
Inc., Respondents.
October 20, 2000 (#347-00)

The C. restrains the District from taking any further action pursuant to any award of the bid for school buses until there can be a plenary hearing. This hearing will resolve the issues as to the award of the contract to Wolfington Body Company. The matter is remanded to the OAL.

BIDS
CD Douglas E. Wicks, Petitioner, v.
11/2000 Bernards Township Board of Education, Somerset County,
WIC Respondent.
(#383-00, November 20, 2000)

Petitioner, a resident of the Township, charges that the Board's specifications for roof replacements and related work on its school buildings "prohibited free, open and full market competition among potential bidders." The C. finds that the Petitioner has not proven by a preponderance of competent, credible evidence that the board's specifications inhibited competitive bidding, that the Board improperly advertised for bids without specifications, or that the board violated law or regulation with "not to scale" drawings in its specifications. Petition dismissed. However, based upon the nature of Petitioner's allegations, a copy of this decision shall be forwarded to the Office of Compliance Investigation for review and any action as that office may deem necessary.

BOARD MEMBERS

CD 5/2000 BER — Berlin Board of Education, Clementon Board of Education, Lindenwold Board of Education, Pine Hill Board of Education, Winslow Board of Education, and Michael Edwards, President of the Berlin Township Board of Education, Camden County, Petitioners, v.
Ralph Condo in his capacity as a member of the Lower Camden County Regional High School District No. 1 Board of Education and a member of the Waterford Board of Education, Camden County, Respondent.
May 1, 2000 (#139-00)

The Boards seek to remove Respondent from his position as member of the Lower Camden County Regional High School District No. 1 Board of Education. The C. approves the parties' settlement.

BOARD MEMBERS

CD 12/2000 COH — Martin Cohen, Petitioner, v.
James R. Durr, Member, Chesterfield Board of Education, Burlington County, Respondent.
December 28, 2000 (#418-00)

xResidency

Petitioner asserts that Mr. Durr is not a resident of the District. The sole basis of this claim is that Respondent listed an out-of-district address on his divorce papers. "In that the ALJ rendered neither sufficient factual findings nor credibility assessments to permit the C. to fairly resolve whether petitioner has met his burden, the C. is compelled to remand this matter for a complete recitation of testimony and findings of fact."

BOARD MEMBERS

CD 1/2000 CRY — Robert Crystal, Petitioner, v.
Barnegat Board of Education, Ocean county, Respondent.
January 18, 2000 (#29-00)

Petitioner appeals the Board's action to censure him for the alleged violation of the Board's Policy #090. This policy provides that "no Board member will act to notify or release information concerning the business of the Board until and unless they have informed every other Board member no less than five days before such dissemination." Petitioner asserts that this action was arbitrary, capricious or unreasonable; denied him his right to due process; violated Board rules and procedures; and violated Petitioner's right to free speech. The Board convened into closed session to discuss potential ethics complaints against Petitioner regarding unauthorized use of school district telephones and undue influence in the hiring of a school district employee. After the closed session meeting, the Petitioner was interviewed by a newspaper reporter. Subsequently, the Board censured Petitioner for discussing closed session issues with the press. The ALJ finds, and the C. affirms, that Petitioner's First Amendment rights were not violated nor was the Board's action to censure Petitioner arbitrary, capricious or unreasonable.

BOARD MEMBERS
CD Susan Settle, Petitioner, v.
4/2000 Pennsville Board of Education and Robert Peddle, Superintendent,
SET Salem County, Respondents.
April 3, 2000

xEthics xGrievance Procedures

The Pennsville Educational Association filed a grievance against Petitioner, a school board member, alleging ethical violations. The Assistant C. grants emergent relief, temporarily enjoining the Board from taking further action in consideration of the grievance filed against Petitioner. The matter shall proceed to the OAL for a review of the merits of the matter.

BONUSES
CD Paul Medeiros, Petitioner, v.
1/2000 Jersey City School District, Hudson County, Respondent.
MED January 24, 2000 (#42-00)

For case summary, see **ABSENTEEISM**.

BUDGETS
CD Fairfield Board of Education, Cumberland County, Petitioner, v.
2/2000 Robert Ench and Sanderina R. Kasper, Executrix of the Estate of
FAI Benjamin Kasper, Partners Trading as Bench Realty, Frederick A. Jacob, and old Republic National Insurance Company, Respondents.
February 17, 2000 (#64-00)

The C. finds that the Board had been obligated to submit to its voters a budget which included a line item accounting for purchase of the Buckshutem Road track. The C. finds that the Board acted outside its scope of authority in effectuating the purchase of the land without such voter approval. The matter is remanded to the OAL for further proceedings on the question of whether the transaction should be voided as the result of the C.'s findings.
On August 2, 2000, the State Board of Education remanded the matter to the C.

BUTTONS
SC-A Green Township Education Association , Plaintiff-Appellant, v.
2/00 Stephen P. Rowe, David Brady, Ronald Parks, Mark Graham, Melinda
GRE McCoy Miller, John McDermott, Doreen Schaffer, Denise Sheehan, Amy Stewart, Ken Swisher and Green Township Board of Education.
Superior Court, Appellate Division
February 28, 2000 (328 N.J. Super. 525)

For case summary, see **FREEDOM OF SPEECH**.

CERTIFICATION
SBD In the Matter of the Denial of Standard Certification to Linda
5/2000 J. Avellino.
AVE May 5, 2000

The State Board of Examiners denied Avellino's request for certification as Teacher of Elementary School, Teacher of Psychology, Student Personnel Services and Substance Awareness Coordinator. The major issue is whether the training program in which Avellino was employed by the Spotswood District during the 1995-96 school year confirmed to the requirements of the regulations governing provisional teachers. The matter is transferred to the C. The State Board of Examiners is directed to revise its decision letters to insure that individuals who are denied the issuance of certification are notified that such decisions may be appealed to the C.

CERTIFICATION
CD Patricia Desmond, Petitioner, v.
2/2000 Asbury Park Board of Education, Monmouth County, Respondent.
DES February 3, 2000 (#48-2000)

For case summary, see **CONTRACT CANCELLATIONS**.

CERTIFICATION
CD Joyce Holloway, Petitioner, v.
7/2000 Saddle River Board of Education, Bergen County, Respondent.
HOL July 27, 2000 (#242-00)

For case summary, see **REDUCTION IN WORK HOURS**.

CERTIFICATION
SBD In the Matter of the waiver granted to the Middletown
5/2000 Township Board of Education, Monmouth County.
MID May 3, 2000

For case summary, see **SUBSTITUTE STAFF**.

CERTIFICATION
CD Neptune Township Education Association, Petitioner, v.
5/2000 Neptune Township Board of Education, Respondent.
NEP May 22, 2000 (#164-00)

For case summary, see **SUBCONTRACTING**.

CERTIFICATION
CD Woodbine Education Association and Paula Harris, Petitioners, v.
8/2000 Woodbine Board of Education, Cape May County, Respondent.
WOO August 18, 2000 (#274-00)

For case summary, see **REDUCTION IN FORCE.**

CERTIFICATION, REVOCATION OF
SBD 2/2000 CRA — In the Matter of the Revocation of the Teaching Certificate of Robert Crawford by the State Board of Examiners. February 2, 2000

The State Board of Examiners revoked the standard certification to serve as a teacher of psychology which it had issued to Respondent. The State Board of Education directs the State Board of Examiners to transmit the case to the OAL for such proceedings as are necessary to correct the record.

CERTIFICATION, REVOCATION OF
SBD 12/2000 "M.S." — In the Matter of the Revocation of the Teaching Certificate of "M.S." by the State Board of Examiners. December 6, 2000

On June 15, 2000, the State Board of Examiners revoked Respondent's teaching certificates for unbecoming conduct. The State Board of Examiners adopted the conclusions of the ALJ that the charge of improper sexual conduct had been proven by a preponderance of the credible evidence and that the Respondent's conduct was so egregious as to warrant revocation of her certificates. The State Board of Education affirms this decision.

CERTIFICATION, SUSPENSION OF
CD 6/2000 MCF — In the Matter of the Suspension of the Teaching Certificate of Rosalind McFadden, Cherry Hill School District, Camden County. June 19, 2000 (#195-00)

Respondent gave thirty days notice in resigning from her teaching position on December 15, 1999. She stated that she would use her sick days and personal days during this time. "The C. agrees with the Board that in resigning abruptly, respondent put her own self-interest above the interests of her students and her professional obligation to provide adequate notice to the Board." Respondent is guilty of unprofessional conduct. The C. suspends her teaching certificate for a period of one year as of the date of this decision. The matter is forwarded to the State Board of Examiners for the purpose of effectuating this decision and taking such further action, if any, as it deems appropriate.

CHARTER SCHOOLS
SBD 4/2000 CHA — In the Matter of the Denial of a Charter School Application. April 5, 2000

Cheryl Dowdell filed a notice of appeal to the State Board of Education from a determination of the C. rejecting an application for a charter school. The State Board of Education dismisses the appeal for failure to perfect.

CHARTER SCHOOLS
SC-NJ In the Matter of the Grant of the Charter School Application
6/2000 of:
ENG Englewood on the Palisades Charter School
Classical Academy Charter School of Clifton, Passaic County
Franklin Charter School, Somerset County
Greater Brunswick Charter School, Middlesex County
New Jersey Supreme Court
June 28, 2000

These two consolidated cases determined that the Charter School Program Act of 1995 is not unconstitutional as applied to these charter schools. "The Commissioner of Education must assess the racial impact of a charter school's approval on the school district where the charter school is located and also must consider the financial impact if a district makes a preliminary showing that its ability to provide a thorough and efficient education is at risk."

CHARTER SCHOOLS
SBD In the Matter of the Denial of the Charter School Application
8/2000 of the Ibrahim Charter School, Passaic County.
IBR August 2, 2000

The State Board of Education affirms the decision of the Assistant Commissioner of Education.

CHARTER SCHOOLS
SBD In the Matter of the Denial of the Charter School Application
7/2000 of the Liberty Academy Charter School, Somerset County.
LIB July 5, 2000

The State Board of Education dismisses the appeal for failure to perfect.

CHARTER SCHOOLS
SBD In the Matter of the Denial of a Charter School Application
12/2000 of Newark Prep, the Charter School for Health Sciences and
NEW Technology, Essex County.
December 6, 2000

By letter dated September 1, 2000, the Acting C. notified the proposed charter school that it was denied final approval to operate for failure to secure an appropriate facility. This appeal ensued. The State Board of Education dismisses the matter for failure to perfect.

CHARTER SCHOOLS

SBD 5/2000 PLE — Pleasantech Academy Charter School Education Association, Petitioner-Appellant, v. Pleasantech Academy Charter School Board of Trustees and David Hespe, Commissioner of Education, Respondents-Respondents.
May 3, 2000

The Association asserts that the teachers employed by the charter school were not being compensated in conformity with the terms of the school's charter. The Director of the Office of School Choice advised counsel for the Petitioner that the charter school was addressing accounting deficiencies and that its teachers were being compensated in accordance with the terms of their individual contracts. The Petitioner filed this appeal to the State Board of Education. The State Board of Education remands the matter to the C. for a final decision with respect to the Petitioner's complaint as there has not been a decision rendered by the C. on this matter.

CHILD STUDY TEAMS

SBD 5/2000 MIL — Arlene Miller, v. Leo F. Klagholz, Commissioner, New Jersey Department of Education Committee, Respondent, and New Hanover Board of Education, Burlington County, Respondent.
May 3, 2000

For case summary, see **SUBCONTRACTING**.

COMPUTERS

CD 6/2000 GRU — In the Matter of the Tenure Hearing of Robert I. Grundfest, Madison School District, Morris County.
June 20, 2000 (#197-00)

For case summary, see **TENURE HEARINGS-TEACHERS**.

COMPUTERS

CD 9/2000 "M.D." — "M.D." and "E.D.," on behalf of minor child, "J.D.," Petitioners, v. Buena Regional School District Board of Education, Atlantic County, Respondent.
September 1, 2000 (#282-00E)

"J.D." was a 9th grade student at the Buena Regional High School during the 1999-2000 school year. In April, 2000, "J.D." and three other students constructed a web site on the Internet in which they published threatening, profane and derogatory material concerning a high school mathematics teacher. "J.D." was suspended for the rest of the school year and barred from sports and extracurricular activities for the 2000-2001 school year. He was also required to sign an agreement governing his behavior before being readmitted. The C. denies emergent relief since Petitioners have not satisfied the requirements necessary for granting it. The matter is returned to the OAL for further proceedings as may be necessary.

CONTRACT CANCELLATIONS
CD Lydia Anderson, Petitioner, v.
1/2000 Newark School District, Essex County, Respondent.
AND January 19, 2000 (#34-2000)

xDivision of Youth and Family Services

Petitioner asserts that the Board improperly canceled her employment as a teacher in violation of the tenure statutes and without due process. The Board asserts that Petitioner directed two students to stand in class and engage in a tug-of-war with "D.M." when the student attempted to sit. It also alleges that Petitioner permitted an uncle of a female student to beat the student in her presence. The Board states that Petitioner engaged in inappropriate and unprofessional conduct by not reporting the incident as required. Petitioner was suspended after this incident and her employment subsequently terminated. The ALJ points out that Petitioner was a non-tenured teacher. As such, she was only entitled to a statement of reasons for her dismissal. "No statute or regulation exists requiring the District to provide petitioner with a hearing. Inasmuch as the District's determination to terminate petitioner was reasonable and not arbitrary or capricious, petitioner's appeal should be dismissed." The C. affirms and dismisses the Petition. A copy of this decision shall be forwarded to State Board of Examiners for review and appropriate action.
Affirmed, State Board of Education, February 7, 2001.

CONTRACT CANCELLATIONS
CD Patricia Desmond, Petitioner, v.
2/2000 Asbury Park Board of Education, Monmouth County, Respondent.
DES February 3, 2000 (#48-2000)

xCertification xTenure Claims

Petitioner has a supervisor of instruction certificate, but not a principal's certificate. She has served as a vice-principal in the District's schools since 1993. The posting for her initial position required an administrator or supervisor certificate. The C. finds that "petitioner made a knowing and material representation of the facts when she listed her certificates held as "Supervisor of Instruction/Principal, K-12," and "Supervisor/Principal" on her resume and employment application. . . .Although the District failed to fulfill its obligation to verify petitioner's certificates, the District's negligence cannot excuse petitioner's actions." Therefore, Petitioner's employment ceased when the County Office advised the District that Petitioner did not hold a principal certificate. "Because petitioner's contract was void *ab initio*, tenure rights never attached." The employment relationship between Petitioner and the District is dissolved effective April 27, 1998, the date on which the Board was notified by the County Office that Petitioner did not have the appropriate certification.

CONTRACT RENEWALS
CD Eligio Castro, Petitioner, v.
3/2000 Atlantic City Board of Education, Atlantic County, Respondent.
CAS March 15, 2000 (#92-00)

xDiscriminatory Practices xEvaluations

[On February 2, 2000, the C. declined Petitioner's request for declaratory judgment in this matter. The State Board of Education finds that this request has been rendered moot because of the following C.'s decision, June 7, 2000.]

Petitioner is a Spanish teacher at the high school. He contests the nonrenewal of his teaching contract for the 1998-99 school year. He alleges that he was discriminated against because he was a cancer patient. He has since abandoned this claim because the matter has been filed in the federal district court. Petitioner now asserts that the Board failed to provide him with the three classroom evaluations for the 1998-99 school year as required by N.J.A.C. 6:3-4.1. The Board stated that three classroom observations were conducted. Petitioner persuaded his supervisor to disregard the observation conducted on November 16, 1998 because he had just learned he had cancer. He required a new evaluation in a few days. However, Petitioner never returned to school. He remained on sick leave until the first of the year and was placed on administrative leave. Petitioner failed to appear for his hearings before the superintendent and the Board. His attorney requested adjournments. The C. finds that the Board evaluated Petitioner in conformity with the applicable law. It is a well-established legal principle that a district board has "virtually unlimited discretion in hiring or renewing nontenured teachers." Therefore, the C. finds that the Board acted within its lawful discretion in not renewing Petitioner's employment in the District.

On October 4, 2000, the State Board of Education dismissed the appeal for failure to file notice within the statutory time limit.

CONTRACT RENEWALS
CD John Cox, Petitioner, v.
3/2000 Hamilton Township Board of Education, Mercer County, Respondent.
COX March 27, 2000 (#100-99)

xSexual Harassment

Petitioner alleges that the Board's decision not to renew his teaching contract was arbitrary, capricious and unreasonable. The Board asserts that Petitioner violated the sexual harassment policy when he did not report information he received concerning sexual harassment of a student by another teacher. Petitioner was the personal friend of a teacher who allegedly had affairs with students. The C. dismisses the Petition as Petitioner fails to meet the limited standard entitling nontenured, nonrenewed teachers to relief.

CONTRACT RENEWALS
CD Richard Cromwell, Petitioner, v.
1/2000 River Vale Board of Education, Bergen County, Respondent.
CRO January 6, 2000 (#4-00)

xCustodial and Maintenance Staff

Respondent avers that he is a tenured custodial employee and protests the nonrenewal of his contract. The Board maintains that he was appointed for a fixed term of employment. Petitioner was appointed to a series of one-year contracts from 1984-1995. From 1995-96 through 1997-98, the parties did not execute any contracts, but signed memoranda stating the Petitioner's salary for the next school year. After examining Board minutes, the ALJ determines that the Board passed resolutions renewing Petitioner's employment for successive fixed terms. The C. concurs and dismisses the Petition.

Affirmed, State Board of Education, June 7, 2000.

CONTRACT RENEWALS
CD Toni Healy, Petitioner, v.
6/2000 Hamilton Township Board of Education, Mercer County, Respondent.
HEA June 26, 2000 (#207-00)

Petitioner was employed from September 1, 1996 to June 30, 1997 as a special education teacher. Her contract was not renewed for the 1997-98 school year because her supervisors "were not satisfied with the behavior management system you utilized for students." The Petitioner appealed the decision to the Board which voted in September, 1997 to continue Petitioner's employment. By then there were no vacant full-time positions in the District for which Petitioner held a valid certificate. In November, Petitioner was assigned as a long-term substitute for a special education teacher on maternity leave. Petitioner was under the assumption that she would receive a permanent full-time position when it became available. However, when Petitioner's employment as a long-term substitute ended, the superintendent did not reassign her to any position for the remainder of the contract year because of his concerns relating to her performance. Had Petitioner continued to work until June 30, 1998, she would have received $8,991.75 additional salary. The ALJ finds that the appeal was timely filed. The ALJ finds that the Board was obligated to pay Petitioner for the remainder of the school year even though it did not reassign her to other teaching duties as it was entitled to do so. The C. concurs and orders the Board to pay Petitioner back pay from April 3 through June 30, 1998.

CONTRACT RENEWALS
CD Cordell Wise, Petitioner, v.
9/2000 Trenton Board of Education, Mercer County, Respondent.
WIS September 11, 2000 (#301-00)

xTimeliness

Petitioner challenges the nonrenewal of his contract by the Board. The Petition is dismissed for lack of timeliness.
Affirmed, State Board of Education, January 3, 2001.

CORPORAL PUNISHMENT
CD In the Matter of the Tenure Hearing of Lenore M. Allen, Old
6/2000 Bridge School District, Middlesex County.
ALL June 19, 2000 (#193-00, June 19, 2000)

For case summary, see **TENURE HEARINGS-LIBRARIANS.**

CORPORAL PUNISHMENT
CD In the Matter of the Tenure Hearing of Juan Cotto, State-
6/2000 Operated School District of the city of Newark, Essex County.
COT June 26, 2000 (#205-00)

For case summary, see **TENURE HEARINGS-TEACHERS.**

CRIMINAL CHARGES
CD In the Matter of the Tenure Hearing of Timothy McEnroe, Berkeley
2/2000 Heights School District, Union County.
MCE February 15, 2000 (#57-00)

For case summary, see **TENURE HEARINGS-CUSTODIAL AND MAINTENANCE STAFF.**

CRIMINAL CHARGES
CD Benjamin Seabrook and Wills, O'Neill & Mellk, Petitioners, c.
8/2000 Trenton Board of Education, Mercer County, Respondent.
SEA August 31, 2000 (#280-00)

For case summary, see **LEGAL FEES**.

CRIMINAL CHARGES
CD In the Matter of the Tenure Hearing of Stanley K. Utley, Trenton
3/2000 School District, Mercer County.
UTL March 2, 2000 (#77-00)

For case summary, see **TENURE HEARINGS-TEACHERS**.

CRIMINAL CHARGES
CD In the Matter of the Tenure Hearing of Gloria Woolard,
10/2000 Newark School District, Essex County.
WOO October 2, 2000 (#333-00)

Respondent failed to appear at the tenure hearing scheduled by the ALJ. Also, her plea in the criminal matter against her included forfeiture of her position as a teacher in the District. Therefore, the C. finds and determines that Respondent is guilty of unbecoming conduct and is dismissed from her teaching position. The matter shall be forwarded to the State Board of Examiners for action as it deems appropriate.

CUSTODIAL AND MAINTENANCE STAFF
CD Richard Cromwell, Petitioner, v.
1/2000 River Vale Board of Education, Bergen County, Respondent.
CRO January 6, 2000 (#4-00)

For case summary, see **CONTRACT RENEWALS**.

CUSTODIAL AND MAINTENANCE STAFF
CD Richard Parisi and Marsha Parisi, Petitioners, v.
1/2000 Saddle Brook Board of Education, Bergen County, Respondent.
PAR January 3, 2000 (#1-2000)

Petitioners allege that the Board did not respond appropriately to their complaints about one of its custodial employees. They assert that the Board did not respond to their written complaint, investigate the matter and that they did not receive acknowledgment that steps were taken to resolve the problem. Also, they protest that they were denied minutes of a meeting at which there was a discussion which led to the denial of their request that the Board reimburse them for legal fees. The dispute began when the custodian, in his private capacity, was hired to do bathroom renovations for Petitioners. They did not approve the work done and dismissed him. They filed suit against him and received a refund. Petitioners complained about him to the Board and he charged Petitioner with harassment. Petitioners incurred legal fees of approximately $2,000. The Board referred Petitioner's complaints to the superintendent of schools who investigated the matter and met with the custodian and his supervisor. He was given a verbal warning by the superintendent who did not recommend any further disciplinary action. The C. dismisses the matter since Petitioners fail to state a claim upon which relief can be granted. Petitioners' request for the reimbursement of legal fees does not arise under the school laws so that the C. is without the authority to order reimbursement. The C. cannot judge Petitioners' ancillary claims which arise under the Open Public Meetings Act and the Right to Know Law.

CUSTODIAL AND MAINTENANCE STAFF
CD Arthur Reinertsen, Petitioner, v.
3/2000 East Brunswick Board of Education, Middlesex County,
REI Respondent.
March 31, 2000 (104-00)

xSalaries

See 1998 School Law Decisions Index for prior case in which Petitioner appealed his removal as head custodian. On July 8, 1998, the C. ordered the Board to compensate Petitioner "at the same rate and for no less than he was receiving as a head custodian, and to further reimburse petitioner for the amount representing the difference between what he should have received, pursuant to the decision, and what he was actually paid by the Board, after he was relieved from his assignment as head custodian." Petitioner maintains that, pursuant to this decision, the Board is obligated to continue to pay Petitioner the negotiated guide amount for head custodians for the 1999-2000 school year and thereafter. The ALJ disagrees and the C. affirms the ALJ's decision. N.J.S.A. 18A:17-3 protects Petitioner in that his salary can never be reduced below $23,480, the amount he would have been paid if he had not been relieved of his position as head custodian in 1997. "The scope of the tenure statute, however, does not extend to protect future salary expectancy." Petition dismissed.

DISCIPLINARY ACTIONS
CD "C.C.," on behalf of her minor son, "R.S.," Petitioner, v.
6/2000 Riverton Board of Education, Burlington County, Respondent.
"C.C." June 8, 2000 (#171-00E)

A teacher reported that "R.S." was copying homework answers from another student's book in the school's hallway between classes. The students denied the incident. The teacher gave "R.S." an incomplete for the assignment and in-school detention. "C.C." refused to allow her son to serve the detention. The C. denies the request for emergent relief and orders the matter to the OAL for further proceedings on the merits of Petitioner's claim as may be deemed necessary.
On September 6, 2000, the State Board of Education dismissed the appeal for failure to perfect.

DISCIPLINARY ACTIONS
CD "K.E." and "C.E.," on behalf of minor children, "J.E." and
12/2000 "M.E.," Petitioners, v.
"K.E." New Milford Board of Education, Bergen County, Respondent.
December 1, 2000

Petitioners request emergent relief staying the discipline of suspensions and community service imposed on their children for violating Respondent's policies. "J.E." and "M.E." did not report an act of vandalism to the school which they observed in progress and did not cooperate with the ensuing policy investigation. The C. denies Petitioner's application to stay the suspensions from October 3-November 10, 2000. Petitioners application to resume school attendance on November 13th without having to submit psychiatric evaluations required by the Board is granted. The C. finds that the penalty of community service envisioned by the Board for their infraction falls within the "restitution and restoration" provision of the Board's policies and refuses emergent relief. The matter shall continue at the OAL for hearing on an expedited basis.

DISCIPLINARY ACTIONS
CD "S.E." and "J.M.," on behalf of minor child, "S.T.M.,"
3/2000 Petitioners, v.
"S.E." Weymouth Board of Education, Atlantic County, Respondent.
March 15, 2000 (#90-00)

Petitioners request emergent relief. "S.T.M." and his friend joked about bringing guns to school and raping their language teacher. These remarks were reported to the school's social worker who reported them to the chief school administrator who contacted the New Jersey State Police. The boys were suspended. The Board agreed to readmit the boys after psychiatric evaluation and approval by the Child Study Team. The Board also ruled that the two boys could not take part in extracurricular activities, including recess. The parents appealed the decision to remove "S.T.M." from extracurricular school activities. The C. finds that Petitioners have failed to satisfy the four-pronged standard set forth in Crowe v. DeGioia for obtaining emergent relief. The matter shall continue at the OAL for expedited hearing.

DISCRIMINATORY PRACTICES
CD Eligio Castro, Petitioner, v.
3/2000 Atlantic City Board of Education, Atlantic County, Respondent.
CAS March 15, 2000 (#92-00)

For case summary, see **CONTRACT RENEWALS**.

DISCRIMINATORY PRACTICES
CD Ellen Woolley and Melvin Clarke, Petitioners, v.
7/2000 Atlantic City Board of Education, Atlantic County,
WOO Bert Lopez, President, Theresa Thomas, Daniel Gallagher, Matthew Doran, James Herzog and Theresa Kelly, individually and jointly, Respondents.
July 10, 2000 (#225-00)

Petitioners filed a petition asserting: (1) a pattern of racial harassment and reprisal in violation of the New Jersey Law Against Discrimination; (2) making public comments regarding ending Petitioners' employment in violation of the rights to confidentiality protected by the Tenure Employee's Hearing Law and the Governor's Executive orders No. 9 and 11; and (3) violating Petitioners' privacy rights under the Open Public Meetings Act. Petitioners assert that this pattern of harassment occurred because they exposed a grade fixing scandal and participated in an investigation about it. The C. notes that Petitioners do not allege an unlawful practice or discrimination based on race or any other "invidious classification" as prohibited by the NJLAD. Therefore, the C. must dismiss allegations of violations of the NJLAD. Petitioners contend that they have suffered unlawful reprisals as a consequence of their involvement in reporting the grading scandal. The C. finds that Petitioners have not been subjected to adverse employment decisions "which would rise to an allegation of reprisal." Regarding the public statements about terminating employment, the C. finds that Petitioners fail to state a claim upon which relief may be granted. Petition dismissed.

DISMISSALS, SETTLEMENTS AND WITHDRAWALS

"A.B.," on behalf of minor child, "S.B.," Petitioner, v. Deptford Board of Education, Gloucester County, Respondent. (#370-00, September 28, 2000)

"A.H.," on behalf of minor child, "K.L.H.," Petitioner, v. Kearny Board of Education, Hudson County, Respondent. (#248-00, July 31, 2000)

"A.J.G.," on behalf of minor child, "M.G.," Petitioners, v. Greater Egg Harbor Regional High School District Board of Education, Atlantic County, Respondent. (#137-00, May 1, 2000)

"A.M.," on behalf of minor, "S.B.," Petitioner, v. Hamilton Township Board of Education, Mercer County, Respondent. (#211-00, June 30, 2000)

Anderson, Kathleen, Petitioner, v. Newark School District, Essex County, Respondent. (#38-00, January 21, 2000)

Arera, William, Garfield School District, Bergen County; In the Matter of the Tenure Hearing of (#354-00, November 3, 3000)

Asbury Park Board of Education, Monmouth County, Petitioner, v. New Jersey Department of Education, Respondent. (#322-00, September 28, 2000; Supplemental Funding).

Asbury Park Board of Education, Monmouth County, Petitioner, v. New Jersey Department of Education, Respondent. (#323-00, September 28, 2000;Whole School Reform Funding).

Asher, Michael, v. Verona Board of Education, Essex County. (#84-00, March 8, 2000)

Aznar, Abbey, Petitioner, v. Jersey City School District, Respondent. (#375-00, September 28, 2000)

"B.M.," on her own behalf and on behalf of her grandson, "M.B.," Petitioner, v. Newark School District, Essex County, Respondent. (#20-00, January 5, 2000)

"B.S." and "M.S.," on behalf of minor child, "S.N.C.," Petitioners, v. Fort Lee Board of Education, Bergen County, Respondent. (#27-00, January 5, 2000)

Badomi, Constance, Elizabeth School District; In the Matter of the Tenure Hearing of

Baily, Joan, Petitioner, v. Teaneck Board of Education, Bergen County, Respondent. (#26-00, January 5, 2000)

Bello-Valdes, Terese, Paramus School District; In the Matter of the Suspension of the Teaching Certificates of(#364-00, Nov. 13, 2000)

Berkley, Michael, Pemberton School District, Burlington County; In the Matter of the Tenure Hearing of (#345-00, October 18, 2000)

Berman, Amy Dalcero, Petitioner, v. Newark School District, Essex County, Respondent. (#37-00, January 21, 2000)

Beumee, Franca, Petitioner, v. Princeton Regional School District Board of Education, Mercer County, Respondent. (#157-00, May 19, 2000)

Bordentown Regional School District Board of Education, Burlington County, Petitioner, v. New Jersey Department of Education, Division of Finance, Respondent. (#54-00, February 15, 2000)

Bourelos, Theodore, Jersey City School District, Hudson County; In the Matter of the Tenure Hearing of (#293-00, Sept. 8, 2000)

Boyd-Hinton, Anne, Petitioner, v. Jersey City School District, Hudson County, Respondent. (#133-00, April 25, 2000)

Braida, Serge, Petitioner, v. Jersey City School District, Hudson County, Respondent. (#121-00, April 14, 2000)

Brown, Lillian, Petitioner, v. Newark School District, Respondent. (#317-00, September 22, 2000)

Brunson, Maude, Petitioner, v. Englewood Board of Education, Bergen County, Respondent. (#212-00, June 30, 2000)

Bunning, William, Petitioner, v. Lenape Regional High School District Board of Education, Burlington County, Respondent. (#114-00, April 10, 2000)

"C.F.," on behalf of minor child, "S.F.," Petitioner, v. Kenilworth Board of Education, Union County, Respondent. (#150-00, May 15, 2000)

"C.H.," on behalf of minor child, "R.M.," Petitioner, v. Mount Olive Board of Education, Morris County , Respondent. (#331-00, October 2, 2000)

"C.J." and "M.J.," on behalf of minor child, "C.M.J.," Petitioners, v. Lakewood Board of Education, Ocean County, Respondent. January 11, 2000 (#15-00)

"C.K.," on behalf of minor child, "R.G.," Petitioner, v. Egg Harbor Board of Education, Atlantic County, Respondent. (#239-00, July 24, 2000; #353-00, November 2, 2000)

"C.S.," on behalf of minor child, "M.C.," Petitioner, v. South Orange-Maplewood School District Board of Education, Essex County, Respondent. (#300-00, September 11, 2000)

Cerullo, Eileen, Petitioner, v. Jersey City School District, Hudson County, Respondent. (#350-00, October 30, 2000)

Chirico, Erna, Petitioner, v. Milltown Board of Education, Middlesex County, Respondent. (#149-00, May 15, 2000)

Comeau, Robert, Petitioner, v. Wharton Board of Education, Morris County, Respondent. (#412-00, September 28, 2000)

Commike, Eileen, Petitioner, v. Fairview Board of Education, Bergen County, Respondent. (#25-00, January 5, 2000)

Connolly, Danelle, Petitioner, v. Woodbine Board of Education, Cape May County, Respondent. (#250-0, July 31, 2000)

Corso, Roy J., Petitioner, v. Bogata Board of Education, Bergen County, Respondent. (#408-00, December 18, 2000)

Cox-Rivers, Letitia, Petitioner, v. New Brunswick Board of Education, Middlesex County, Respondent. (#377-00, September 28, 2000)

Cuesta, Franciso, J., Petitioner, v. Elizabeth Board of Education, Union County, Respondent. (#316-00, September 22, 2000)

Cupo, Daniel, Petitioner, v. Jersey City School District, Hudson County, Respondent. (#135-00, April 27, 2000)

De Fuccio, Mary Anne and Donna Kraft, Petitioners, v. Passaic County Vocational School District Board of Education, Passaic County, Respondent. (#35-00, January 21, 2000)

Di Federico, Ateo, Petitioner, v. State-Operated School District of the City of Newark, Essex County, Respondent. (#46-00, February 2, 2000)

Dispoto, Jamie, Petitioner, v. Lacey Board of Education, Ocean County, Respondent. (#368-00, September 28, 2000)

Dooley, Mary Jane, Petitioner, v. Ramsey Board of Education, Bergen County, Respondent. (#19-00, January 5, 2000)

East Orange Community Charter School, Inc., Petitioner, v. East orange Board of Education, Essex County, Respondent. (#71-00, February 28, 2000)

"F.H." and "A.H.," on behalf of minor daughter, Petitioners, v. Audubon Board of Education, Camden County, Respondent. (#311-00, September 21, 2000)

Faul, Arlene, Petitioner, v. Bergen County Vocational Technical School District Board of Education, Bergen County, Respondent. (#367-00, September 28, 2000)

Firoz, Fatemah, Petitioner, v. State-Operated School District of the City of Newark, Essex County, Respondent. (#182-00, June 15, 2000)

Ford, Mary, Petitioner, v. Paterson School District, Passaic County, Respondent. (#216-00, July 3, 2000)

Franklin Lakes Education Association et al., v. Franklin Lakes Board of Education, Bergen County. (#85-00, March 8, 2000)

"G.L.," on behalf of minor child, "D.L.," Petitioner, v. Millville Board of Education, Cumberland County, Respondent. (#318-00, September 25, 2000)

Graham, Eugene, Petitioner, v. Newark School District, Essex County, Respondent. (#14-00, January 10, 2000)

Greller, Julie, Petitioner, v. Northern Valley Regional High School District Board of Education, Bergen County, Respondent. (#400-00, December 7, 2000)

Groschel, Robyn, Essex Falls Board of Education, Essex County; In the Matter of the Suspension of the Certification of (#24-00, June 5, 2000)

Harris, Marvin, Petitioner, v. Newark School District, Essex County, Respondent. (#127-00, April 17, 2000)

Harris, Vernelle, Petitioner, v. Jersey City School District, Hudson County, Respondent. (#201-00, June 23, 2000)

Hauptman, Deborah, Petitioner, v. Jersey City School District, Hudson County, Respondent. (#244-00, July 27, 2000)

Hawkins, Robin, Petitioner, v. Newark School District, Essex County, Respondent. (#202-00, June 23, 2000)

Heim, Michael, Petitioner, v. Harmony Board of Education, Warren County, Respondent. (#13-00, January 10, 2000)

Hendricks, Wayne, Bridgeton School District; In the Matter of the Tenure Hearing of. (#72-00, February 28, 2000)

Hernandez, Rogelio, Petitioner, v. Newark School District, Essex County, Respondent. (#411-00, September 28, 2000)

Hildebrandt, Raymond, Petitioner, v. Elizabeth Board of Education, Union County, Respondent. (#252-98, June 10, 1998; #105-00R, March 31, 2000)

Holmes-Williams, Jacqueline, Petitioner, v. Camden Board of Education, Camden County, and State Board of Examiners, Respondents. (#378-00, September 28, 2000)

Horner, Barbara, Atlantic City Special Services School District, Atlantic County; In the Matter of the Tenure Hearing of (#415-00, December 21, 2000)

"J.D.," on behalf of minor child, "E.D.S.," Petitioner, v. Kearny Board of Education, Hudson County, Respondent. (#372-00, September 28, 2000)

"J.M.," on behalf of minor child, "D.D.," Petitioner, v. Elizabeth Board of Education, Essex County, Respondent. (#122-00 E, April 14, 2000)

"J.M.," on behalf of minor child, "R.G.V.," Petitioner, v. Fort Lee Board of Education, Bergen County, Respondent. (#273-00, August 18, 2000)

"J.O." and "K.O.," on behalf of minor child, "C.J.O.," Petitioners, v. Maple Shade Board of Education, Burlington County, Respondent. (#178-00, June 12, 2000)

"J.P.," on behalf of minor child, "S.H.," Petitioner, v. Botota Board of Education, Bergen County, Respondent. (#374-00, September 28, 2000)

Jabour, Thomas, Petitioner, v. Delaware Valley Regional High School District Board of Education, Hunterdon County, Respondent. (#62-00, February 15, 2000)

Jackson, Sheila, Linden School District; In the Matter of the Tenure Hearing of (#11-00, January 10, 2000)

Jansen, Carl, Petitioner, v. Newark School District, Essex County, Respondent. (#194-00, June 19, 2000)

Johnson, Constance, Petitioner, v. Englewood Board of Education, Bergen County, Respondent. (#212-00, June 30, 2000)

Jones, James D., Petitioner, v. Trenton Board of Education, Mercer County, Respondent. (#326-00, September 27, 2000)

Jones, Wilbert, Petitioner, v. Jersey City School District, Hudson County, and Richard DiPatri, Respondent. (#23-00, Jan. 5, 2000)

"K.P.," on behalf of minor child, "J.P.," Petitioner, v. Monroe Board of Education, Middlesex County, Respondent. (#414-00, September 28, 2000)

Kaska, Dr. Charles, Trenton School District; In the Matter of the Tenure Hearing of (#319-00, September 25, 2000)

Kenkare, Lois, Petitioner, v. Manville Board of Education, Somerset County, Respondent. (#324-00, September 27, 2000)

Kidd, Michelle, Atlantic City School District; In the Matter of the Tenure Hearing of (#191-00, June 19, 2000)

Kwon, Sang Yeon, Petitioner, v. Pascack Valley Regional School District Board of Education, Bergen County, Respondent. (#145-00, May 8, 2000)

Lassiter, Paul, Petitioner, v. Newark School District, Essex County, Respondent. (#192-00, June 19, 2000)

Lasus, Martin, Petitioner, v. Newark School District, Essex County, Respondent. (#102-00, March 31, 2000)

Leibowitz, Mark, Petitioner, v. Newark School District, Essex County, Respondent. (#9-00, January 10, 2000)

Longo, Christine, Long Branch School District, Monmouth County; In the Matter of the Tenure Hearing of (#116-00, April 11, 2000)

"M.M." and "V.S.," on behalf of minor children, "N.M." and "R.M.," Petitioners, v. Milltown Borough Board of Education, Middlesex County, Respondent. (#366-00, November 13, 2000)

"M.S.," on behalf of minor sons, "D.R.S." and "D.R.S.," Petitioner, v. Ewing Board of Education, Mercer County, Respondent. (#123-00, April 14, 2000)

"M.S.," on behalf of her minor son, "R.S.," Petitioner, v. Ewing Board of Education, Mercer County, Respondent. (#120-00, April 14, 2000)

"M.V.," on behalf of minor child, "C.V.," Petitioner, v. Hamilton Board of Education, Mercer County, Respondent. (#156-00, May 19, 2000)

"M.V.B." and "L.V.B.," on behalf of minor child, "C.C.," Petitioners, v. Wayne Board of Education, Passaic County, Respondent. (#286-00, September 5, 2000)

McDougall, Letitia, Petitioner, v. Princeton Regional School District Board of Education, Mercer County, Respondent. (#117-00, April 11, 2000)

Macchia, Mary Beth, Petitioner, v. Jersey City School District, Hudson County, Respondent. (#326-00, September 27, 2000)

Mahmoud, Judith, Petitioner, v. Elizabeth Board of Education, Union County, Respondent. (#110-00, April 4, 2000)

Manning, Clifford, Petitioner, v. Emerson Board of Education, Bergen County, Respondent. (#285-00, September 1, 2000)

Marshall, Cynthia, Petitioner, v. Teaneck Board of Education, Bergen County, Respondent. (#397-00, September 28, 2000)

New Brunswick Education Association, Petitioner, v. New Brunswick Board of Education, Middlesex County, Respondent. (#144-00, May 8, 2000)

Ngo, Tri, Camden School District, Camden County; In the Matter of the Tenure Hearing of (#299-00, September 11, 2000)

Noon, Barbara Ann., Petitioner, v. Montville Board of Education, Morris County, Respondent. (#369-00, September 28, 2000)

Passaic Board of Education, Passaic County, Petitioner, v. New Jersey Department of Education, Respondent. (#342-00, October 16, 2000)
Patel, Manibhai, Petitioner, v. Newark School District, Respondent. (#321-00, September 22, 2000)
Paulsboro Education Association and Gus Wilson, Petitioner, v. Paulsboro Board of Education, Gloucester County, Respondent. (#275-00, August 18, 2000)
Pressman, Ellen, Petitioner, v. Waldwick Board of Education, Bergen County, Respondent. (#373-00, September 28, 2000)

"R.H." and "A.H.," on behalf of minor child, "A.H.," Petitioners, v. Bogota Board of Education, Bergen County, and Roy J. Corso, Superintendent, Respondents. (#288-OC, September 5, 2000)
"R.S.," on behalf of minor child, "M.S.," Petitioner, v. Ramapo Indian Hills Regional High School District Board of Education, Bergen County, Respondent. (#396-00, September 28, 2000)
Ralston, Joy, Petitioner, v. Newark School District, Essex County, Respondent. (#189-00, June 16, 2000)
Rieger, Russell, Petitioner, v. New Milford Board of Education, Bergen County, Respondent. (#155-00, May 19, 2000)
Rucki, Eileen, Petitioner, v. Elizabeth Board of Education, Union County, Respondent. (#329-00, October 2, 2000)

"S.E.," on behalf of minor child, "J.E." and "L.F.," on behalf of minor child, "J.T.," Petitioners, v. Morris Hills Regional School District Board of Education, Morris County, Respondent. (#55-00, February 15, 2000)
"S.S.," on behalf of minor child, "B.S.," Petitioner, v. South Orange-Maplewood School District Board of Education, Respondent. (#382-00, November 20, 2000)
"S.W.," on behalf of minor child, "K.E.," Petitioner, v. Asbury Park Board of Education, Monmouth County and Red Bank Regional High School District Board of Education, Monmouth County. (#340-00, October 16, 2000)
Siderio, Michelle, Petitioner, v. Monroe Township Board of Education, Gloucester County, Respondent. (#254-00, August 11, 2000)
Snee, Ann M., Petitioner, v. Passaic County Technical Institute Board of Education, Passaic County, Respondent. (#413-00, September 28, 2000)
Soprano, Robert J., Petitioner, v. Holland Board of Education, Hunterdon County, Respondent. (247-00, July 31, 2000)
South River Board of Education, Middlesex County, Petitioner, v. New Jersey Department of Education, Division of Finance and the South Amboy Board of Education, Middlesex County, Respondents. (#241-00, July 24, 2000)
Struck, Robert, Petitioner, v. Newark School District, Essex County, Respondent. (#376-00, September 28, 2000)

Taliaferro, Carolyn, Petitioner, v. Jersey City School District, Hudson County, Respondent. (#410-00, December 18, 2000)
Teaneck Board of Education, Bergen County, Petitioner, v. Edgewater Board of Education, Bergen County, Bogota Board of Education, Bergen County, Hackensack Board of Education, Bergen County, Bobbette Tribble and Martha Cain, Respondents. (#240-00, July 24, 2000)
Thomas, Beatrice, Petitioner, v. Newark School District, Essex County, Respondent. (#341-00, October 16, 2000)
Tilli, John, Petitioner, v. Fair Lawn Board of Education, Bergen County, Respondent. (#395-00, December 4, 2000)
Transky, Darius, Petitioner, v. Trenton Board of Education, Mercer County, Respondent. (#371-00, September 28, 2000)
Trenton Education Association, Petitioner, v. Trenton Board of Education, Mercer County, Respondent. (#126-00, April 17, 2000)

Union County Regional High School District No. 1, Union County; In the Matter of the Distribution of Liquid Assets upon Dissolution of the (#88-00, March 13, 2000)
Urban, Frances, Montvale School District, Bergen County; In the Matter of the Tenure Hearing of (#12-00, January 10, 2000)

"V.A." and "Q.A.," on behalf of minor child, "J.L.J.," Petitioner, v. South Orange-Maplewood Board of Education, Essex County, Respondent. (#167-00, May 26, 2000)
"V.R.," on behalf of minor child, "J.D.C.," Petitioner, v. South Orange-Maplewood School District Board of Education, Essex County, Respondent. (#176-00, June 12, 2000)
Vaid, Rajeev, Petitioner, v. Newark School District, Essex County, Respondent. (#21-00, January 5, 2000)
Vaughan, Kathy, Petitioner, v. Red Bank Board of Education, Monmouth County, Respondent. (#61-00, February 15, 2000)
Vineland Board of Education, Cumberland County, Petitioner, v. New Jersey Department of Education, Respondent. (#258-00, August 18, 2000)

Wasseff, Mary, v. Jersey City School District. (#83-00, March 8, 2000)
Wasseff, Mary, Jersey City School District; In the Matter of the Tenure Hearing of. (#83-00, March 8, 2000)
White, Sheila, Petitioner, v. Newark School District, Essex County, Respondent. (#237-00, July 13, 2000; #238-00, July 13, 2000)
Widmann, James, Trenton School District, Mercer County; In the Matter of the Tenure Hearing of (#393-00, December 1, 2000)
Wood-Ridge Board of Education, Bergen County, Petitioner, v. Moonachie Board of Education, Bergen County, Respondent. (#115-00, April 10, 2000)

Zak, Deborah, Petitioner, v. Princeton Regional School District Board of Education, Mercer County, Respondent. (#384-00, November 20, 2000)

DISTANCE LEARNING

CD 5/2000 NEP — Neptune Township Education Association, Petitioner, v. Neptune Township Board of Education, Respondent. May 22, 2000 (#164-00)

For case summary, see **SUBCONTRACTING**.

DIVISION OF YOUTH AND FAMILY SERVICES
SC-A In re an allegation of physical abuse concerning "R.P."
7/2000 Superior Court, Appellate Division [333 N.J. Super. 105]
"R.P." July 18, 2000

The issue is: Does a teacher have a due process right to challenge the form of an investigatory finding by DYFS that the teacher has had improper physical contact with a student? A principal of an elementary school reported that the father of a first grader alleged that "M.I.," a teacher, grabbed his daughter, "R.P.," by the back of the neck. DYFS investigated and sent a report to the superintendent of schools. DYFS concluded that physical abuse was not substantiated, but expressed concerns about the teacher's actions. "M.I." was administratively counseled about the District's "hands-off" policy, a disciplinary letter was placed in his personnel folder, and he was warned that "future incidents may result in more severe actions." The Court concludes that "even though a teacher has no right to an adjudicatory hearing to challenge such a finding unless DYFS concludes that the teacher's conduct constitutes 'substantiated' child abuse, the teacher may challenge the wording of the finding on the ground that it is misleading and unfairly damaging to his reputation. . . .[The Court also concludes] that DYFS inaccurately and unfairly conveyed the impression that its finding was based on an adjudicatory hearing by stating in a letter to the teacher's employer that the finding was based on the 'preponderance of the credible evidence.'" DYFS is ordered to send a corrected finding to the teacher's employer "which clearly states that the finding was investigatory only."

DRUG ABUSE
CD "D.B.," on behalf of minor, "B.B.," Petitioner, v.
6/2000 Morris School District Board of Education, Morris County, the
"D.B." Superintendent of Schools and the Administration of Morristown High School, Respondents.
June 12, 2000 (#174-00)

Petitioner seeks a declaratory judgment to prevent the Respondents from referring "B.B." to the Board's Core Team for investigation into possible chemical dependency. "B.B." was present at a "senior cut day" where extensive drinking took place. The C. finds that the Board's application of its policy does not violate the law. Petition dismissed.

DRUG ABUSE
CD In the Matter of the Tenure Hearing of Vyvian Felder, Newark
4/2000 School District, Essex County.
FEL April 20, 2000 (#131-00)

For case summary, see **TENURE HEARINGS-TEACHERS**.

DRUG ABUSE
CD In the Matter of the Tenure Hearing of Joseph Graceffo,
9/2000 Wayne School District, Passaic County.
GRA September 21, 2000 (#310-00)

For case summary, see **TENURE HEARINGS-VICE-PRINCIPALS.**

DRUG ABUSE
CD 10/2000 SAN — In the Matter of the Tenure Hearing of Manuel Santiago, Elizabeth School District, Union County. October 2, 2000 (#330-00)

For case summary, see **TENURE HEARINGS-CUSTODIAL AND MAINTENANCE STAFF.**

DRUG ABUSE
CD 3/2000 UTL — In the Matter of the Tenure Hearing of Stanley K. Utley, Trenton School District, Mercer County. March 2, 2000 (#77-00)

For case summary, see **TENURE HEARINGS-TEACHERS.**

DUES
CD 2/2000 NEW — New Jersey School Boards Association, Petitioner, v. Wyckoff Board of Education, Bergen County, Respondent. February 3, 2000 (#50-00)

For case summary, see **NEW JERSEY SCHOOL BOARDS ASSOCIATION.**

EARLY CHILDHOOD EDUCATION
CD 1/2000 SHE — Lynn P. Sherman et al., Petitioners, v. Beach Haven Board of Education, Ocean County, Respondent. January 18, 2000 (#30-00)

Petitioner requests that the District be compelled to reinstate the half-day kindergarten program for four-year-old children which it discontinued after 14 years. Petitioners allege that no educational purpose existed for the action, that the District acted in bad faith and its actions were arbitrary, capricious and unreasonable. A full time program for five-year-old children was substituted. The C. determines that the Board effectively precluded the public from having sufficient notice of the meeting in which the elimination of the program was going to be discussed so as to enable all interested persons to attend the meeting. However, there is no basis to grant the relief sought by Petitioners to reinstate the preschool program since the Board took official action on a later occasion to ratify the decision to discontinue the half-day kindergarten program. Petition dismissed. **Affirmed**, State Board of Education, June 7, 2000.

EMERGENT RELIEF

"J.B.," on behalf of minor child, "C.B.," Petitioner, v. Buena Regional School District Board of Education, Atlantic County, Respondent. (#291-00, September 8, 2000)

"R.L." and "U.L.," on behalf of minor child, "R.L.," Petitioners, v. East Orange Board of Education, Essex County, Respondent. (#98-00E, March 23, 2000 (#98-00E)

"T.C.-M.," on behalf of minor children, Petitioner, v. South Plainfield Board of Education, Middlesex County, Respondent. (#289-00E, September 6, 2000)

ETHICS
CD 7/2000 ARO — In the Matter of Martin Arocho, New Brunswick Board of Education, Middlesex County, Respondent. July 13, 2000 (#231-00SEC)

The Commission found that Respondent violated the Act by voting for a resolution that the Board contract with the Puerto Rican Action Board while being a member of PRAB. The C. approves censure as the appropriate penalty.

ETHICS
CD 11/2000 CIR — In the Matter of Antonio Cirillo, Moonachie Board of Education, Bergen County. November 20, 2000 (#385-00SEC)

In response to question number three on the personal/relative disclosure statement, Mr. Cirillo did not record that his wife received compensation from a business that worked for the Board and also received wages from a job with an insurance company. The School Ethics Commission found that Mr. Cirillo violated N.J.S.A. 18A:12-25 and 26 of the Act and recommended censure. The C. concurs.

ETHICS
CD 6/2000 CON — In the Matter of Frederick Confessore, Harrison Board of Education, Hudson County. June 16, 2000 (#184-00SEC)

It is alleged that Respondent violated the School Ethics Act because he is a part owner of Study Hall, a day care facility located in Harrison. Respondent, the Assistant Superintendent of Schools in the District, oversees technology programs related to curriculum and instruction. He sent a letter to Harrison residents directly marketing his daycare program to parents of preschool students touting his experience in the District. The C. upholds the Commission's penalty of suspension of one month without pay from his position in the District.

ETHICS
CD 8/2000 DEV — In the Matter of Joseph De Vierno, Long Hill Board of Education, Morris County. August 14, 2000 (#256-00SEC)

Mr. De Vierno is suspended from office as a board member pending his attendance at the September training session. He will be removed from office without further proceedings if he fails to attend a training session by the end of October 2000.

ETHICS
CD 7/2000 DOR — In the Matter of Anne Dorety, Oldmans Board of Education, Salem County. July 10, 2000 (#224-00SEC)

The C. orders her removal from office as a Board member due to her repeated failure to attend the statutorily required training session within one year of her election.

ETHICS
CD In the Matter of Robert Fisher, Upper Pittsgrove Board of
8/2000 Education, Salem County.
FIS August 10, 2000 (#252-00)

Mr. Fisher is suspended from office as a board member pending his attendance at the October training session. He will be removed from office without further proceedings if he fails to attend the training session as scheduled.

ETHICS
CD In the Matter of Patricia Haines, Haddonfield Board of
11/2000 Education, Camden County.
HAI November 27, 2000 (#389-00SEC)

Petitioner is a Vice-President of Commerce National Insurance Services, a subsidiary of Commerce Bank North. As Board President, she named herself as a member of the Board's Finance Committee. She voted on a Board resolution authorizing the issuance and sales of new bonds with Commerce designed as the paying agent. The School Ethics Commission concluded that Respondent should have abstained from the vote because she had an indirect financial involvement. The C. orders Ms. Haines reprimanded as a school official found to have violated the School Ethics Act.

ETHICS
SBD In the Matter of Edward Mercer, Brick Township Board of
2/2000 Education, Ocean County.
MER February 2, 2000

The Brick Board of Education filed a notice of appeal to the State Board of Education from a determination by the School Ethics Commission that Respondent had not violated the School Ethics Act. The matter has been dismissed for noncompliance of requests for information by the State Board of Education.

ETHICS
CD In the Matter of Greg R. Notholt, Bradley Beach
7/2000 Board of Education, Monmouth County.
NOT July 10, 2000 (#226-00SEC)

Respondent is suspended from office as a Board member as of the date of this decision pending his attendance at the October training session. Should he fail to attend the October training session as scheduled, he will be removed from office.

ETHICS
CD In the Matter of Frank Pannucci, Brick Township Board of
1/97 Education, Ocean County.
PAN January 28, 1997 (#38-97 SEC)[97 N.J.A.R. 2d(EDU) 339]

Respondent is a teacher in East Orange and a member of the NJEA. He is a member of the Brick Township Board of Education. The BTEA is the local bargaining unit of the NJEA. This complaint alleges that Respondent participated in negotiation sessions with the BTEA and voted on the collective bargaining agreement. The School Ethics Commission finds that Respondent violated N.J.S.A. 18A:12-24.c. of the School Ethics Act. There are mitigating circumstances. Respondent received inadequate advice from Board counsel as to whether he should vote. The School Ethics Commission had only recently issued the advisory opinion setting forth that his voting on the contract would violate the Act. Therefore, the Commission recommends a penalty of censure. The C. concurs and orders Respondent censured as a school official found to have violated the School Ethics Act.
On June 4, 1997, the State Board of Education grants the motion for leave to appear as amicus curiae filed by the New Jersey School Boards Association.
On January 6, 1999, the State Board of Education grants the motion for leave to appear as amicus curiae filed by the New Jersey Education Association.
On March 1, 2000, the State Board of Education held that N.J.S.A. 18A:12-24c does not "automatically prohibit a board member from voting on a collective negotiations agreement solely on the basis of his status or that of his immediate family with respect to membership or representation by a different local affiliate of the same statewide association with whom the agreement is made." Mr. Pannucci's involvement with another local affiliate did not compromise his objectivity or independence of judgment. The State Board of Education reverses the Ethics Commission finding that he violated N.J.S.A. 18A:12-24c and the C.'s imposition of a sanction on the basis of that finding.

ETHICS
CD Susan Settle, Petitioner, v.
4/2000 Pennsville Board of Education and Robert Peddle, Superintendent,
SET Salem County, Respondents.
April 3, 2000

For case summary, see **BOARD MEMBERS.**

ETHICS
CD In the Matter of Alexander Sipos, Garfield Board of Education,
7/2000 Bergen County.
SIP July 10, 2000 (#221-00SEC)

The Commission found that Respondent, a Board member, violated N.J.S.A. 18A:12-24c when he made two motions to pass resolutions that resulted in the appointment of his wife to two positions with the Board. The C. finds that censure is the appropriate penalty in this matter.

ETHICS
CD In the Matter of Bruce White, Ewing Township Board of Education,
3/2000 Mercer County.
WHI March 15, 2000 (#91-00)

A Ewing Board member alleged that fellow Board member Bruce White violated the School Ethics Act when he entered into negotiations with members of the Ewing Township Education Association without Board authority. It is also asserted that his spouse is a member of the NJEA with which the ETEA is affiliated. Mr. White's wife is a teacher in Trenton. The C. finds that, given the change in law that has occurred during this ongoing administrative proceeding, he cannot adequately assess the Commission's recommended penalty without having the benefit of that body's review of its decision in light of the State Board's ruling in Pannucci. The matter is returned to the Commission so that it may determine what effect the State Board's reversal of prior decisional law may have on its finding and recommended penalty in this matter. On June 1, 2000, the C. found that the appropriate penalty, under the circumstances set forth by the Commission, is suspension as a Board member for a period of 45 days from the date of this decision. [#169-00] On September 6, 2000, the State Board of Education dismissed the appeals on the grounds that neither complainant has standing to challenge the C.'s determination.

EVALUATIONS
CD Gerald Battle et al., Petitioners, v.
11/2000 Jersey City School District, Hudson County, Respondent.
BAT November 13, 2000 (#365-00)

For case summary, see **INCREMENTS**.

EVALUATIONS
CD Eligio Castro, Petitioner, v.
3/2000 Atlantic City Board of Education, Atlantic County, Respondent.
CAS March 15, 2000 (#92-00)

For case summary, see **CONTRACT RENEWALS**.

EVALUATIONS
CD Melvin Holston, Petitioner, v.
9/2000 State-Operated School District of the City of Jersey City,
HOL Hudson County, Respondent.
September 15, 2000 (#305-00)

For case summary, see **INCREMENTS**.

FREEDOM OF SPEECH

SC-A 2/00 GRE Green Township Education Association , Plaintiff-Appellant, v. Stephen P. Rowe, David Brady, Ronald Parks, Mark Graham, Melinda McCoy Miller, John McDermott, Doreen Schaffer, Denise Sheehan, Amy Stewart, Ken Swisher and Green Township Board of Education.
Superior Court, Appellate Division
February 28, 2000 (328 N.J. Super. 525)

The issues are: Does the Board's conflict of interest policy barring teachers from engaging in specified political activities infringe upon their right to free speech? May the Board bar teachers from wearing a political button bearing the inscription "NJEA SETTLE NOW" while on school property in the presence of students? In 1992 during the course of an acrimonious labor dispute, the Association members displayed similar buttons. The Board contends that this display resulted in classroom disruptions. The Association protests this allegation. The Chancery Division held that the Board's interest in achieving its educational objectives outweighed the teachers' First Amendment right to comment on matters of public concern. The Chancery Division found no intent on the part of the Board to extend the policy to settings other than the classroom. The Superior Court, Appellate Division, affirms in part and reverses in part. The Superior Court finds that the prohibitions in Board's policy as written are not confined to the setting of the school facility or classroom. "Nor are its restraints and prohibitions always limited to situations in which students are present. . . .Read literally, the clause bars employees from using their lunch breaks or free periods to express their opinions to other willing adults even if no students are present. Read literally, the clause precludes teachers from speaking at board of education meetings conducted at the school facility. . .the Board's prohibition against displaying campaign materials is not limited to school property." Therefore, the Superior Court finds unconstitutional the first two clauses of the Board's policy. The Superior Court states that a carefully worded protocol prohibiting teachers from promoting positions on labor relations issues in the presence of students and on school property would pass constitutional muster. There would be no constitutional impediment to a policy barring teachers from displaying campaign materials while on school property that is being used as a polling place on the day of a school election. The Superior Court states that the Board should redraft its policy to render it constitutional. The Superior Court finds that the Board's prohibition against teachers wearing the Association's buttons in the presence of students while on school premises is constitutional. "The first rule of teaching should be that teachers shall teach. A classroom is not a place for proselytizing students to advance a teacher's financial interests. Nor should a classroom be transmogrified into a teacher's soapbox. Just as a board of education may set the curriculum, it may also require teachers to confine their classroom activities to providing students with a thorough and efficient education. . . .government has a greater power to regulate speech when it acts as an employer than when it acts in relation to the general citizenry." However, the Superior Court does permit teachers to respond to questions propounded by students and does not preclude teachers from discussing the topic of education "in a bona fide manner consistent with their role as educators. Nor does the prohibition bar teachers from wearing buttons in other settings not involving the presence of students."

GRADUATION
CD David Michael Buckley, Petitioner, v.
8/2000 Ewing Board of Education, Mercer County, Respondent.
BUC August 18, 2000 (#268-00)

xAbsenteeism
Petitioner was denied his diploma. He was deemed academically ineligible to complete a required physics course due to excessive unexcused absences. The school's attendance policy provides that if a student has a chronic illness that may cause absenteeism and/or lateness to school, it is mandatory that the student obtain a doctor's note. The doctor's notes that Petitioner produced do not explain or excuse his absences. The C. upholds the Board's decision. Petition dismissed.

GRADUATION
CD "D.H." and "K.H.," on behalf of his minor daughter,
5/2000 "S.H.," Petitioners, v.
"D.H." Camden County Regional High School District No. 1
Board of Education, Camden County, Respondent.
May 19, 2000 (#160-00E)

Petitioners request that the C. find that Petitioner Deanna Hoover be allowed to graduate from the Edgewood Senior High School at the end of the 1999-2000 school year. They also ask that the C. find that "S.H." was properly placed in the eleventh grade for the 1999-2000 school year. Both students previously attended St. Joseph High School. Because of a dispute as to tuition, St. Joseph High School refused to send their school records to the Respondent District. Both students passed the Grade 11 High School Proficiency Test. The Board placed Deanna Hoover in the twelfth grade and "S.H." in the eleventh grade for the 1999-2000 school year. Without their transcripts, the principal testified that she could not certify that Deanna Hoover has the necessary credits needed for graduation or that "S.H." has the needed credits for advancement to the twelfth grade. The ALJ orders, and the C. concurs, that Deanna Hoover be permitted to graduate provided that she passes the required courses necessary for graduation. The motion for emergent relief is denied for "S.H." since a final decision will be rendered in sufficient time to allow "S.H." to make plans for the next school year. On July 3, 2000, the C. found that "S.H.' should be placed in the 12th grade for the 2000-2001 school year provided that she passes her current courses. (#214-00, July 3, 2000)

GRADUATION
CD "G.J.C." and "L.C.," on behalf of minor child, "N.C.,"
1/2000 Petitioners, v.
"G.J.C." Somerville Board of Education, Somerset County, Respondent.
January 12, 2000 (#17-00)

The Board denied "N.C." credit for his senior year first-year course in physics because of excessive absenteeism. He was barred from graduation until he passed a five-credit course of his choosing, bringing the number of credits to the total required. Petitioners had been advised that "N.C.'s" absences were accumulating and were reminded of the Board's rule regarding 15 absences for full year courses and 8 absences per semester course as well as the Board's rule regarding tardiness after the first ten minutes of class being recorded as a full course. Petitioner received a grade of A- for the course. The C. finds that the Board's decision to compel "N.C." to take a summer course after he had successfully completed his physics course was unreasonable. The C. orders "N.C." credited with the grade earned and with the credits accumulated for successful completion of the physics course taken during the regular school year. His cumulative average is to be recalculated to reflect the actual grade earned and he is to be awarded his high school graduation diploma.

GRADUATION

CD "G.L.," on behalf of minor child, "D.L.," Petitioner, v.
6/2000 Millville Board of Education, Cumberland County, Respondent.
"G.L." June 20, 2000 (#198-00E)

Petitioner moves for emergent relief asking that her daughter be permitted to march in process with her class at graduation. "D.L.' has an educational disability. The C. notes that she does not have the necessary number of credits to be certified for graduation. Request denied. The matter is returned to the OAL for further proceedings as necessary.

GRIEVANCE PROCEDURES

CD Susan Settle, Petitioner, v.
4/2000 Pennsville Board of Education and Robert Peddle, Superintendent,
SET Salem County, Respondents.
April 3, 2000

For case summary, see **BOARD MEMBERS.**

HOME SCHOOLING

CD "M.C.," on behalf of minor child, "L.C.," Petitioner, v.
2/2000 Freehold Regional High School District Board of Education,
"M.C." Monmouth County, Respondent.
February 2, 2000 (#47-00)

"L.C." has been home schooled. "M.C." wanted to enroll her in 10th grade at Colts Neck High School. The District did not evaluate "L.C." before placing her in 9th grade at Manalapan High School. (See 1998 School Law Decisions Index for background on matter.) The C. finds that "it is implicit in the language of N.J.S.A. 18A:38-25 that a home-school child is required to receive instruction equivalent to that provided by the public schools. The C. also concurs [with the ALJ] that, when a child has been lawfully home schooled, a district should place the child for initial purposes at the level represented by the parents as being the level of instruction received by the child at home." The C. directs the District to place "L.C." in the 11th grade and expeditiously assess her course proficiencies through the mechanisms established by the District for such assessments if she should wish to return to Manalapan High School. The C. finds that the Board's denial of Petitioner's request that "L.C." be placed at Colts Neck High School was within its lawful authority.

INCREMENTS
CD Joanne Alessio, Petitioner, v.
8/2000 Jersey City School District, Hudson County, Respondent.
ALE August 18, 2000 (#262-00)

Petitioner appeals the withholding of her salary increment for the 1998-99 school year. Petitioner taught English as a Second Language at the high school level in the 1997-98 school year. Her prior experience was as an elementary level ESL teacher. Petitioner was absent from work for nineteen days when she fell at work and hurt her ankle. She was evaluated three days after her return to work and again evaluated in February, 1998 by the same administrator. Other administrators evaluated her teaching performance. Her evaluations stated that Petitioner did not use ESL instructional techniques, did not maintain accurate, complete and up-to-date records for her students, did not properly assess her students' needs and evaluate their progress, and did not employ effective organization and planning of instructional techniques. She was also rated as deficient in the affective domain. Petitioner refused to participate in post-evaluative conferences. She signed the forms with written notes that she did not agree with them. Petitioner asserts "that any alleged deficiency in her teaching skills was the result of the District's failure to properly prepare her for her new assignment, together with the fact that she was injured and absent for nineteen days prior to the evaluations." The ALJ points out that a master teacher was assigned to assist Petitioner and she refused to cooperate with the evaluators. The C. concurs and finds that the Board's decision to withhold Petitioner's increment was not arbitrary, capricious or unreasonable. Petition dismissed

INCREMENTS
CD Gerald Battle et al., Petitioners, v.
11/2000 Jersey City School District, Hudson County, Respondent.
BAT November 13, 2000 (#365-00)

xEvaluations

Twenty-one teachers appealed the decision of the State District Superintendent to withhold their salary increments for the 1997-98 school year. Subsequently, fifteen Petitioners withdrew their appeals. Petitioners' employment and salary increments were withheld for less than satisfactory performance ratings during the 1996-97 school year. Petitioners argue that: the withholding of their increments was arbitrary; the evaluations punished the teachers instead of providing direction and instruction to improve performance; there were no standards as to when the increment would be denied; teachers were not given advance notice that their increments were in peril; and that the executive assistant/human resources did not have the authority to deny the increments. The C. points out that there are only two determinations to be made when reviewing the District's decision: whether the underlying facts were as claimed and whether it was unreasonable for the administration to conclude as they did based upon these facts. The ALJ finds, and the C. affirms, that the District's withholding of the increments was a valid exercise of its discretionary authority in each case. Petition dismissed.

INCREMENTS
CD Rhonda Bland-Carter, Petitioner, v.
9/2000 State-Operated School District of the City of Newark,
BLA Essex County, Respondent.
September 11, 2000 (#298-00)

xTimeliness

Petitioner is a tenured school nurse who challenges the withholding of her increment for the 1999-2000 school year. Petitioner began work on August 30, 1999. By letter dated August 31, 1999, the State District Superintendent informed Petitioner of the district's determination to withhold her increment for the 1999-2000 school year. The petition is time barred because it was filed after the 90th day of the notice of the withholding of the increment.

INCREMENTS
CD Linda Burgess, Petitioner, v.
7/2000 Asbury Park Board of Education, Monmouth County, Respondent.
BUR July 6, 2000 (#219-00)

Petitioner appeals the withholding of her salary increment. Since the Board failed to participate in the scheduled proceedings in this matter, its defenses are stricken. The C. directs the Board to restore the increment.

INCREMENTS
CD Helen Cheloc, Petitioner, v.
6/2000 Elizabeth Board of Education, Union County, Respondent.
CHE June 12, 2000 (#173-00)

xTimeliness

Petitioner protests the Board's withholding of her increment for the 1994-95 school year. She also seeks reinstatement to her former position of Assistant Board Secretary/Director of Administration. The Board voted to establish the position of comptroller and reassigned the fiscal supervisory duties performed by Petitioner to this position. Petitioner retained her title as director of administration, her salary level and responsibility over the workers' compensation department. Ms. Cheloc alleges that the Board retaliated against her for objecting to allegedly improper budget-related actions in violation of the Conscientious Employee Protection Act. The Board maintains that the Petitioner did not timely appeal the decision to withhold her salary increment. The ALJ finds, and the C. affirms, that Petitioner filed her petition 90 days after she was notified of the Board's decision. The matter was timely filed. The Board argues that Petitioner is not part of any bargaining unit and is not part of any salary schedule established by the Board. The Board argues that Petitioner is not guaranteed any predetermined increment each year and that it has the authority to determine whether Petitioner is entitled to a salary increase. The C. finds that Petitioner did not make a case that the Board's decision not to award her a salary increase was made for retaliatory reasons. Furthermore, Petitioner did not receive any above average or outstanding scores in her formal evaluation. The C. finds that the Board's abolishment of Petitioner's prior position and creation of a new Comptroller position was not arbitrary nor capricious. Petition dismissed.

INCREMENTS
CD John Elik, Petitioners, v.
9/2000 State-Operated School District of the City of Jersey City,
ELI Hudson County, Respondent.
September 1, 2000 (#283-00)

The Board withheld Petitioner's salary increment for the 1998-99 school year. Petitioner has been a special education teacher for thirteen years. He holds art education and teacher of the handicapped certificates. During the 1997-98 school year he taught ten, ten-year-old students who were neurologically impaired and functioned between grades one and two. He was assigned a teacher's aide. Petitioner was formally observed on at least four separate occasions by three different supervisors. As a result of these observations, and other less formal contacts throughout the year, the District determined to withhold Petitioner's employment and adjustment increments for "less than satisfactory performance." The majority of the observations were critical of Petitioner's assessment of the needs of and evaluation of the progress of his pupils as well as his lack of effective organization and planning. His ability to use effective instructional techniques was criticized by two administrators. Petitioner protests that the teaching requirements were not made clear to him and his evaluators. The ALJ dismisses his defense that the alleged deficiencies of his teaching skills were the result of the District's failure to properly train or prepare him for his assignment. The C. concurs and finds that the Petitioner did not meet his burden to prove by a preponderance of credible evidence that the District's decision to withhold his increment was arbitrary, capricious or unreasonable. Petition dismissed.

INCREMENTS
CD Joanne Grompone, Petitioner, v.
2/2000 Jersey City School District, Hudson County, Respondent.
GRO February 28, 2000 (#69-00)

In 1990 the parties agreed to settlement agreement relating to a 1989-90 increment withholding and tenure charges. In accordance with the Agreement, Petitioner resigned at the end of the 1990-91 school year. In May, 1996, Petitioner filed a complaint in the Superior Court, seeking to invalidate the 1990 settlement claiming that the Board prematurely ceased payments due her. The Board asserted that the early cessation of payments in February, 1991 resulted from a payroll processing error whereby Petitioner had received more money than she was entitled to under the agreement. Petitioner also argued that the settlement should be invalidated and also argued the merits of the underlying tenure case that led to the settlement. The Court granted the Board's motion for summary judgment and dismissed Petitioner's complaint and indicated that the matter should be returned to the Commissioner. In June, 1999, Petitioner filed a Petition with the C. challenging the validity of the settlement agreement and charging the Board with failure to properly perform its obligations under the agreement. The C. dismisses the matter as untimely.
Affirmed, State Board of Education, August 2, 2000.

ETHICS
CD 7/2000 ARO — In the Matter of Martin Arocho, New Brunswick Board of Education, Middlesex County, Respondent. July 13, 2000 (#231-00SEC)

The Commission found that Respondent violated the Act by voting for a resolution that the Board contract with the Puerto Rican Action Board while being a member of PRAB. The C. approves censure as the appropriate penalty.

ETHICS
CD 11/2000 CIR — In the Matter of Antonio Cirillo, Moonachie Board of Education, Bergen County. November 20, 2000 (#385-00SEC)

In response to question number three on the personal/relative disclosure statement, Mr. Cirillo did not record that his wife received compensation from a business that worked for the Board and also received wages from a job with an insurance company. The School Ethics Commission found that Mr. Cirillo violated N.J.S.A. 18A:12-25 and 26 of the Act and recommended censure. The C. concurs.

ETHICS
CD 6/2000 CON — In the Matter of Frederick Confessore, Harrison Board of Education, Hudson County. June 16, 2000 (#184-00SEC)

It is alleged that Respondent violated the School Ethics Act because he is a part owner of Study Hall, a day care facility located in Harrison. Respondent, the Assistant Superintendent of Schools in the District, oversees technology programs related to curriculum and instruction. He sent a letter to Harrison residents directly marketing his daycare program to parents of preschool students touting his experience in the District. The C. upholds the Commission's penalty of suspension of one month without pay from his position in the District.
On February 7, 2001, the State Board of Education denied the Respondent's request to supplement the record on appeal with an additional submission.

ETHICS
CD 8/2000 DEV — In the Matter of Joseph De Vierno, Long Hill Board of Education, Morris County. August 14, 2000 (#256-00SEC)

Mr. De Vierno is suspended from office as a board member pending his attendance at the September training session. He will be removed from office without further proceedings if he fails to attend a training session by the end of October 2000.

ETHICS
CD 7/2000 DOR — In the Matter of Anne Dorety, Oldmans Board of Education, Salem County. July 10, 2000 (#224-00SEC)

The C. orders her removal from office as a Board member due to her repeated failure to attend the statutorily required training session within one year of her election.

INCREMENTS
CD George Montgomery, Petitioner, v.
2/2000 Irvington Board of Education, Essex County, Respondent.
MON February 15, 2000 (#58-00)

Petitioner asserts that the Board wrongfully withheld his annual increments for the 1996-97 school year. The Board asserts that Petitioner physically assaulted the District's parent coordinator. Petitioner had filed a grievance regarding this increment withholding. This grievance resulted in a binding arbitration hearing before PERC. This matter was placed on the inactive list. The jurisdictional issue raised at this hearing was whether the reason for withholding Petitioner's increments was disciplinary or based upon his performance. The Arbitrator held that the increments were withheld for primarily disciplinary reasons and ordered the matter to proceed to a hearing. The resulting arbitration award held that Petitioner's conduct constituted "just cause" for the imposition of the increment withholding. [See also: In the Matter of the Arbitration between Irvington Education Association and Irvington Board of Education, Arbitrator: Lawrence I. Hammer, PERC Docket No. AR-96-326, July 24, 1998] Under the circumstances in this matter, the C. is without subject matter jurisdiction over the controversy. Petition dismissed.

INCREMENTS
CD David Schlessinger, Petitioner, v.
12/2000 Jersey City School District, Hudson County, Respondent.
SCH December 1, 2000 (#394-00)

Petitioner has taught in the District for 31 years. Upon his return from medical leave, he was assigned to teach first grade, a grade he had never taught before. He did not receive inservice training for this assignment. The principal and vice-principal evaluated his teaching on several occasions and found it to be less than satisfactory. The C. finds that Petitioner has failed to prove that the District's decision to withhold his increment was arbitrary, capricious or unreasonable. Petition dismissed.

INCREMENTS
CD Bertha Smallwood, Petitioner, v.
8/2000 Jersey City School District, Hudson County, Respondent.
SMA August 18, 2000 (#270-00)

Petitioner appeals the decision of the District to withhold her increment for the 1998-99 school year. Petitioner was assigned to teach fifth grade during the 1997-98 school year. The math supervisor observed Petitioner teach a 45-minute math lesson. He rated her as less than satisfactory in every performance category on the evaluation form. The supervisor reviewed the evaluation with Petitioner and provided her with a comprehensive list of "suggestions for improvement." He made follow-up visits to her classroom to assist her. The supervisor provided Petitioner with a stack of materials to assist her in remedying her performance problems. Her second formal evaluation rated her as unsatisfactory in every performance category. Petitioner did not implement any of the suggestions given to her by the math supervisor. Petitioner was also evaluated by her principal in the area of language arts. She was given a less than satisfactory performance rating in the category of organization and planning. The principal's second evaluation rated Petitioner as unsatisfactory in every performance category. The principal directed Petitioner to visit and observe other teachers. Petitioner refused to do so. Petitioner's students had low test scores and were at least a grade behind. The C. finds that the Board's decision to withhold Petitioner's increment was not arbitrary, capricious or unreasonable. Petition dismissed.

INCREMENTS
CD Judy Smith, Petitioner, v.
7/2000 Asbury Park Board of Education, Monmouth County, Respondent.
SMI July 6, 2000 (#218-00)

Petitioner appeals from the Board's withholding of her salary increment. She argues that the Board failed to notify her of the reason for the withholding and that it was arbitrary, capricious and unreasonable. The Board has failed to participate in this appeal. Therefore, the Board is directed to restore the increment.

JOB DESCRIPTIONS
CD Woodbine Education Association and Paula Harris, Petitioners, v.
8/2000 Woodbine Board of Education, Cape May County, Respondent.
WOO August 18, 2000 (#274-00)

For case summary, see **REDUCTION IN FORCE.**

JOB INJURIES
CD In the Matter of the Tenure Hearing of Grace Folger,
5/2000 Orange School District, Essex County.
FOL May 15, 2000 (#147-2000)

For case summary, see **TENURE HEARINGS-TEACHERS**.

JOB INJURIES
CD Paul Medeiros, Petitioner, v.
1/2000 Jersey City School District, Hudson County, Respondent.
MED January 24, 2000 (#42-00)

For case summary, see **ABSENTEEISM**.

LANGUAGE INSTRUCTION
CD Neptune Township Education Association, Petitioner, v.
5/2000 Neptune Township Board of Education, Respondent.
NEP May 22, 2000 (#164-00)

For case summary, see **SUBCONTRACTING**.

LEAVES, SICK
CD In the Matter of the Tenure Hearing of Celese Segall,
4/2000 Elizabeth School District, Union County.
SEG April 17, 2000 (#128-00)

For case summary, see **TENURE HEARINGS-TEACHERS**.

LEAVES, SICK
CD Lucy Sheridan, Petitioner, v.
10/2000 Paterson School District, Passaic County, Respondent.
SHE October 16, 2000 (#344-00)

Petitioner, a school nurse, alleges that the District wrongfully deducted time from her sick leave bank in violation of N.J.S.A. 18A:30-2.1. The C. dismisses the matter since Petitioner knowingly relinquished any claim under this statute when she accepted her "Section 20" settlement before the Division of Workers' Compensation. Petition dismissed.

LEGAL FEES
CD Benjamin Seabrook and Wills, O'Neill & Mellk, Petitioners, v.
8/2000 Trenton Board of Education, Mercer County, Respondent.
SEA August 31, 2000 (#280-00)

xCriminal Charges xSave Harmless

The legal firm of Wills, O'Neill & Mellk successfully represented Petitioner against criminal charges. Petitioners seek reimbursement for legal fees and disbursements totaling $9,649.45 from Respondent Board under N.J.S.A. 18A:16-6.1. The C. finds that the pre-trial investigative work undertaken by the firm "was of significant and critical assistance" to the successful defense of the criminal action. Pursuant to statute, the C. finds that the Board is obligated to reimburse Mr. Seabrook for the legal fees and costs incurred by the firm for work performed in connection with the defense of the criminal charges. The amount is reduced by $1,606 which represents billing entries attributable to services rendered with respect to a binding civil action since these charges are not recoverable in this proceeding.

LIMITED STAR DISTANCE LEARNING CONSORTIUM
CD Neptune Township Education Association, Petitioner, v.
5/2000 Neptune Township Board of Education, Respondent.
NEP May 22, 2000 (#164-00)

For case summary, see **SUBCONTRACTING**.

MAGNET SCHOOLS
CD "S.G.," on behalf of minor child, "R.G.," Petitioner, v.
9/2000 Fair Lawn Board of Education, Bergen County, Respondent.
"S.G." September 25, 2000 (#320-00)

xScholarships, Fellowships and Loans

Petitioner's son attends the Academy for the Advancement of Science and Technology, a magnet school run by the Bergen County Technical School District. The Respondent Board paid for his tuition and transportation in accordance with N.J.S.A. 18A:54-20.1. The Respondent Board did not allow "R.G." to apply for or receive college scholarships donated to the District and administered by the Fair Lawn High School. The C. finds that the Board's restriction of its scholarship funds to students attending its high school is not arbitrary, capricious or unlawful. Petition dismissed.

MAGNET SCHOOLS
CD Scotch Plains-Fanwood Board of Education, Union County,
9/2000 Petitioner, v.
SCO Union County Board of Chosen Freeholders, Union County Vocational-Technical School District Board of Education, and the New Jersey Department of Education, Respondents.
September 22, 2000 (#313-00)

The Petitioner contests the legality of a magnet school operated by the county vocational school district. It seeks an order restraining the magnet school from accepting students residing in Petitioner's district and from collecting tuition for such students enrolled in the magnet school. The C. notes that the Department of Education does not approve or regulate the format of vocational and technical education programs. "As such, vocational and technical education programs may be offered through a magnet school format, a career academy format or through a traditional program format." Petitioner Board is directed to remit tuition costs to the Respondent UCVT for its resident students attending the magnet school for the 1997-98 school year and thereafter.

MANAGEMENT PREROGATIVES

CD 6/2000 NOR — North Bergen Federation of Teachers, Local 1060, American Federation of Teachers, and AFL-CIO, Petitioners, v. North Bergen Board of Education, Hudson County, Respondent. June 12, 2000 (#172-00)

For case summary, see **TELECOMMUNICATION DEVICES**.

NEW JERSEY SCHOOL BOARDS ASSOCIATION

CD 2/2000 NEW — New Jersey School Boards Association, Petitioner, v. Wyckoff Board of Education, Bergen County, Respondent. February 3, 2000 (#50-00)

xDues xNew Jersey School Boards Association

The NJSBA seeks an order that the Wyckoff Board pay it dues assessed to the Association under N.J.S.A. 18A:6-50 for the fiscal years 1993-94 through 1999-2000. The NJSBA also seeks an order that the Board make future timely payments of the assessed dues. The C. finds that all the boards of education in the State are obligated by statute to pay the dues assessed to it by the NJSBA. "If the Wyckoff Board wished to 'call into question' the reasonableness of dues being assessed by the NJSBA, the appropriate recourse would have been to bring that issue before the association's NJEA Delegate Assembly, since it is this body which by law has the statutory power to approve NJSBA's assessed dues." The Board argues that it is entitled to a setoff amounting to the value of services denied it by the NJSBA when the Board's "good standing" status was removed by the Association. "When the Board embarked on its long course of intentional refusal to pay dues assessed by the NJSBA, it acted at its own peril and will not be rewarded for such willful disregard of the law by having the amount of monies owing to the NJSBA reduced in the manner argued by respondent." The C. directs the Board to pay the assessed dues for 1993-94 through 1999-2000 in a mutually acceptable payment schedule. It is ordered to pay to the NJSBA the dues it is assessed in future fiscal years.

NONPUBLIC SCHOOLS

CD 3/2000 MOU — Mount Holly Board of Education, Petitioner, v. New Jersey State Department of Education, Respondent. March 1, 2000 (#74-00)

For case summary, see **TRANSPORATION OF STUDENTS**.

PART-TIME POSITIONS

CD 7/2000 HOL — Joyce Holloway, Petitioner, v. Saddle River Board of Education, Bergen County, Respondent. July 27, 2000 (#242-00)

For case summary, see **REDUCTION IN WORK HOURS**.

PENSIONS
SC Helen Kasper, Petitioner-Appellant, v.
7/2000 Board of Trustees of the Teachers' Pension and Annuity Fund,
KAS Respondent-Respondent.
July 18, 2000 (164 N.J. 564)

Petitioner was an educational media specialist. On May 31, 1991, Ms. Kasper arrived at school at 7:45 a.m. The school day officially began at 8:30 a.m. Ms. Kasper came early because the school principal required that certain media materials be distributed to various classrooms before the official start of classes. As she was climbing the school steps to the front door of the building, a man grabbed her purse and pulled her to the ground. The principal found her a few minutes after the attack and she suffered several injuries. She filed a claim for accidental disability retirement benefits. The TPAF Board determined "that Petitioner was totally and permanently disabled from the performance of her duties, that her disability was the direct result of a 'traumatic event' and that she was qualified for an ordinary service retirement." Her application for accidental disability retirement was denied since the traumatic event did not occur "during and as a result of the performance of her regular or assigned duties" as required by N.J.S.A. 18A:66-39c. The Superior Court, Appellate Division, affirmed the Board's decision. The Supreme Court reverses the Appellate Division's decision. "An employee may qualify for an accidental disability pension as a result of a traumatic injury occurring prior to the start of or after the end of the formal workday, so long as the employee is at premises owned or controlled by the employer for the purpose of performing his or her regular duties and not for some other purpose." The case is remanded to the TPAF Board for proceedings consistent with this opinion.

POSITIONS, ABOLISHMENT
CD Helen Cheloc, Petitioner, v.
6/2000 Elizabeth Board of Education, Union County, Respondent.
CHE June 12, 2000 (#173-00)

For case summary, see **INCREMENTS**.

POSITIONS, ABOLISHMENT
CD Donna Custode, Petitioner, v.
10/2000 Hackettstown Board of Education, Warren County, Respondent.
CUS October 30, 2000 (#349-00)

xSalaries xSecretaries and Clerks xTransfers

Petitioner was employed by the Board as an executive secretary to a department head. Before the beginning of the 1998-99 school year, the Board adopted a resolution fixing her salary in accordance with its negotiated salary guide. On June 10, 1998, the Board abolished the position of Director of Special Services and transferred Petitioner to a lower-paying secretarial position. She asserts that this constitutes a transfer from one secretarial position to another and that the Board violated her tenure rights by reducing her salary. The Board asserts that the higher-paying position was no longer needed and its action was a demotion as a result of a RIF. The C. finds that Petitioner had acquired a vested right in the salary which the Board established for her on May 13, 1998 when it approved her movement to the 14th step on the "higher level" salary guide for the 1998-99 school year. Since Petitioner remained in the same tenurable position after the RIF, the Board was not permitted to reduce her compensation without meeting the requirements in N.J.S.A. 18A:17-2. The Board is directed to compensate Petitioner, within 60 days of the date of this decision, with back pay and related emoluments for the 1998-99 and 1999-2000 school years.

POSITIONS, ABOLISHMENT

CD Hiwatha Green-Janvier, Petitioner, v.
12/2000 Atlantic City Board of Education, Atlantic County,
GRE Bert Lopez, President, James Herzog, Daniel Gallagher and William Steele, Principal, individually and jointly, Respondents.
December 11, 2000 (#404-00)

Petitioner appeals the Board's decision to eliminate her nontenured position as Chief for the Center for Safety and Security. The issues are: Whether the Board's action to terminate Petitioner's position was arbitrary and capricious? Whether, subsequent to her termination, the Board properly compensated Petitioner for her vacation time and compensatory time? Whether the Board's decision was discriminatory and violated the New Jersey Law Against Discrimination? The C. concurs with the Board's contention that the District was in a financial crisis and that its action to pursue a RIF was for reasons of economy. There is no evidence that the District engaged in discriminatory action when it voted to abolish Petitioner's position. Respondent properly exercised its contractual rights to provide Petitioner with 30 days notice that her position was abolished and her employment ended. The C. notes that Petitioner's contracts are silent regarding employment benefits. The parties' supplemental stipulation states that Petitioner was a twelve month employee entitled to 1.6 days of vacation time per month from November 1997 to June 1998 which the Board did not pay her. The C. orders the Board to provide compensation to Petitioner for any unused vacation days and sick days or personal days, if they were provided to her in the policy or agreement.

PROFANITY

CD In the Matter of the Tenure Hearing of Juan Cotto, State-
6/2000 Operated School District of the city of Newark, Essex County.
COT June 26, 2000 (#205-00)

For case summary, see **TENURE HEARINGS-TEACHERS**.

PROFANITY

CD In the Matter of the Tenure Hearing of Randall Dunham,
4/2000 Point Pleasant Borough School District, Ocean County.
DUN April 17, 2000 (#124-00)

For case summary, see **TENURE HEARINGS-TEACHERS**.

REDUCTION IN FORCE

CD Virginia Stanton, Petitioner, v.
1/2000 Willingboro Board of Education, Burlington County, Respondent.
STA January 24, 2000 (#43-00)

Petitioner acquired tenure as a teacher of art. Her employment was terminated on June 30, 1985 due to a RIF. She was recalled and re-employed by Respondent on September 1, 1994. However, in September, 1988, the Board employed a non-tenured art teacher to fill a vacancy to teach art. Petitioner was neither notified of the position nor offered a position. She filed this Petition within 90 days of discovering this fact. The parties recognize Petitioner's right on September 1, 1988 to be re-employed as a tenured teacher of art. The C. approves the parties' settlement terms.

REDUCTION IN FORCE

CD 8/2000 WOO — Woodbine Education Association and Paula Harris, Petitioners, v. Woodbine Board of Education, Cape May County, Respondent. August 18, 2000 (#274-00)

xSchool Nurses

Petitioner Harris is a certificated school nurse with 32 years of service in the District. Petitioners assert that the Board first acted to subcontract school nursing services even though a duly certified school nurse must perform certain services under school law. The Board abolished her position. Petitioners allege that she was given a choice between a 19-3/4 hour per week position without benefits and premature retirement with benefits. They assert that her teaching functions were transferred to less senior and nontenured staff in violation of her tenure and seniority rights. The Petitioners also assert that since 1998, an individual who only possesses a county substitute certificate has been filling the school nurse position. The Board asserts that it abolished Petitioner's school nurse position, which included both school nurse and health teaching responsibilities, and created two separate and distinct positions, one for school nurse and one for teaching health. The C. finds that Petitioner is "entitled to tenure protection in all assignments within the position of school nurse for which the endorsement on her educational services certificate qualifies her. . . Pursuant to N.J.A.C. 6:11-11.7, the school nurse endorsement authorizes services as a school nurse and teaching in health-related areas." The C. finds that the Board's assertion that it created two positions is not supported by the record. The job description included health instruction both before and after the Board's RIF affecting Petitioner's school nurse position. Under the facts of this matter, the assignment of teaching of health to teaching staff members with less seniority than Petitioner violates her rights. The C. points out that "where there does exist an obligation to aggregate assignments, such obligation is a general principle of law, not an absolute one." The C. holds that "county substitute certificates are intended only for persons *temporarily performing the duties of a fully certified and regularly employed teaching staff members.*" The C. orders Petitioner's reinstatement to her school nurse position on a full-time basis and that she be provided all salary, emoluments and benefits and pension credit to which she is entitled, less mitigation, retroactive to September 1, 1998. Pre- and post-judgment interest is denied.

REDUCTION IN WORK HOURS

CD 7/2000 HOL — Joyce Holloway, Petitioner, v. Saddle River Board of Education, Bergen County, Respondent. July 27, 2000 (#242-00)

xCertification xPart-Time Positions xSeniority

Petitioner is an art teacher. The Board reduced her assignment from full-time to part-time for the 1989-99 school year. Petitioner asserts that she should have been offered the full-time position as technology coordinator which the Board gave to another teacher with less seniority than Petitioner. The Board maintains that the selection of a different candidate as technology coordinator was its management prerogative since Petitioner never served in that position. The C. remands the matter to the OAL for determination of the appropriate endorsement, if any, for the position of technology coordinator.

REDUCTION IN WORK HOURS
CD Richard Markowski, Petitioner, v.
3/2000 Cape May County Special Services School District Board of
MAR Education, Cape May County, Respondent.
March 24, 2000 (#99-00)

Petitioner was employed as a social studies teacher from January 1, 1995 through June 30, 1998 when his full time tenured teaching position was reduced to a part-time position. Petitioner was placed on a preferred eligibility list and offered a part-time position. He declined the offer in order to accept full-time employment in another public school district. Petitioner claims that the Board retained a less senior teaching staff member to replace him and assigned this replacement teacher to more time than that offered to him. The C. agrees. The C. finds that no reduction in force was actually effectuated until April, 1999, when the classroom schedule of the replacement teacher was changed. Therefore, from June 30, 1998 until April, 1999, Petitioner's tenure and seniority rights were violated. The C. orders the Board to provide Petitioner with the salary and other emoluments to which he was entitled between September, 1998 and April 1, 1999, less mitigation. The Board shall maintain Petitioner on its seniority list for the position of social studies teacher and that he be advised when and if a position becomes available.
Affirmed, State Board of Education, July 5, 2000.

REDUCTION IN WORK HOURS
CD Linda Peters, Petitioner, v.
11/2000 Pinelands Regional School District Board of Education, Ocean
PET County, Respondent.
December 11, 2000 (#403-00)

Petitioner, a tenured speech correctionist, asserts that the Board's actions reducing her position from a full-time to a part-time one of 23 hours per week violated her tenure rights. In 1996, the C. granted a waive to the Board permitting it to increase the size of speech language services groups to no more than five students. Based on this waiver, the Board reduced Petitioner's work hours for the 1996-97 school year with a commensurate reduction in her annual salary. There was no comparable reduction in her assigned caseload and job responsibilities. In 1997, the Department of Education, Office of Special Education issued a report which showed violations of students' IEPs and procedural concerns. Based on this report, the Board increased Petitioner's workweek to 32 hours with a corresponding increase in salary. It restored her full-time position for the 1997-98 school year. The ALJ finds that the Board engaged in an illegal RIF by reducing her position from full-time to part-time without reducing the amount of work she was required to do. The C. agrees and orders the Board to pay Petitioner all salary and emoluments owing and due her for the 1996-97 school year.

RESIDENCY
CD Martin Cohen, Petitioner, v.
12/2000 James R. Durr, Member, Chesterfield Board of Education,
COH Burlington County, Respondent.
December 28, 2000 (#418-00)

For case summary, see **BOARD MEMBERS**.

RESIDENCY

CD 12/2000 SOU — South River Board of Education, Middlesex County, Petitioner, New Jersey State Department of Education, Division of Finance, Respondent.
December 18, 2000 (#416-00)

The Board disputes the Department's determination that "S.R." is or was a resident in the District and that Board is responsible for the costs of her education. The Department argues that the pupil's parent resident in South River on the date of "S.R.'s" placement at the Edna Mahon Correction Center. The matter is remanded to the OAL for further proceedings.

RESIDENCY

Absecon Board of Education, Atlantic county, Petitioner, v. "M.L.G." and "L.G.-P.," on behalf of minor child, "B.G.," Respondents. (#236-00, July 13, 2000)

Bradley Beach Board of Education, Monmouth County, Petitioner, v. New Jersey Department of Education, Division of Finance, Respondent. (#215-00, July 3, 2000)

"C.C.," on behalf of minor son, "J.H.," Petitioner, v. Union Township Board of Education, Union County, Respondent. (#36-00, January 21, 2000)

"C.M.," on behalf of "F.O.," Petitioner, v. Edgewater Board of Education, Burlington County, Respondent. (#303-00, September 11, 2000)

"E.K.," on behalf of minor children, "K.K., Jr." and "M.K.," Petitioner, v. Point Pleasant Borough Board of Education, Ocean County, Respondent. (#356-00, November 3, 2000; **Affirmed**, State Board of Education, February 7, 2001.

"E.L.," on behalf of minor child, "A.H.," Petitioner, v. Morris Hills Regional School District Board of Education, Morris County, Respondent. (#56-00, February 15, 2000)

"G.E.," on behalf of her minor nephew, "R.C.," Petitioner, v. South Orange-Maplewood Board of Education, Essex County, Respondent. (#10-00, January 10, 2000)

"G.E.A.," on behalf of minor child, "J.G.A.," Petitioner, v. Atlantic City Board of Education, Atlantic County, Respondent. (#31-00, January 18, 2000)

"G.M.," on behalf of minor niece, "B.S.G.," Petitioner, v. West Orange Board of Education, Essex County. (#234-00, July 13, 2000)

"H.T.," on behalf of minor child, "A.T.," Petitioner, v. Union Township Board of Education, Union County, Respondent. (#134-00, April 25, 2000)

Hunterdon Central Regional School District Board of Education, Hunterdon County, Petitioner, v. "E.F." and "G.F.," Respondents. (#49-00, February 2, 2000)

"J.A.D.," on behalf of minor child, "J.D.," Petitioner, v. Marlboro Board of Education, Monmouth County, Respondent. (#28-00, January 18, 2000).

"J.C." and "S.C.," on behalf of minor child, "D.C.," Petitioners, v. West Orange Board of Education, Essex County, Respondent. (#296-00, September 11, 2000)

"J.M.," on behalf of minor child, "M.C.C.," and "M.C.C.," Petitioner, v. Hamilton Board of Education, Mercer County, Respondent. (#251-00, August 4, 2000)

"M.A.D.," on behalf of minor child, "R.L.," Petitioner, v. Mount Ephraim Board of Education, Camden County, Respondent. (#227-00, July 10, 2000)

"M.F." and "P.J.F.," on behalf of minor children, Petitioners, v. Hope Township Board of Education, Warren County, Respondent. (#246-00, July 31, 2000; **Affirmed**, State Board of Education, February 7, 2001)

"M.J.," on behalf of minor grandson, Petitioner, v. West Orange Board of Education, Essex County, Respondent. (#302-00, September 11, 2000)

"M.L.," on behalf of minor child, "S.C.," Petitioner, v. West Orange Board of Education, Essex County, Respondent. (#401-00, December 7, 2000)

"M.R." and "O.R.," on behalf of minor child, "A.M.," Petitioners, v. Fort Lee Board of Education, Bergen County, Respondent. (#381-00, November 17, 2000)

"M.S.," on behalf of minor child, "M.S.," Petitioner, v. West Orange Board of Education, Essex County, Respondent. (#406-00, December 15, 2000)

"R.C.P.," on behalf of minor child, "A.S.K.," Petitioner, v. Ramapo Indian Hills Regional High School District Board of Education, Bergen County, Respondent. (#264-00, August 18, 2000; **Affirmed**, State Board of Education, January 3, 2001)

"S.L.S.," on behalf of minor child, "T.P.," Petitioner, v. Bordentown Regional School District Board of Education, Burlington County, Respondent. (#281-00, August 31, 2000)

"S.T." and "J.T.," on behalf of minor child, "H.T.," Petitioner, v. Springfield Board of Education, Union County, Respondent. (#177-00, June 12, 2000)

"T.M.," on behalf of minor child, "M.E.," Petitioner, v. West Orange Board of Education, Essex County, Respondent. (#265-00, August 18, 2000)

Wayne Board of Education, Passaic County, Petitioner, v. "E.P." and "R.P.," parents of "E.P.," a minor child, Respondents. (#32-00, January 19, 2000)

RIGHT TO KNOW LAW

SC-A 3/2000 WIL — Dr. H. Benjamin Williams, Plaintiff-Respondent, v. Atlantic City Board of Education et al., Defendants and The Press of Atlantic City, Defendant/Intervenor-Appellant. Superior Court, Appellate Division Docket No. A-1109-98T3 March 28, 2000 [329 N.J. Super. 308]

xTenure Charges

In a closed session, the Board suspended Dr. Williams from his position as superintendent of schools and placed him on administrative leave. Dr. Williams alleged violations of the Open Public Meetings Act, the Law Against Discrimination and the Tenure Employees Hearing Act. The Board filed tenure charges against Plaintiff. The Press filed a motion to intervene and to obtain a copy of the tenure charges and supporting documents. The motion judge permitted the Press to intervene, but declined its motion for disclosure of the tenure charges. The Press contends that the tenure charge documents are statutory public records accessible under the Right to Know Law. The Court notes that the Board was required to conduct its proceedings in closed session when addressing the conduct of Plaintiff and whether probable cause existed for his dismissal or a reduction in salary. Dr. Williams argues if the tenure charge documents are open to the public, the closed session activity of the Board and the privacy rights of the employee are undermined. The Court disagrees. "The tenure charge documents filed with the Board's secretary pursuant to N.J.S.A. 18A:6-11 are "public records" within the meaning of the Right to Know Law. The documents were accessible on filing."

SALARIES

CD 10/2000 CUS — Donna Custode, Petitioner, v. Hackettstown Board of Education, Warren County, Respondent. October 30, 2000 (#349-00)

For case summary, see **POSITIONS, ABOLISHMENT.**

SALARIES

CD 3/2000 REI — Arthur Reinertsen, Petitioner, v. East Brunswick Board of Education, Middlesex County, Respondent. March 31, 2000 (104-00)

For case summary, see **CUSTODIAL AND MAINTENANCE STAFF.**

SALARY OVERPAYMENTS
CD Alison Hendershot, Petitioner, v.
2/2000 Montague Board of Education, Sussex County, Respondent.
HEN February 28, 2000 (#70-00)

Petitioner has worked as a part-time basic skills teacher or elementary school teacher since the 1993-94 school year. She was on maternity leave from February, 1997 through June, 1997 and returned to work for the 1997-98 school year. She was paid $18,013 for the 1997-98 school year. For the 1998-99 school year, Petitioner's salary was $16,599.23. Petitioner contends that the Board was prohibited from reducing her compensation as a part-time teacher while employing nontenured teachers in her area of certification. The Board contends that Petitioner accepted a reduction in hours from half time to four ninths time in 1997-98, but was erroneously paid half time salary. The reduction in her salary for 1998-99 merely corrected this error. The C. finds no evidence on the record to support Petitioner's contention that she was subjected to a RIF in the 1998-99 school year since the Board did not reduce her salary for reasons of economy, but for salary overpayment. The sole issue is whether the Board improperly reduced Petitioner's salary in the 1998-99 school year in violation of her tenure rights. The C. finds that the Board's adjustment of Petitioner's salary for the 1998-99 school year violated her statutory tenure protections. "The proper means of redress, although less immediate in its result, is to freeze petitioner's salary at its 1997-98 amount." The C. directs the Board to reimburse Petitioner the amount of $1,413.77. The Board is to freeze Petitioner's salary at this level until such time as a 4/9 position at Petitioner's step on the salary guide meets or exceeds $18,013.

SAVE HARMLESS
CD Benjamin Seabrook and Wills, O'Neill & Mellk, Petitioners, c.
8/2000 Trenton Board of Education, Mercer County, Respondent.
SEA August 31, 2000 (#280-00)

For case summary, see **LEGAL FEES**.

SCHOLARSHIPS, FELLOWSHIPS AND LOANS
CD "S.G.," on behalf of minor child, "R.G.," Petitioner, v.
9/2000 Fair Lawn Board of Education, Bergen County, Respondent.
"S.G." September 25, 2000 (#320-00)

For case summary, see **MAGNET SCHOOLS**.

SCHOOL ADMISSION

CD 9/2000 "M.G.L." "M.G.L.," on behalf of herself and minor children, "B.S.," "D.J.," and "V.J.," Petitioner, v. West Orange Board of Education, Essex County, Respondent. September 7, 2000 (#290-00)

Petitioner contests the Board's policies and procedures for school admission which resulted in a delay in enrolling her children in school. The C. finds that it was improper for the Board to require that a Certificate of Inhabitancy be completed as part of its registration process. This factor contributed substantially to the delay in the children's enrollment. Petitioner and her sister should never have been required to make several visits to the West Orange Zoning and Housing Authority and be subjected to a housing inspection as part of the registration process. The C. further finds that when Petitioner came into the District office on November 3, 1998 to enroll her children, she should have been provided a date for review of the enrollment/registration material sooner than November 16th. "There is no provision in statute or code which requires a parent or guardian to provide a transcript prior to a child's enrollment in school. Furthermore, the C. "finds that incomplete immunization records may not interfere with the enrollment of a child in a school district, notwithstanding that it may, by law, be a basis for delaying actual admission to school." The C. orders the District to discontinue inclusion of a CI in its registration packet. The District is ordered not to allow the absence or incompleteness of transcripts and immunization records to interfere with the enrollment of a new student. The county superintendent is directed to review the District's policies and procedures for enrolling new students. All other relief requested by Petitioner is denied.

SCHOOL DISTRICT REORGANIZATION

CD 6/2000 BER Berlin Township Board of Education, Petitioner, v. Lower Camden County Regional District No. 1 Board of Education, Camden County, Respondent. June 29, 2000 (#210-00EM)

The Berlin Board is a constituent district of the Regional District which will be dissolved. The Regional Board approved a Dissolution Incentive Program by which selected personnel are to be paid money in the present school year and again in the 2000-2001 school year in return for their promise to continue their employment until the dissolution date. The Berlin Board seeks a temporary restraining order against the Respondent Board from making such payments until a hearing is conducted on its Petition of Appeal pending before the C. The C. grants the motion and remands the matter to the OAL for a plenary hearing on its merits.

SCHOOL DISTRICT REORGANIZATION
CD In the Matter of the Dissolution of Lower Camden County Regional
2/2000 High School District No. 1, Camden County.
LOW February 25, 2000 (#67-00)

The Petitioners are the boards of education and governing bodies of two municipalities that are constituents of a regional high school district which is being dissolved. They seek reconsideration of a January 27, 1999 Assistant C.'s decision concerning the funding of capital improvements in the Regional District at the present apportionment rate. Although the dissolution date has not been set, it is agreed that the capital improvements would have benefit after the dissolution date. The ALJ explains the significant procedural distinctions between a withdrawal and a dissolution regarding the assumption of indebtedness. The State Board of Education has not amended the withdrawal regulations to incorporate dissolutions, nor has it ever promulgated any separate rules for dissolution. Therefore, the ALJ will apply the withdrawal regulations to dissolution. The ALJ concludes that the $2.75 million lease purchase agreement does not constitute indebtedness. Therefore, this Petition is dismissed. The C. concurs.
On July 5, 2000, the State Board of Education **affirmed** the C.'s decision.

SCHOOL NURSES
CD Woodbine Education Association and Paula Harris, Petitioners, v.
8/2000 Woodbine Board of Education, Cape May County, Respondent.
WOO August 18, 2000 (#274-00)

For case summary, see **REDUCTION IN FORCE.**

SECRETARIES AND CLERKS
CD Donna Custode, Petitioner, v.
10/2000 Hackettstown Board of Education, Warren County, Respondent.
CUS October 30, 2000 (#349-00)

For case summary, see **POSITIONS, ABOLISHMENT.**

SENDING-RECEIVING RELATIONSHIPS
CD Hammonton Board of Education, Atlantic County, Petitioner, v.
1/2000 Hammonton Education Association et al., Respondents.
HAM January 4, 2000 (#2-00)

The Lower Camden County Regional School District No. 1 is currently a limited purpose regional school district which operates four schools educating pupils in grades 7-12. Its constituent districts submitted an application to the C. requesting that a Board of Review convene to authorize a public referendum to consider the dissolution of the Regional District. The application was granted and dissolution was approved by the voters. Thereafter, the Hammonton District and Waterford District entered into a proposed sending-receiving relationship whereby the Hammonton Board agreed to accept Waterford's 7-12 grade students. There are matters to be answered before the sending-receiving relationship is implemented. The C. finds that the execution of a sending-receiving relationship is within the inherent powers of each Board of Education under education law and regulation. The Hammonton Board asks the C. if it has any responsibility to use employees of the dissolved Regional District. Under N.J.S.A. 18A:13-64, the employment rights of employees of the dissolving district involve continued employment in one of the constituent districts. "Moreover, this statutory right is confined to instances where regional staff members cannot be accommodated within their certification to available

high school positions. It is uncontroverted here that Hammonton is not a constituent district of the LCCR, nor is it claimed that Hammonton either had any input in the hiring or employment of LCCR employees, or played any role whatsoever in the referendum to dissolve the LCCR. As such, N.J.S.A. 18A:13-64 does not operate to create an independent obligation for Hammonton to employ staff of the LCCR as a result of the district's dissolution." Hammonton does not have any derivative responsibility under N.J.S.A. 18A:28-6.1 to employ regional district staff because of its proposed sending-receiving relationship with Waterford. This statute applies only if a district closes a school and then sends its pupils from the closed school to the receiving district. All of the affected staff were employed by the Regional District, not the Waterford District. The staff of the dissolved Regional District will be able to select positions in all seven of the constituent districts, but will not be able to select positions in grades 7-12 in Waterford. The C. finds that under N.J.S.A. 18A:38-20, the current boards of education of Hammonton and Waterford may not enter into a thirty year sending-receiving relationship. This statute specifically prohibits any term exceeding ten years. At the end of this period, the new boards may enter into subsequent 10-year successor agreements if desired.

SENDING-RECEIVINIG RELATIONSHIPS

CD 3/2000 LOW

Lower Camden County Regional Education Association and Lower Camden County Regional High School District No. 1 Principals and Supervisors Association, Petitioners, v. Berlin Board of Education, Chesilhurst Board of Education, Clementon Board of Education, Lindenwold Board of Education, Pine Hill Board of Education, Waterford Board of Education and Winslow Board of Education, Respondents. March 14, 2000 (#89-00 E)

The C. has not approved an effective date for the dissolution of the Lower Camden County Regional High School District, a grade 7-12 limited purpose regional school. Petitioners filed an application for emergency relief before the C. seeking a stay of the scheduled staff selection process by the Respondent boards pending a plenary hearing on the merits of Respondents' Petition. The ALJ denies the motion for emergency relief. "If mistakes occur or oversights are made, there is time to correct such matters before the effective date of the dissolution and petitioners do have remedies available to them should the need arise. The legal rights of petitioners underlying their claims in the petition of appeal are not clearly settled, nor have petitioners demonstrated a likelihood of success on the merits." The C. concurs and orders the matter to further proceedings on merits.

SENDING-RECEIVING RELATIONSHIPS

CD 3/2000 WIN

Winfield Board of Education, Union County, Petitioner, v. Rahway Board of Education, Union County, Respondent. March 2, 2000 (#76-00)

Petitioner Board does not have high school facilities. It seeks to sever its sending-receiving relationship with the Rahway Board. Petitioner seeks to enter into such a relationship with the Kenilworth Board of Education. The Rahway Board opposes the severance. After examining the record, the C. determines that there is no showing of substantial financial, educational, or racial negative impact and grants the requested severance. Withdrawal shall be phased out over a four-year period, beginning with the incoming 9th grade class in September, 2000.

SENIORITY
CD Joyce Holloway, Petitioner, v.
7/2000 Saddle River Board of Education, Bergen County, Respondent.
HOL July 27, 2000 (#242-00)

For case summary, see **REDUCTION IN WORK HOURS**.

SENIORITY
CD Sandra Siino, Petitioner, v.
6/2000 Kearny Board of Education, Hudson County. Respondent.
SII June 16, 2000 (#185-00)(#186-00)(#187-00)

The C. approves the parties' settlements in these three cases, except in the area of seniority. Because the record does not contain a precise employment history, the C. is unable to verify the seniority determinations agreed to by the parties. The C. finds and determines that the seniority calculation cannot be deemed binding or precedent setting for any future reduction in force in the District because it could impact on other teaching staff members not party to this consolidated matter.

SENIORITY
CD Patricia L. White and Judith Van Oostendorp, Petitioners, v.
6/2000 Kearny Board of Education, Hudson County, Respondent.
WHI June 16, 2000 (#188-00)

The C. approves the parties' settlement, except in the area of seniority. The record does not contain a precise employment history so the C. is unable to verify the legal correctness of the seniority determination. The C. finds and determines that the seniority calculation cannot be deemed binding or precedent setting for any future reduction in force in the District because it could impact on other teaching staff members not party to this consolidated matter.

SEXUAL ABUSE
CD In the Matter of the Tenure Hearing of Henry Allegretti, Trenton
3/2000 School District, Mercer County.
ALL March 22, 2000 (#96-00)

For case summary, see **TENURE HEARINGS-TEACHERS**.

SEXUAL HARASSMENT
CD In the Matter of the Tenure Hearing of Gregory J. Brewer,
12/2000 Roselle School District, Union County.
BRE December 11, 2000 (#405-00)

For case summary, see **TENURE HEARINGS-TEACHERS**.

SEXUAL HARASSMENT
CD John Cox, Petitioner, v.
3/2000 Hamilton Township Board of Education, Mercer County, Respondent.
COX March 27, 2000 (#100-99)

For case summary, see **CONTRACT RENEWALS**.

SEXUAL HARASSMENT
CD "D.K.," on behalf of minor child, "M. O'K.," Petitioner, v.
5/2000 Belmar Board of Education, Monmouth County, Respondent.
"D.K." May 5, 2000 (#143-00)

For case summary, see **SUSPENSIONS AND EXPULSIONS**.

SEXUAL HARASSMENT
CD "P.C.," on behalf of minor child, "M.C.," Petitioner, v.
3/2000 Monroe Board of Education, Gloucester County, Respondent.
"P.C." March 31, 2000 (#106-00E)

For case summary, see **SUSPENSIONS AND EXPULSIONS**.

SEXUAL HARASSMENT
CD In the Matter of the Tenure Hearing of Roger Wood, South
8/2000 Plainfield School District, Middlesex County.
WOO August 18, 2000 (#271-00)

For case summary, see **TENURE HEARINGS-TEACHERS**.

STATE AID
CD Bayonne Board of Education, Hudson County, Petitioner, v.
10/2000 Dr. Leo Klagholz and the New Jersey State Board of Education,
BAY Respondents, and
Hackensack Board of Education, Bergen County, Petitioner, v.
Dr. Leo Klagholz, Brian W. Clymer and New Jersey State
Board of Education, Respondents.
October 11, 2000 (#338-00)

On March 4, 1998, the State Board of Education directed that a plenary hearing be conducted in order to determine whether the Bayonne Board of Education had the requisite standing to pose a State equal protection challenge to the method of distribution of foundation and categorical aid under the Quality Education Act of 1990 as amended. If Bayonne has such standing, has it demonstrated that a State equal protection violation has occurred in connection with distribution of the aid? Bayonne contends that the method of distribution chosen by Respondents is based upon outdated enrollment data, thereby depriving Bayonne of additional aid since its enrollment increased while its State aid did not. The ALJ finds that Bayonne has standing since its petition can be read to pursue claims on behalf of its students since the reduction in State Aid funding impacts on the offerings that can be made to students. The ALJ finds that Bayonne failed to prove that funding formulas created any improper classifications among school districts or that the formulas had a disparate impact on Bayonne. The C. concurs and dismisses the Petition.

STATE AID
CD "D.S.," on behalf of minor child, "A.S.," Wildwood Board of
1/2000 Education, et al., Petitioners, v.
"D.S." Leo F. Klagholz, Commissioner of Education and the New Jersey
Department of Education, Respondents.
January 10, 2000 (#6-00)

Petitioners allege that Respondents failed to properly implement the provisions of the Comprehensive Education Improvement and Financing Act as they pertained to the District's State aid for the 1997-98 and 1998-99 school years. They assert that the Board's students were denied their constitutional entitlement to a thorough and efficient education because the State provided less aid. The C. notes that Wildwood received more aid in 1997-98, even after stabilization, than it had under the prior funding formula. Furthermore, the District received 1.5 million over and above CEIFA aid through special language in the 1997 and 1998 Appropriation Acts. CEIFA's stabilization provision will work in the 1999-2000 school year and beyond so that the "final aid calculation for Wildwood in any given year will include core curriculum standards aid based on the district's growth in actual enrollment, without the transitional limitation imposed during the first two years of the act's operation. . . .To the extent that petitioners are alleging that the stabilization provision, as it will apply in 1999-2000 and beyond, acts to prevent the district from providing T&E in accordance with the constitutional mandate, such allegation, in addition to being insufficiently pled, is premature until such time as the funding formulas of CEIFA have been fully reflected in the educational programs of the district and afforded an opportunity to work as intended." Petition dismissed.
Affirmed, State Board of Education, June 7, 2000.

STATE AID
CD Lakewood Board of Education, Ocean County, Petitioner, v.
3/2000 New Jersey State Department of Education, Office of Compliance,
LAK Respondent.
March 8, 2000 (#81-00)

For case summary, see **TRANSPORATION OF STUDENTS**.

STATE AID
CD Wildwood Crest Board of Education, Cape May County,
2/2000 Petitioner, v.
WIL New Jersey Department of Education, Office of Complaince,
Respondent.
February 28, 2000 (#73-00)

The C. finds that the Board exceeded its authority by constructing a sidewalk on property owned by the municipality and waiving the municipality's responsibility to pay contaminated soil removal costs in return for labor provided by Wildwood Crest. The Department is ordered to recover all state aid which was improperly disbursed on the sidewalk project.

STATE HEALTH BENEFITS PLAN
CD In the Matter of the Tenure Hearing of Sheree Baker,
11/2000 Newark School District, Essex County.
BAK November 20, 2000 (#386-00)

For case summary, see **TENURE HEARINGS-TEACHERS**.

STATE HEALTH BENEFITS PLAN
CD 9/2000 BUT — In the Matter of the Tenure Hearing of Elaugh Butler, State-Operated School District of the City of Newark, Essex County.
September 1, 2000 (#284-00)

For case summary, see **TENURE HEARINGS-TEACHERS**.

STATE HEALTH BENEFITS PLAN
CD 12/2000 JAM — In the Matter of the Tenure Hearing of Cecelia James, Newark School District, Essex County.
December 22, 2000 (#417-00, December 22, 2000)

For case summary, see **TENURE HEARINGS-TEACHERS**

STATE HEALTH BENEFITS PLAN
CD 1/2000 LIS — In the Matter of the Tenure Hearing of John Lister, State-Operated School District of the City of Newark, Essex County.
January 21, 2000 (#39-00)

For case summary, see **TENURE HEARINGS-TEACHERS**.

STRIKES
SC-A 5/2000 MID — Middletown Board of Education, Monmouth County, Plaintiff-Appellant/Cross-Respondent, v.
Middletown Township Education Association, Diane Swaim, et al. Defendants-Respondents, and
New Jersey Education Association and John Molloy, Defendants-Respondents.
Superior Court, Appellate Division
May 16, 2000

The Board obtained an order to show cause with restraints which they served on about 300 of some 850 employees threatening to strike. Most of the secretarial staff reported for work, but only about 130 of the 770 teachers did so. The Board hired substitute teachers to keep the schools open. On September 3, 1998, it moved for litigant's relief. On September 10th, the teachers returned to work. The Board moved for an order allowing it the monetary damages it had sustained as a result of the strike. It docked the pay of the striking teachers. It seeks additional funds to pay for the cost of the substitute teachers, security, legal fees, transportation costs for replacement staff, and extra overtime. The Superior Court, Chancery Division, judge declined to award damages since the Board's total expenses did not exceed its savings in teachers' salaries. The judge did allow the requested counsel fees. The Board appeals from the portion of the judgment denying its claim for the non-instructional expenses it incurred. The Superior Court, Appellate Division, agrees with the trial judge. The defendant MTEA acknowledged in the trial court its responsibility for the $30,000 counsel fee and does not challenge the concession before this court. Regarding the issue of cross-appellants' joint and several liability, there is no basis on which to impose that liability on them. "There is no competent evidence that cross-appellants participated in planning, supporting or carrying out the strike and no competent evidence to support the Board's bare speculation that the cross-appellants colluded with defendant MTEA and its members. Absent a factual basis that could support a finding that they were involved in the strike, the judgment against them cannot stand." The matter is remanded to the trial court for entry of an appropriate amended judgment.

SUBCONTRACTING
CD Kittrels Educational Training Systems, Inc. and Alonzo
9/2000 Kittrels, Petitioners, v.
KIT State-Operated School District of the City of Newark, Essex County, Respondent.
September 18, 2000 (#309-00)

Since October, 1987, the firm entered into written agreements with the Newark Board of Education engaging it as a consultant to provide various educational services. No successor written contract was entered into for the 1994-95 school year, but it was extended on a month-to-month basis as of July 1, 1994. On July 12, 1995, the State took over operation of the Newark School District and advised the firm that its services were no longer needed. Petitioner asserts that he should have been paid in accordance with the contract as extended from July 1 to July 12, 1995. He also asserts that he was entitled to sixty calendar days pay after July 12, 1995 and was entitled to a $1200 payment as a bonus authorized by certain senior staff employees of the District. The issue is: At the time the contract was terminated, did the District owe Petitioner for services? The C. finds that Petitioners do not have any entitlement to 60 days pay pursuant to N.J.S.A. 18A:7!-44(a) nor to the bonus payment adjustment. However, the C. notes that Petitioners are entitled to payment for the services during July 1995.

SUBCONTRACTING
SBD Arlene Miller, v. Leo F. Klagholz, Commissioner, New
5/2000 Jersey Department of Education Committee, Respondent, and
MIL New Hanover Board of Education, Burlington County, Respondent.
May 3, 2000

xChild Study Teams

Petitioner was employed as a school psychologist and was a member of the child study team. The Board abolished her position effective June 30, 1996. The Board had been granted a waiver of regulations so as to provide all basic child study team services by contracting with a private vendor. Petitioner claims that the language of N.J.S.A. 18A:46-5.1 requires boards to provide basic child study team services only through its own employees or by combining with other districts to provide such services through authorized public entities. The State Board of Education finds that Petitioner's view is correct. The grant of the waiver was not a valid exercise of the C.'s authority and is invalid.
On November 27, 2000, the C. rejected the parties' settlement. The agreement is expressly contingent upon the Division of Pensions and Benefits recognition of additional pension credit to be attributed to Petitioner for the 1996-97 school year. The C. cannot sanction a settlement which is contingent upon the satisfaction of conditions by another agency and which provides that if such conditions are not met, the agreement shall be deemed null. The C. directs that the matter be remanded to the OAL and held in abeyance pending review by the Division of Pensions and Benefits of the parties' proposal.

SUBCONTRACTING

CD 5/2000 NEP — Neptune Township Education Association, Petitioner, v. Neptune Township Board of Education, Respondent. May 22, 2000 (#164-00)

xCertification xDistance Learning xLanguage Instruction xLimited Star Distance Learning Consortium

The Board entered a contract with Limited Star Distance Learning Consortium (STARNET) to provide distance learning credit courses in Latin I, II, and III at the Neptune Township Senior High School. STARNET provides student instruction via direct television broadcast and videotape programs. It provides collateral materials including calendars and lesson plans as well as text books, laboratory apparatus, resource materials, work books, language audio tapes and other instructional materials. The instructor who presented the Latin instruction via closed circuit television did not hold a New Jersey standard teaching certificate. STARNET requires the District to assign a classroom facilitator for high school credit courses. The two Department Chairpersons who were assigned to facilitate the Latin classes were not certified in any foreign language. The Association asserts that the Board may not use non-certified teaching personnel to provide foreign language instruction for academic credit to its high school students. The Association contends that Core Course Proficiencies could not be met through the distance learning technique. The C. finds that the Latin instruction provided through Respondent's distance learning program could not lawfully be delivered by a person not in possession of appropriate New Jersey certification. The Board is directed to cease its current means of providing Latin instruction through STARNET.

SUBSTITUTE STAFF

SBD 5/2000 MID — In the Matter of the waiver granted to the Middletown Township Board of Education, Monmouth County. May 3, 2000

The Middletown Education Association appealed the grant of a waiver from N.J.A.C. 6:11-4.5(c) to the Board by the C. This would permit it to employ individuals possessing a certificate of eligibility with advanced standing to serve as a substitute teacher for up to sixty days in the same assignment. The State Board of Education finds that waiving the requirement that an individual's service as a daily substitute under a county substitute certificate must be limited to twenty days in a given assignment constitutes a waiver of the certification rules which would otherwise apply. County substitute certificates are not teaching certificates. Therefore, as detailed in Guttenberg, such a waiver cannot properly be granted. The waiver is invalidated.

SUSPENSIONS AND EXPULSIONS

CD 5/2000 "B.B." — "B.B.," on behalf of minor child, "J.L.," Petitioner, v. Weymouth Board of Education, Atlantic County, Respondent. May 3, 2000 (#141-00E)

The Petitioners allege that the Board improperly suspended "J.L." from its schools and placed her on home instruction. The ALJ finds that the Board's case against her was based entirely upon hearsay. The ALJ orders her immediate reinstatement. The C. concurs and returns the matter to the OAL for such further proceedings as may be necessary to bring it to conclusion.

SUSPENSIONS AND EXPULSIONS
CD "B.G.," on behalf of minor child, "J.G.," Petitioner, v.
4/2000 Somerville Board of Education, Somerset County, et al.,
"B.G." Respondents.
April 28, 2000 (#138-00E)

The C. grants the request for emergent relief. The Board will reinstate "J.G." to regular classes at the high school effective April 10, 2000. Should the Board again suspend "J.G.," it will provide him with: written notice of any charge on which the suspension is based, a written statement of the factual allegations on which any charges are based, the means of contact of any person with knowledge of relevant facts, a copy of any relevant documents and notice of a Board hearing during which "J.G." may confront any witnesses and evidence against him and call witnesses and offer evidence in his defense. The matter is being returned to the OAL for further proceedings, if any, necessary to bring the matter to conclusion.

SUSPENSIONS AND EXPULSIONS
CD "D.C.," on behalf of "T.C.," Petitioner, v.
2/2000 Sterling High School District Board of Education, Respondent.
"D.C." February 15, 2000 (#63-00E)

The Board expelled "T.C." Petitioner maintains that the Board must provide "T.C." an education in a proper facility. The C. points out that the Board has offered to pay both tuition and transportation costs for "T.C.'s" attendance at one of three local alternative high schools provided he maintains good attendance at the chosen school. The C. finds that Petitioner is not entitled to documents about "T.C." from the District's Core Team. The C. denies Petitioner's request for emergent relief and orders the matter continued at the OAL on the merits of Petitioner's claims.

SUSPENSIONS AND EXPULSIONS
CD "D.C.," on behalf of minor child, "T.C.," Petitioner, v.
9/2000 Sterling Regional High School District Board of Education,
"D.C." Camden County, Respondent.
September 8, 2000 (#292-00)

Petitioners demand that the Board: remove from their son's pupil record an entry relating to a theft charge; provide copies of records made and maintained pursuant to the Board's substance abuse prevention program; and provide "T.C." an education in a proper facility after his expulsion. The ALJ finds that the Board has removed from "T.C.'s" pupil record the entry on the theft charge. The ALJ points out that the records maintained as part of the drug abuse program are confidential. Such patient records may only be divulged with a patient's prior written consent or, upon a showing of good cause as authorized by an "appropriate order of a court of competent jurisdiction." The ALJ finds that the Board did not act arbitrarily in expelling "T.C." The Board has directed "T.C." to several alternative schools through which he can obtain credits to obtain his high school degree and the Board has offered to pay for such educational services. The C. affirms and dismisses the Petition.

SUSPENSIONS AND EXPULSIONS
CD "D.K.," on behalf of minor child, "M. O'K.," Petitioner, v.
5/2000 Belmar Board of Education, Monmouth County, Respondent.
"D.K." May 5, 2000 (#143-00)

xSexual Harassment
The Board suspended "M.O'K." from school for three days and suspended him from the basketball team for the entire season. He was accused of exposing his buttocks, making an obscene gesture and a remark during basketball practice. The C. agrees with the Board that "M.O.'K.'s" conduct falls within the prohibitions of the District's Code of Student Conduct against sexual harassment and that the sanctions imposed against him were consistent with that Code. Petition dismissed.

SUSPENSIONS AND EXPULSIONS
CD "F.B." and "M.B.," on behalf of minor children, "J.B."
2/2000 and "L.B.," Petitioners, v.
"F.B." Moorestown Board of Education, Burlington County, Respondent.
February 15, 2000 (#53-00)

Petitioners appealed the Board's decision to suspend "J.B." and "L.B." from classes and extracurricular activities for consuming alcohol off school premises prior to a school sponsored dance. The C. finds that the suspensions were arbitrary and capricious since the Board did not enforce its Drug and Alcohol Abuse Policy against all students who were suspected of involvement in this incident. Furthermore, under its own disciplinary policy, the Board was not authorized to impose sanctions for conduct of this type. The C. directs the Board to revise its policy to eliminate the phrase "near school property" and to reflect the sphere of the Board's disciplinary authority more clearly. The Board is ordered to remove from the students' school records all references to the disciplinary actions.

SUSPENSIONS AND EXPULSIONS
CD "G.L.," on behalf of minor child, "R.M.," Petitioner, v.
6/2000 State-Operated School District of the City of Jersey City,Hudson
"G.L." County, Respondent.
June 13, 2000 (#180-00E)

In his paper for his creative writing class, "R.M." describes acts of violence against a number of persons in the high school, including the principal. The teacher gave his paper to the school's guidance counselor who showed it to the principal. "R.M." was suspended for ten days. During his suspension, he was observed in the school's parking lot. The principal was assigned a security guard to accompany her to and from her car and be present in the principal's office after school hours. "R.M." was evaluated by a psychiatrist. "R.M." was ordered to attend classes in another school to complete his senior year. The C. denies emergent relief. The matter shall continue at the OAL for further proceedings on the merits of the claim if deemed necessary.

SUSPENSIONS AND EXPULSIONS
CD "J.F." and "B.F.," on behalf of minor child, "M.F.,"
6/2000 Petitioners, v.
"J.F." Pemberton Board of Education, Burlington County, Respondent.
June 13, 2000 (#179-00)

The Board suspended "M.F." for one day for writing inappropriate notes to her teachers. The C. determines that the Board's decision was not arbitrary, capricious, unreasonable or a violation of her constitutional rights. The imposition of this suspension will not be disturbed by the C. Petition dismissed.

SUSPENSIONS AND EXPULSIONS
CD "K.W.," on behalf of minor child, "C.C.," Petitioner, v.
3/2000 Lower Camden County Regional High School District No. 1 Board of
"K.W." Education, Camden County, Respondent.
March 20, 2000 (#95-00)

"C.C." was expelled for telephoning a bomb threat to the high school under its Policy of Discipline Procedure. C. finds that Petitioner has failed to establish that the Board's decision to expel "C.C." was arbitrary, capricious or otherwise contrary to law. Dismissed.

SUSPENSIONS AND EXPULSIONS
CD "M.C." and P.C.," on behalf of minor child, "B.G.," Petitioners,
8/2000 v.
"M.C." Buena Regional School District Board of Education, Atlantic County, Respondent.
August 18, 2000 (#263-00E)

Petitioners request emergent relief. "B.G." was expelled. The Board directed that "B.G." be enrolled in an alternative high school. Petitioners request that "B.G." be placed on home instruction and/or returned to attendance at the Buena Regional High School. The C. denies emergent relief. Matter shall move to plenary hearing on its merits.

SUSPENSIONS AND EXPULSIONS
CD "M.G." and "M.G.," on behalf of minor child, "A.G.,"
11/2000 Petitioners, v.
"M.G." Washington Township Board of Education, Gloucester County, Respondent.
November 6, 2000 (#359-00)

The Board expelled "A.G." after two drug tests showed that he had taken marijuana. "This matter concerns a district's dual responsibility to arrange for the immediate medical examination of a pupil when a staff member suspects that he is under the influence of alcohol or other drugs at school or a school-sponsored function, and, where that suspicion is substantiated, to ensure that he receives appropriate follow-up services." The C. finds that N.J.S.A. 18A:40A-12 does not require that parental consent be obtained before a pupil receives this medical examination. Once a staff member advises the administrator of suspected student use, the principal or designee may not substitute his/her judgment for that of the referring staff member. Upon the student's return to school, a substance awareness coordinator or other appropriately trained teaching staff member shall interview the student for the purpose of determining the extent of involvement with prohibited substances and possible need for treatment. Board policy provides that if a pupil is found to be under the influence of prohibited substances twice during his enrollment in the District, the pupil will be excluded from school pending an expulsion hearing by the Board. After "A.G.'s" second positive finding of marijuana, the Board conducted an expulsion hearing without further documentation of his progress in treatment. "A.G." was placed on home instruction until his 16th birthday when the Board terminated educational services to him. The C. is concerned about the perfunctory hearing on expulsion. "Notwithstanding the fundamental nature of an expulsion hearing, not only were petitioners dissuaded from attending the hearing and arguing on A.G.'s behalf, but there are also indications in the record that the Board may have deliberately failed to consider the viability of options other than expulsion, such as alternative educational programs, that might be suitable for him." The C. directs the Board to readmit "A.G." to its District and to determine, after considering pertinent factors including available alternative educational options, whether expulsion is the appropriate sanction in his case.

SUSPENSIONS AND EXPULSIONS
CD "P.C.," on behalf of minor child, "M.C.," Petitioner, v.
3/2000 Monroe Board of Education, Gloucester County, Respondent.
"P.C." March 31, 2000 (#106-00E)

xSexual Harassment

The Board suspended "M.C.," a seventeen-year-old senior, based on its determination that he had committed sexual harassment. The C. orders emergent relief and permits "M.C." to attend the senior class trip to Florida. The matter shall continue at the OAL for expedited hearing. On August 18, 2000, the C. approved the withdrawal of the matter (#261-00).

SUSPENSIONS AND EXPULSIONS
CD "P.H." and "P.H.," on behalf of minor child, "M.C.,"
9/2000 Petitioners, v.
"P.H." Bergenfield Board of Education, Bergen County, David C. Hespe, Commissioner of Education and New Jersey State Board of Education, Respondents.
September 15, 2000 (#304-00E)

"M.C." slashed another student's coat with a razor-blade box cutter. He had two other weapons in his possession. He was charged as a juvenile with aggravated assault and unlawful possession of weapons on school grounds. "M.C." pled guilty to two disorderly persons offenses resulting from the charges and was placed on probation. The District expelled him. After the expulsion, the District discontinued all educational services to "M.C." and takes the position that it is no longer responsible for his education. The C. orders that home instruction should be provided to "M.C." until the matter is heard at the OAL.

SUSPENSIONS AND EXPULSIONS
CD "V.A.," on behalf of minor child, "K.M.A.," Petitioner, v.
3/2000 Collingswood Board of Education, Camden County, Respondent.
"V.A." March 20, 2000 (#94-00)

The shutdown screen message on the computers in the school labs reads: "It is now safe to turn off your computer." "K.M.A." opened the shutdown message file on the computer he was using and substituted the message "if you turn me off I will blow up." "K.M.A." was suspended and arrested. The Board expelled him. Based on the circumstances, the C. determines that the Board did not act reasonably when it concluded, under the circumstances of this matter, that "K.M.A.'s" entitlement to a free public education in the District should be permanently severed. The penalty was too harsh. "K.M.A.'s" record shall reflect that he is entitled to reinstatement for the 1999-2000 school year. Should he request readmission to the District, the Board should conduct a full and fair evaluation in order to determine whether a return to the regular school environment or an alternative placement is warranted.

TELECOMMUNICATION DEVICES
CD North Bergen Federation of Teachers, Local 1060, American
6/2000 Federation of Teachers, and AFL-CIO, Petitioners, v.
NOR North Bergen Board of Education, Hudson County, Respondent.
June 12, 2000 (#172-00)

xManagement Prerogatives

Petitioners challenge the Board policy prohibiting possession and use of portable paging or telecommunication devices by employees during school hours. Petitioners assert that the policy is *ultra vires*, arbitrary and capricious and violates free speech. The parties partially settled, agreeing that employees could use cellular phones during their lunch periods. A hearing was held on the issue regarding employee use of cellular phones during their professional periods. The C. finds that the Board's imposition of restrictions in the use of telecommunications devices during preparation or professional periods was a reasonable exercise of its discretionary authority not subject to disturbance by the C. Petition dismissed.

TENURE CLAIMS
CD Patricia Desmond, Petitioner, v.
2/2000 Asbury Park Board of Education, Monmouth County, Respondent.
DES February 3, 2000 (#48-2000)

For case summary, see **CONTRACT CANCELLATIONS**.

TENURE CLAIMS
CD Nancy J. DiComo, Petitioner, v.
10/2000 Newark School District, Essex County, Respondent.
DIC October 2, 2000 (#327-00)

Petitioner asserts that she is tenured in a supervisory position and seeks reinstatement to a position as vice principal with back pay. The District avers that she is only tenured as a teacher. Petitioner taught elementary school from 1964 through June, 1972. From 1972 through June, 1979 she was a remedial reading resource teacher. From 1980 through 1996, Petitioner was in the following titles: central office supervisor of reading; supervisory monitor; and central office supervisor of special projects. When the State took over the District in 1996, Petitioner became a vice principal and remained in that position until 1998 when she was not renewed as vice principal. The District claims that her supervisory position was abolished and transferred her to a classroom position. The C. notes that "this matter does present for the first time in a contested case the circumstance wherein a central office administrative/supervisory employee, whose position was abolished pursuant to N.J.S.A. 18A:7A-44 was not, upon reorganization, either terminated or returned to an 'other than central office' position to which he or she was entitled by virtue of tenure and/or seniority rights, but rather, is placed in a *school-based* administrative position in which the individual has not previously attained tenure." The C. finds that a vice principal position is separately tenurable from that of supervisor. It requires an endorsement different from that of supervisor and constitutes a school-based rather than a central office position. "Tenure accruing to a vice principal position cannot be achieved without actual service in the position for the requisite statutory length of time." The C. concludes that Petitioner cannot attain, through the reorganization of a state-operated district, tenure status in a school-based administrative position when she has only served on central office supervisory positions. Petition dismissed.

TENURE CHARGES

SC-A 3/2000 WIL — Dr. H. Benjamin Williams, Plaintiff-Respondent, v. Atlantic City Board of Education et al., Defendants and The Press of Atlantic City, Defendant/Intervenor-Appellant. Superior Court, Appellate Division Docket No. A-1109-98T3 March 28, 2000

For case summary, see **RIGHT TO KNOW LAW.**

TENURE HEARINGS

CD 4/2000 BRO — In the Matter of the Tenure Hearing of Joseph Brown, New Jersey State Department of Corrections, Garden State Correction Facility, Mercer County. April 20, 2000 (#132-00)

The Department of Corrections filed tenure charges against Respondent, alleging conduct violating security procedures designed to ensure the safety of staff and inmates assigned to the details. The C. approves the parties' settlement.

TENURE HEARINGS-ADMINISTRATORS

CD 3/2000 HAG — In the Matter of the Tenure Hearing of Gloria Hagopian, Paterson School District, Passaic County. March 22, 2000 (#97-00)

The District certified tenure charges of unbecoming conduct against Respondent, the tenured Director of Research, Planning and Evaluation. The charges involve mishandling of funds. The C. finds that Respondent's actions constitute unbecoming conduct warranting her dismissal from her tenured position. The matter shall be referred to the State Board of Examiners for action against Respondent's certificate as it deems appropriate.

TENURE HEARINGS-CUSTODIAL AND MAINTENANCE STAFF

CD 1/2000 CAR — In the Matter of the Tenure Hearing of Denise Carmona, Atlantic City School District, Atlantic County. January 4, 2000 (#3-00)

The Board certified tenure charges against Respondent, a tenured custodian, for excessive absenteeism, abandonment of position and unbecoming conduct. On August 5, 1999, Respondent threatened to kill administration officials. She has been absent from work for 302 days. Respondent has not replied to the Board's charges. Therefore, each of the count is deemed to be admitted. The C. orders Respondent dismissed from her tenured custodial position.

TENURE HEARINGS-CUSTODIAL AND MAINTENANCE STAFF

CD 2/2000 MCE — In the Matter of the Tenure Hearing of Timothy McEnroe, Berkeley Heights School District, Union County. February 15, 2000 (#57-00)

xCriminal Charges

The Board filed tenure charges with the C. against Respondent, a tenured custodian. He was charged with conduct unbecoming a public employee based upon his arrest for committing a burglary and criminal mischief. Respondent entered a plea of guilty to the criminal mischief charge and to the charge of burglary in the third degree. A judgment of conviction on the count of third degree burglary was formally entered which included an order of forfeiture of his public employment by the Superior Court. The Board moves for summary decision. The C. finds that the tenure charges are moot. His employment with the Board ceased, effective upon the date of the forfeiture order.

TENURE HEARINGS-CUSTODIAL AND MAINTENANCE STAFF

CD 8/2000 RAN — In the Matter of the Tenure Hearing of Lawrence Randolph, Elizabeth School District, Union County. August 30, 2000 (#279-00)

The Board certified tenure charges of unbecoming conduct, excessive and chronic absenteeism and excessive lateness and neglect of duties against Respondent, a tenured custodian. No replay has been received from Respondent in response to the Board's charges. Therefore, the C. directs that each count of the charges against Respondent is deemed to be admitted. Respondent is dismissed from his tenured position as a custodian in the Board's employ as of the date of this order.

TENURE HEARINGS-CUSTODIAL AND MAINTENANCE STAFF

CD 10/2000 SAN — In the Matter of the Tenure Hearing of Manuel Santiago, Elizabeth School District, Union County. October 2, 2000 (#330-00)

xDrug Abuse

Respondent, a tenured head custodian, was arrested for possession of marijuana and cocaine. The Board asserts that despite his successful completion of the PTI program, his involvement with drugs is sufficiently flagrant to warrant dismissal from his position. The C. agrees with the Board that this single incident of drug possession, under the factual circumstances presented herein, and in light of the ALJ's credibility determinations, is sufficient to warrant Respondent's removal as a janitor with the District.

TENURE HEARINGS-LIBRARIANS

CD 6/2000 ALL — In the Matter of the Tenure Hearing of Lenore M. Allen, Old Bridge School District, Middlesex County. June 19, 2000 (#193-00, June 19, 2000)

xCorporal Punishment

The C. rejects the parties' settlement. Respondent, a school librarian, is charged with conduct unbecoming a staff member because of alleged use of corporal punishment and failure to adopt recommendations for reducing stress at work, inability to cope with personal conflicts, and creating a volatile classroom environment. The revisions to the settlement must specify that Respondent will not oppose proceedings before the State Board of Examiners to suspend or revoke her certificates. If the parties are unable to reach accord on the agreement, the matter shall proceed to hearing on its merits.

On November 1, 2000, the State Board of Education determined that the criteria set forth in Cardonick have been met. It is not necessary for the proposed settlement in this case to include an express agreement by Respondent not to oppose referral to the State Board of Examiners. The State Board of Education concludes that "the acknowledgment of the Commissioner's duty to make the referral already included in the proposal is sufficient to insure that, as required by Cardonick, Respondent understands that one of the implications of the settlement is referral to the Board of Examiners and, consequently, the potential for the board to initiate proceedings to revoke or suspend her certification." The State Board of Education approves the parties' settlement and directs the matter be transmitted to the State Board of Examiners.

TENURE HEARINGS-PRINCIPALS
CD 6/2000 BLA — In the Matter of the Tenure Hearing of Hattie Black, State-Operated School District of the City of Newark, Essex County. June 12, 2000 (#175-00)

xTests and Testing

Respondent, a school principal, is charged with unbecoming conduct relating to an alleged breach of security of the policies of the Elementary School Proficiency Assessment and purchases made without District approval. The parties have settled. The C. rejects the agreement. The C. remands the matter to the OAL for revision of the settlement which specifies that Respondent will not oppose proceedings before the State Board of Examiners to suspend or revoke her certificates. If the parties are unable to reach accord, the matter shall proceed to the OAL for hearing on merits.

TENURE HEARINGS-PRINCIPALS
CD 6/2000 KIM — In the Matter of the Tenure Hearing of Morris Kimble, Trenton School District, Mercer County. June 15, 2000 (#181-00)

Tenure charges were filed against Respondent, a tenured principal. Allegations include: early release of a student without proper authorization; failure to take steps to discipline the school disciplinarian for allowing the early release; failure to insure that the staff were made aware of the Board's early dismissal policy; failure to meet and respond to parental concerns; arriving to work and meetings late; failing to submit the middle school budget plan in the designated format; failure to provide access to the Holland Middle School by a Trenton Times reporter in accordance with Board policy and administrative directives; failing to insure adequate instruction on March 3, 1999 when many members of the staff attended a funeral; and generally failing to follow Board policies and administrative directives. The C. does not approve the parties' settlement. The record provides no information as to what position Respondent will hold between his resuming employment with the Board and the effective date of his retirement. The C. cannot determine how the payment of accumulated sick days, vacation days and personnel leave days was calculated. The matter is remanded to the OAL

TENURE HEARINGS-PSYCHOLOGISTS
CD In the Matter of the Tenure Hearing of Margaret Sidberry,
8/2000 Willingboro School District, Burlington County.
SID August 18, 2000 (#272-00)

The Board filed tenure charges of inefficiency, pattern of conduct and unbecoming conduct against Respondent, a tenured school psychologist. The Board asserts that Respondent failed to prepare and submit psychological assessment reports in a timely manner as required by federal and state law. The Board submitted 53 memos from the Director of Pupil Personnel Services reminding her of overdue reports; three annual evaluations reprimanding her for overdue reports; an increment withholding; and four professional improvement plans to guide her to improve the submission of reports. Respondent points to her overall good record in other aspects of her position. She asserts that staff cutbacks and shortages, increased case management duties, extra assignments, scheduling difficulties, and the huge volume of students assigned to her for processing interfered with her writing and submission of reports. The C. finds that the Board sustained its charges of inefficiency against Respondent. It provided her with a period of remediation during which it accorded her reasonable support to assist her in overcoming such inefficiencies. Respondent was unwilling or unable to improve. The C. orders Respondent's removal from her tenured position. "At a very minimum, the untimely preparation and submission of her reports delayed the initial or re-evaluative placement of students in appropriate educational programs and placed the District in unnecessary jeopardy of potential legal action for failure to comply with federal and state statutes and regulations governing the rights of classified students." The matter shall be transmitted to the State Board of Examiners for action against Respondent's certificate as it deems appropriate.
Affirmed, State Board of Education, January 3, 2001.

TENURE HEARINGS-SUPERINTENDENTS OF SCHOOLS
CD In the Matter of the Tenure Hearing of Dr. Robert H. Mann,
7/2000 Asbury Park School District, Monmouth County.
MAN July 7, 2000 (#217-00)

The Board seeks to remove Dr. Mann, its superintendent of schools, before the end of the contract period. The C. does not approve the parties' settlement. The C. remands the matter to the OAL for expansion of the record and revision of the settlement agreement.
On December 7, 2000, the C. rejected the revised settlement and remanded the matter to the OAL. The settlement must indicate Respondent's understanding that the matter will be referred to the State Board of Examiners for possible revocation of certificate. (#399-00R)

TENURE HEARINGS-SUPERINTENDENTS OF SCHOOLS
CD In the Matter of the Tenure Hearing of Mark Mullen, Chesterfield
5/2000 School District, Burlington County.
MUL May 15, 2000 (#148-00)

The Board certified tenure charges alleging conduct unbecoming a chief school administrator. It asserts that Respondent made misrepresentations to the Board, exhibited incompetence in the handling of school board issues and in performing his duties, and failed to adhere to school board policies. The Board maintains that Respondent failed to: supervise and direct fiscal operations and instructional programs, negotiate between the Board and the teachers' association, and failed to ensure the safety and well being of pupils by mishandling the school nurse situation. The C. approves the parties' settlement and transmits a copy of this decision to the State Board of Examiners for action as it deems appropriate.

TENURE HEARINGS-SUPERINTENDENTS OF SCHOOLS
CD 1/2000 WIL
In the Matter of the Tenure Hearing of Dr. H. Benjamin Williams, Atlantic City School District, Atlantic County. January 24, 2000 (#40-00)

The tenure charges against Respondent allege that Dr. Williams did not properly oversee the purchase order system and the fiscal and financial affairs of the District. Respondent asserts that these conditions existed before he was superintendent and that he was in the process of establishing safeguards over the finances. The C. approves the parties' settlement. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

TENURE HEARINGS-TEACHERS
CD 3/2000 ALL
In the Matter of the Tenure Hearing of Henry Allegretti, Trenton School District, Mercer County. March 22, 2000 (#96-00)

xSexual Abuse

The District filed tenure charges of conduct unbecoming a teaching staff member against Respondent, a tenured teacher of French. He was suspended from his position without pay for 120 days pending resolution of these charges. Respondent is charged with: using inappropriate language and actions during his French class, making inappropriate comments of a sexual nature to female students, hitting a female student on the buttocks with a book, and making inappropriate comments of a sexual nature to minor students. DYFS received an allegation of sexual and emotional abuse concerning these charges. After conducting an investigation, DYFS concluded that sexual abuse was unfounded in relation to Respondent's actions. DYFS did find that there was evidence Respondent made inappropriate comments to female students concerning sexual situations and body parts. The C. determines that Respondent's use of inappropriate language and inappropriate conduct with his students is conduct unbecoming a teacher. In view of all the facts in this matter, including Respondent's prior unblemished history, the extreme penalty of loss of tenured employment is not warranted. The C. orders a loss of salary for six months plus the withholding of salary increments for the 1999-2000 and 2000-2001 school years. Respondent is to be reinstated to his position only after he is determined to be fit by a psychologist or psychiatrist to be selected and paid by the Board within 60 days of the date of this decision.
Affirmed, State Board of Education, August 2, 2000.

TENURE HEARINGS-TEACHERS
CD 11/2000 BAK
In the Matter of the Tenure Hearing of Sheree Baker, Newark School District, Essex County. November 20, 2000 (#386-00)

xState Health Benefits Program

The District charged Respondent, a tenured teacher, with conduct unbecoming a teaching staff member for her participation in a plan to defraud the State Health Benefit Program. Respondent pled guilty to charges of conspiracy in the second degree and charges of theft by deception in the third degree based on her participation in the scheme. Respondent has resigned her position with the District. The matter is dismissed and will be forwarded to the State Board of Examiners for action as it deems appropriate.

TENURE HEARINGS-TEACHERS

CD 12/2000 BRE — In the Matter of the Tenure Hearing of Gregory J. Brewer, Roselle School District, Union County. December 11, 2000 (#405-00)

xSexual Harassment

Tenure charges of unbecoming conduct were filed against Respondent, a tenured teacher of science. The Board alleges that he sexually harassed a 19-year-old female student during class. The student states that Respondent asked her for her phone numbers, pulled a string on her blouse and wanted to date her. The C. notes that paramount to the resolution of this case is the credibility of the witnesses. The C. determines that in the interest of fairness, Respondent's Motion to Re-open the Hearing be granted and that the matter be remanded to the OAL for further proceedings. "The C.'s independent review of the record, including a thorough scrutiny of the transcripts, compels him to agree with respondent that the within ALJ's stated determinations with regard to respondent's credibility were based, in large part, on facts not supported by evidence in the record. . . .Given the gravity of the allegations, *i.e.*, sexual misconduct directed at a special education student, and the significance of the stakes at issue here, the C. concludes that it is essential that respondent be provided with an opportunity for entry into the record of such further testimony and evidence as will permit the critical determinations relating to credibility to be based on a full and fair record." Respondent is entitled to back pay for the period October 16-December 15, 1998 since the summer months were incorrectly excluded from the computation of the 120 days.

TENURE HEARINGS-TEACHERS

CD 9/2000 BUT — In the Matter of the Tenure Hearing of Elaugh Butler, State-Operated School District of the City of Newark, Essex County. September 1, 2000 (#284-00)

xState Health Benefits Plan

Petitioner brought tenure charges of conduct unbecoming a teacher against Respondent. The charges were based on Respondent's intentional participation in a scheme to defraud the State Health Benefits Program by conspiring with Dr. Cal H. Lichtman to submit claims for psychological services allegedly rendered. Petitioner allegedly provided information required and used to submit fraudulent claims to the insurance carrier for payment for psychological services not rendered. Respondent received a share of the fees collected. On May 5,2000, Respondent was convicted of crimes of the second and third degree which involved dishonesty. As part of the sentence, the judge entered an order forfeiting Respondent's employment with the District. Because Respondent forfeited her public employment pursuant to N.J.S.A. 2C:51-2a(1) and 2, as a consequence of the judicial order, the tenure charges are rendered moot.

TENURE HEARINGS-TEACHERS
CD 6/2000 COT — In the Matter of the Tenure Hearing of Juan Cotto, State-Operated School District of the city of Newark, Essex County. June 26, 2000 (#205-00)

xCorporal Punishment xProfanity

The District charged Respondent, a tenured teacher, with several counts of corporal punishment, unbecoming conduct and subordination." It states that Respondent used excessive force to discipline students, used profanity and racial epithets in his classroom, and referred to students in derogatory and demeaning language. The District asserts that Respondent in separate incidents pushed a student against a wall, pushed another student into a chair, pushed a student against a blackboard, grabbed a student by the neck and pushed him into a chair, and made derogatory statements to students about "welfare kids" and "project kids." Respondent had received prior warnings and reprimands. The ALJ finds that Respondent was aware that corporal punishment is illegal and that he had received ample notice that he should refrain from excessive use of physical force in disciplining students. The C. concurs that the District has sustained its tenure charges against Respondent. The appropriate penalty is dismissal. The matter shall be forwarded to the State Board of Examiners.

Affirmed, State Board of Education, November 1, 2000.

TENURE HEARINGS-TEACHERS
CD 12/2000 DUF — In the Matter of the Tenure Hearing of Robert Duffield, Stow Creek Township School District, Cumberland County. December 18, 2000 (#407-00)

Respondent pled guilty in court to the charge of aggravated sexual assault, based upon his sexual relations with an 8th grade student in his class. The C. orders Respondent's dismissal from his position as a tenured teacher and refers the decision to the State Board of Examiners

TENURE HEARINGS-TEACHERS
CD 4/2000 DUN — In the Matter of the Tenure Hearing of Randall Dunham, Point Pleasant Borough School District, Ocean County. April 17, 2000 (#124-00)

xAlcohol Abuse xProfanity

The Board certified charges of unbecoming conduct against Respondent, a tenured teacher. A parent complained about messages from Respondent left on his home answering machine and directed to his two daughters who are students in the District. Respondent admitted that he made the telephone calls, but claimed that it was the result of a reaction to medication and alcohol. He did not remember the content of the messages, which included profanities. The C. finds that Respondent's behavior constitutes conduct unbecoming a teaching staff member. The C. rejects as untenable Respondent's claim of entitlement to the protections afforded a handicapped person by New Jersey's Law Against Discrimination because of his "alcoholism disability." "Employers are not required to tolerate criminal or egregious conduct of employees, even if the conduct in question was caused by a disability." Respondent claims that his offending actions were not "work related." The C. disagrees since the messages were directed to two students, caused them great distress and disrupted their educational program. Furthermore, the "mere fact that misconduct occurred at a time and place entirely apart from school and even may involve people entirely unrelated to it does not immunize the offender from disciplinary sanction commensurate with his offense." The C. orders Respondent dismissed from his tenured position. The matter shall be transmitted to the State Board of Examiners for action, as it deems appropriate, against Respondent's certificate.

Affirmed, State Board of Education, September 6, 2000.

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of Brian Eilert, Hazlet
4/2000 School District, Monmouth County.
EIL April 3, 2000 (#109-00)

The Board preferred a charge of unbecoming conduct against Respondent, a tenured teacher. It alleges that he told students to kick another pupil. The ALJ finds that the egregious behavior demonstrated by Respondent constitutes an incident sufficiently flagrant to demonstrate unfitness. The C. concurs. Respondent is to be dismissed from his tenured position. A copy of this decision shall be forwarded to the State Board of Examiners for review.

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of Neal A. Ercolano,
5/200 Branchburg Board of Education, Somerset County, and
ERC Neal A. Ercolano, Petitioner, v.
Branchburg Board of Education, Somerset County, Respondent.
May 1, 2000 (#140-00)

See **1998 School Law Decisions Index** for background. The C. held that Respondent's conduct was unbecoming a teaching staff member based upon his conviction for simple assault of a sixth grade student while in school. Despite his previous record, the C. finds that this incident is sufficiently flagrant to warrant Respondent's dismissal from his teaching position. The C. concludes that Respondent was entitled to his salary and related emoluments retroactive to February 27, 1998 without off-set for substituted employment. The C. finds that Respondent has not met his burden of establishing that the Board's action to withhold his salary increment for the 1997-98 school year was arbitrary and capricious. Respondent is dismissed from his tenured position as a teacher in the District. The matter is referred to the State Board of Examiners for action against his certificate as it deems appropriate.

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of Vyvian Felder, Newark
4/2000 School District, Essex County.
FEL April 20, 2000 (#131-00)

xDrug Abuse

Charges of conduct unbecoming a teacher were certified against Respondent, a tenured teacher of mathematics. The District accused Respondent of leaving her classroom without authorization, being in possession of a controlled dangerous substance while on school premises and being arrested for it, and testing positive for cocaine. After the charges, Respondent sought treatment and entered into a residential rehabilitation center. The criminal charges were disposed of by treating Ms. Felder as a first offender. The C. approves the parties' settlement. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

TENURE HEARINGS-TEACHERS

CD 3/2000 FIN — In the Matter of the Tenure Hearing of Patricia Finn, Bordentown Regional School District, Burlington County. March 10, 2000 (#86-00)

The Board filed tenure charges against Respondent alleging incapacity and other just cause. Charge A. includes failure to prepare adequate lesson plans, failed to adhere to developed lesson plans, failed to provide pupils with the instruction scheduled for a given date, failed to adhere to the individual educational plans of special education pupils, and failed to supervise and use the instructional aide in an appropriate manner. Charge B. involves just cause for removal and includes failure to adhere to policies regarding meetings with parents and other staff members, failure to prepare and follow lesson plans, failure to follow IEPs, leaving her classroom unattended, and permitting an instructional aid to deliver instruction directly. Before filing the charges with the C., the Board did not follow the procedures for certifying charges of inefficiency as set out in N.J.S.A. 18A:6-11. Until the 1996-97 school year, Respondent's evaluations were mostly favorable. The ALJ characterizes most of the charges as charges of inefficiency. The Board did not provide Respondent the 90 day statutory period of assistance to overcome the specific inefficiencies. Therefore, these charges are dismissed without prejudice. Charges of leaving her classroom unattended and permitting an instructional aide to deliver instruction directly to students are "discrete incidents of conduct or behavior which violate some known rule or regulation." The ALJ characterizes these charges as conduct unbecoming a teaching staff member or other just cause. The C. reviewed the two just cause charges and found them sufficient, if true, to warrant dismissal of reduction in salary. The C. remands the two charges to the OAL for further proceedings.

The C. approves the parties' settlement, November 8, 2000 (#360-00R).

TENURE HEARINGS-TEACHERS
CD 5/2000 FOL — In the Matter of the Tenure Hearing of Grace Folger, Orange School District, Essex County. May 15, 2000 (#147-2000)

xAbsenteeism xJob Injuries xTextbooks

The Board filed tenure charges of excessive absenteeism, unbecoming conduct, insubordination, and other just cause against Respondent, a tenured teacher of special education. Charges 1 through 4 allege excessive absenteeism during the 1994-95, 1996-97, 1997-98 and 1998-99 school years. The charges aver that the absences "resulted in a disruption of the proper operation of Park Avenue, interfering with the instructional process, resulting in a detrimental impact on the educational environment. . . ." Respondent asserts that the majority of the absences were due to on the job injuries. The Board argues that Respondent did not return to employment on dates reasonably expected by her physicians. It asserts that she exhibited a pattern of absences occurring before and after weekends and holidays raises questions regarding her credibility. The ALJ notes that it has not yet been determined by the Division of Workers' Compensation whether any of Respondent's injuries arose out of and in the course of her employment. However, the ALJ states that "action may be taken against a teacher because of excessive absenteeism even if such is the result of work-related injuries." The ALJ upholds Charges 1 through 4. Respondent argues that Charges 5 through 13 constitute charges of inefficiency and should be dismissed because the Board did not comply with pertinent procedural requirements. Charge 5 alleges that Respondent failed to follow a specific administrative directive requiring her to inform her principal of a scheduled attendance at a mandated professional day and that such conduct constitutes unbecoming conduct, insubordination and just cause for dismissal. Charge 6 asserts that Respondent failed to follow an administrative directive requiring all staff members to submit lesson plans in a timely manner. Charge 7 alleges that Respondent abandoned her classroom to attend an education workshop without prior authorization from her principal and failed to follow a specific administrative directive by ignoring the principal's request to return from the workshop to her classroom. Charge 8 asserts that Respondent failed to follow a specific administrative directive requiring all teachers to submit a list of core curriculum needs to immediate Team Leaders. Charge 9 maintains that Respondent failed to follow specific administrative directives requiring all teachers to attend a mandatory staff meeting. The ALJ finds that the Board has not proven Charges 5-9 by a preponderance of the creditable evidence. Charge 10 alleges that Respondent failed to follow an administrative directive requiring all teachers to keep beepers and cellular telephones out of sight and to ensure that they are disengaged during the instructional day. The ALJ finds that the Board has proven Charge 10 by a preponderance of credible evidence and states that the withholding of an increment is an appropriate penalty. Charge 11 alleges that Respondent failed to follow a specific administrative directive by her continued failure to use the Board's adopted texts, thus constituting unbecoming conduct, insubordination and other just cause. It maintains that such failure adversely affected the instruction provided her students. The ALJ states that failure by a teacher to use a district's adopted textbooks constitutes insubordination and/or unbecoming conduct. However, the ALJ finds that the Board has not proven this charge by a preponderance of the creditable evidence. Charge 12 alleges that Respondent continuously failed to follow administrative directives during the 1998-99 school year. The AlJ dismisses this charge. Charge 13 avers that Respondent failed to follow by a specific administrative directive by failing to group students according to their IEP levels, thus adversely affecting the instruction provided to students. Charge dismissed. The C. finds nothing in the record indicating that the Board based its decision to certify tenure Charges 1 through 4, excessive absenteeism, against

Respondent solely upon application of a mechanistic, mathematical or statistical formula. The Board has met the standard for termination of a tenured employee for excessive absenteeism set forth in White. Thus, there must be consideration of "(1) the particular circumstances of the absences and not merely the number of absences, (2) the impact that the absences had on the continuity of instruction during the period of time the absences occurred, not merely after the fact and (3) that there be some warning given to the employee that his or supervisors were dissatisfied with the pattern of the absences." The C. upholds the ALJ's findings regarding Charge 10. The C. orders Respondent's termination from her tenured position. A copy of this decision shall be forwarded to the State Board of Examiners for review and action as it deems appropriate.

TENURE HEARINGS-TEACHERS

CD 6/2000 GRU — In the Matter of the Tenure Hearing of Robert I. Grundfest, Madison School District, Morris County. June 20, 2000 (#197-00)

xComputers

Respondent, a tenured instructor of basic skills, was charged with conduct unbecoming a teaching staff member for using a school computer to access and view pornography on the Internet during school hours. Respondent denies the charges and claims that any access to illicit material was inadvertent. The charges are based upon the allegations of a student Respondent was tutoring in his basic skills class. This student has been receiving psychological counseling. Respondent argues that his rights were violated when the principal confronting him did not inform him of the identity of his accuser or the specifics of the allegations against him. Respondent notes that the computer was shared by the six teachers who regularly used the room, plus it was available to any additional teachers and students who wanted to use it. The computer was not password-protected and had no log-in procedure to identify the user. There was also open access to the room in which the computer was used for community groups who used the school evenings and weekends. The Board argues that the student's testimony is augmented by clear evidence because the "computer was 'rife' with pornographic content, including a large amount of access to pornographic 'news groups,' which the Board maintains cannot be inadvertently accessed but must be accessed through subscriptions." The C. notes that "Not only was J.M. unsure which month(s) he observed respondent viewing sexually explicit material as indicated above, but he was also inconsistent in recounting which days of the week, the time of day and the number of instances. . . .Although J.M. had writing only three days a week, he testified that he saw respondent accessing pornographic material every time he went into the classroom and that he went there every day." No other teacher nor student ever saw Respondent do anything inappropriate on the computer." The Board did not have a policy in place governing the use of school computers prior to "J.M.'s" accusations nor was there security measures in place regarding the use of computers. The C. notes that the Board's computer experts contaminated the evidence in their search for websites and dates accessed. The C. finds that the Board failed to meet its burden of proof substantiating the charges of misconduct by Respondent by a preponderance of credible evidence. The C. orders Respondent's reinstatement with back pay for the period of his suspension at the level of pay that he would have received had the charges not been brought against him.
On November 1, 2000, the State Board of Education agreed with the C. that the Board failed to demonstrate the charges against the Respondent by a preponderance of the credible evidence.

TENURE HEARINGS-TEACHERS

CD 1/2000 JAC — In the Matter of the Tenure Hearing of Sheila Jackson, Linden School District, Union County.
Sheila Jackson, Petitioner, v.
Linden Board of Education, Union County, Respondent.
January 10, 2000 (#11-00)

xIncrements

The Board certified charges of unbecoming conduct, insubordination and incapacity against Respondent, a tenured teacher of music. Ms. Jackson filed a Petition of Appeal alleging that the Board improperly withheld her employment and adjustment increments for the 1999-2000 school year. The two cases were consolidated. The C. approves the parties' settlement.

TENURE HEARINGS-TEACHERS

CD 12/2000 JAM — In the Matter of the Tenure Hearing of Cecelia James, Newark School District, Essex County.
December 22, 2000 (#417-00, December 22, 2000)

xState Health Benefits Program

The District certified charges alleging conduct unbecoming a teaching staff member against Respondent. The District alleges that Respondent participated in a plan intended to defraud the State Health Benefits Program when she provided personal information to a psychologist which enabled him to submit false claims for treatment on her behalf. Respondent pled guilty to criminal charges associated with this matter and agreed to forfeit her position with the District. The matter shall be transmitted to the State Board of Examiners for action against Respondent's certificate as it deems appropriate.

TENURE HEARINGS-TEACHERS

CD 5/2000 JOH — In the Matter of the Tenure Hearing of James Johnson, State-Operated School District of the City of Jersey City, Hudson County.
May 19, 2000 (#158-00)

xAbsenteeism

The District certified tenure charges of unbecoming conduct or other just cause against Respondent, a tenured teacher. The District avers that Respondent was guilty of excessive absenteeism and chronic tardiness over the course of six years. Respondent failed to submit an answer to the tenure charges. The C. deemed the charges to be admitted and issued summary decision dismissing Respondent from his tenured position on December 23, 1999 [See 1999 School Law Decisions Index]. On January 4, 2000, Respondent's attorney filed a notice of motion for reconsideration, together with Mr. Johnson's supporting affidavit and a letter from his physician. On January 7, 2000, the C. vacated his summary decision order and forwarded the matter to the OAL for hearing on the underlying tenure charges. Respondent has resigned his position. The C. approves the District's withdrawal of the tenure matter. A copy of this decision is being forwarded to the State Board of Examiners.

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of Henry Komorowski,
7/2000 Jersey City School District, Hudson County.
KOM July 27, 2000 (#243-00)

The District filed eleven charges of unbecoming conduct against Respondent, a tenured teacher of industrial arts. During his fifth grade technology course for the Gifted and Talented Program, Respondent discussed ways to torture and/or kill "L.S.," a student. Respondent testified that "the discussions were intended to get the attention of the students and put them in a relaxed mode." Respondent also distributed an advertisement for the purchase of guns on the Internet. The C. dismisses this charge since there is no evidence to prove that Respondent gave this advertisement to students. The C. finds that the District has proved the remaining ten charges by a preponderance of credible evidence. The C. concludes that Respondent "has breached his responsibilities as a teacher and engaged in conduct unbecoming a professional teaching staff member." The C. finds that dismissal is the appropriate penalty in this matter. A copy of this decision will be forwarded to the State Board of Examiners for action as it deems appropriate.
Affirmed, State Board of Education, December 6, 2000.

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of John Lister, State-
1/2000 Operated School District of the City of Newark, Essex County.
LIS January 21, 2000 (#39-00)

xState Health Benefits Plan

Respondent has decided not to contest the tenure charges of unbecoming conduct certified against him. He was a coordinator of substance abuse awareness teacher. The C. finds that Respondent "knowingly and willfully participated in conduct intended to defraud the State Health Benefits Program resulting in theft of and improper payment of public monies and that such behavior warrants respondent's dismissal." The matter shall be transmitted to the State Board of Examiners for review and action as it deems appropriate.

TENURE HEARINGS-TEACHERS
CD 6/2000 MAM — In the Matter of the Tenure Hearing of George Mamunes, Pascack Valley Regional High School District, Bergen County. June 26, 2000 (#208-00)

The Board filed seven tenure charges against Respondent, a tenured teacher. The charges assert that Respondent exhibited "unbecoming conduct on seven occasions in the classroom when he uttered racist, sexist and/or derogatory comments to students and when he required students to chant "school sucks" in the classroom. Respondent faults the Board's investigation because the administrators allegedly did not search out witnesses that would provide evidence in support of him and did not record such evidence when they did receive it. The ALJ finds that the investigation was not tainted. The C. concurs. The C. finds that the Board has sustained its burden of proving all seven charges of conduct unbecoming a teacher by a preponderance of credible evidence. "As to the appropriate penalty, the Commissioner finds it necessary to balance the totality of the record herein with the need to stress most emphatically on respondent the seriousness of his conduct and his need for greater control and sensitivity in dealing with his students." In view of all the facts in this matter, the extreme penalty of loss of tenured employment is not warranted. The C. orders the forfeiture of 120 days of pay withheld following the certification of tenure charges, the forfeiture of an additional two months' salary, and the withholding of increments until the end of the 2000-01 school year. The C. notes that it would be appropriate for the board to compel Respondent to attend training classes designed to address and prevent insensitive conduct in the classroom.
Affirmed, State Board of Education, November 1, 2000.

TENURE HEARINGS-TEACHERS
CD 10/2000 MIT — In the Matter of the Tenure Hearing of Zena Mitchell, Newark School District, Essex County. October 16, 2000 (#343-00)

The C. rejects the parties' settlement. Respondent, a tenured teacher, is charged with conduct unbecoming a teaching staff member. She is accused of engaging in inappropriate and unjustified physical contact with students, failure to attend required training relating to effective student techniques and crisis intervention and failure to supervise her students properly. The C. notes that Respondent's resignation from the District is contingent upon action to be taken by the Division of Pensions and Benefits. "The C. cannot approve a settlement where a material term, such as respondent's resignation, is dependent upon the satisfaction of conditions by another agency, and where the parties make no provision for that condition's nonoccurrence." Also, the C. notes that the proposed settlement provides no explanation of how the lump sum payment to Respondent for the purchase of her service credits is consistent with the public's interest or how it was calculated. The C. cannot approve settlement terms that would infringe upon the right of the District to respond to any inquiries that might arise concerning Respondent's employment. The parties cannot bind the C. to a confidentiality provision. The matter is remanded to the OAL for revision of the settlement, including the specification that Respondent will not oppose proceedings before the State Board of Examiners. If the parties cannot reach settlement, the matter shall proceed to hearing.

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of George Montgomery,
7/2000 Irvington School District, Essex County.
MON July 13, 2000 (#228-00)

On May 20, 1998, the Board certified tenure charges of unbecoming conduct against Respondent, a tenured teacher. Respondent was suspended from his teaching duties without pay pending disposition of the charges. Budget reductions by the superintendent of schools were the initial cause of disputes between Respondent and the superintendent. Respondent's position of "staff developer" which he held in addition to his teaching duties was eliminated. Respondent was issued a written reprimand due to his conduct outside the superintendent's office concerning a canceled PTA meeting. Respondent's response to this written reprimand formed the basis for the tenure charges. Mr. Montgomery had this rebuttal published in the Irvington Herald newspaper. Respondent also published another letter in the newspaper concerning his dispute with the superintendent which formed the basis for the charges of conduct unbecoming a teacher. The C. approves the parties' settlement. The settlement provides that the terms of the Agreement shall be kept confidential. The C. emphasizes to the parties that he is not bound by this settlement term. See Williams, v. Atlantic City Public Schools et al., 329 N.J. Super. 308, 2000. A copy of this decision shall be transmitted to the State Board of Examiners for action as it deems appropriate.

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of Donald Pantalone,
1/2000 Somerset County Vocational School District, Somerset County.
PAN January 13, 2000 (#18-00)

Respondent signed the first settlement agreement. Despite the legal principle that a settlement agreement may not be executed until approved by the C., resigned his teaching position and the Board paid him his salary and benefits in accordance with the settlement terms. The C. did not approve the settlement and remanded it for modification. Respondent refused to sign the second settlement agreement because it listed the charges against him. The Board argues that a binding settlement has been entered into and asks that the settlement be enforced. The Board states that it would be difficult to proceed with the matter to hearing because many of the students needed to testify no longer attend its school. Furthermore, the Board would have to continue to pay Respondent's salary until a final decision on the merits of the tenure charges was issued. Therefore, the C. determines that the disposition of this matter "shall be construed as a withdrawal of the tenure charges by the Board, not as a settlement." A copy of this decision shall be transmitted to the State Board of Examiners for review and action, as deemed appropriate.

TENURE HEARINGS-TEACHERS
CD In the Matter of the Tenure Hearing of Celese Segall,
4/2000 Elizabeth School District, Union County.
SEG April 17, 2000 (#128-00)

xAbsenteeism xLeaves, Sick

Respondent is a tenured teacher of mathematics. From September 1992 to October 28, 1999, Respondent was absent 720 days from her tenured teaching position. The Board filed a tenure charge of alleged chronic and excessive absenteeism, incapacity, incompetency and unbecoming conduct. Respondent has not given the Board adequate explanation for her prolonged absences. She refused to undergo a medical exam in March 1999. The C. orders Respondent's dismissal from her employment.

TENURE HEARINGS-TEACHERS
CD 3/2000 UTL — In the Matter of the Tenure Hearing of Stanley K. Utley, Trenton School District, Mercer County. March 2, 2000 (#77-00)

xCriminal Charges xDrug Abuse

Respondent was found guilty of possession of a controlled dangerous substance (cocaine) and possession with intent to distribute. The District certified tenure charges of conduct unbecoming a tenured teacher. Respondent has failed to answer to these charges. The C. grants summary judgment to the Board and orders Respondent dismissed from his tenured position as an elementary school teacher as of the date of this order. The matter shall be referred to the State Board of Examiners for action against Respondent's certificate as it deems appropriate.

TENURE HEARINGS-TEACHERS
CD 3/2000 VAR — In the Matter of the Tenure Hearing of Nicholas Varanelli, Orange School District, Essex County. March 31, 2000 (#103-00)

The District certified written charges of unbecoming conduct and other just cause against Respondent, a tenured teacher of Spanish. The C. cannot approve the parties' settlement. Neither the ALJ's decision nor the settlement agreement sufficiently explains how the settlement meets the Cardonick standards since the charges include assaulting a student and loudly and abusively using expletives directed at a student. The matter is remanded to the OAL for expansion or, and revision to, the record and settlement agreement. If the parties are unwilling or unable to agree to a settlement consistent with this decision, the matter shall proceed to plenary hearing.

TENURE HEARINGS-TEACHERS
CD 8/2000 WOO — In the Matter of the Tenure Hearing of Roger Wood, South Plainfield School District, Middlesex County. August 18, 2000 (#271-00)

xSexual Harassment

The Board certified tenure charges of unbecoming conduct and other just cause against Respondent, a tenured teacher. The Board alleges that Respondent "wrongfully and repeatedly touched his female students." Respondent pled guilty to three counts of third-degree endangering the welfare of children and violations of N.J.S.A. 2C:24-4(a). The Superior Court judge found that Respondent was a sex offender whose misconduct was characterized by a pattern of repetitive and compulsive behavior. The C. finds that Respondent's guilty plea and the Judgment of Conviction sustains the Board's tenure charges of unbecoming conduct against Respondent and justifies his dismissal. The C. finds that because the delay in the disposition of this matter was at Respondent's request, he has no entitlement to back pay or benefits from the Board.

TENURE HEARINGS-VICE PRINCIPALS
CD 9/2000 GRA — In the Matter of the Tenure Hearing of Joseph Graceffo, Wayne School District, Passaic County. September 21, 2000 (#310-00)

xDrug Abuse

The Board contends that on six occasions Respondent violated state law and the Board's policy regarding drug testing students who were suspected of being under the influence of alcohol or other drugs. The Board asserts that Respondent's conduct was unprofessional and unbecoming and warrants dismissal from his employment. The operative statute, N.J.S.A. 18A:40A-12 is part of a larger enactment intended to establish a comprehensive public school program for prevention of substance abuse and provision of assistance to students. The C. points out that "nowhere in the statute is the principal or designee given the authority to substitute his/her judgment for that of the referring staff member, *once a staff member advises the designated administrator of his or her belief that the student is under the influence of alcohol or drugs and articulates the observations, symptoms and indicators underlying this conclusion.*" The C. finds that the Respondent exhibited unprofessional and unbecoming conduct by his violation of statute and the Board's policy when he decided not to test students upon receiving reports from staff members that they appeared to be under the influence of alcohol or drugs. In ascertaining the penalty, the C. notes that the Board has not properly implemented the statute nor its policy. Instead of mandating that a student appearing to be under the influence of alcohol or drugs be immediately examined by a physician, the Board has established a District practice which ignores that mandate and substitutes drug screening in its stead. The Board took no disciplinary action against any other staff members who failed to properly implement the statute and policy. Therefore, the C. finds that the extreme penalty of loss of tenured employment is not warranted. The C. orders that Respondent be permanently reduced one step on the salary guide and forfeit all salary and benefits accrued during the first 120 days of his suspension. The Board is ordered to revise its policies and procedures to reflect statutory requirements and institute a program of continuing education so that staff members will be able to fulfill their obligations under the law.

TESTS AND TESTING
CD 6/2000 BLA — In the Matter of the Tenure Hearing of Hattie Black, State-Operated School District of the City of Newark, Essex County. June 12, 2000 (#175-00)

For case summary, see **TENURE HEARINGS-PRINCIPALS.**

TEXTBOOKS
CD 5/2000 FOL — In the Matter of the Tenure Hearing of Grace Folger, Orange School District, Essex County. May 15, 2000 (#147-2000)

For case summary, see **TENURE HEARINGS-TEACHERS**.

TIMELINESS
CD 9/2000 BLA — Rhonda Bland-Carter, Petitioner, v. State-Operated School District of the City of Newark, Essex County, Respondent. September 11, 2000 (#298-00)

For case summary, see **INCREMENTS.**

TIMELINESS
CD "C.C.," on behalf of her minor son, "R.S.," Petitioner, v.
9/2000 Riverton Board of Education, Burlington County, Respondent.
"C.C." September 18, 2000 (#306-00E)

Petitioner asks for emergent relief to stay the proposed detention of "R.S." which, she asserts, was improperly imposed. Petitioner also alleges a number of inappropriate actions by employees of the Board. Petitioner argues that these incidents show a pattern of inappropriate actions towards her son and her expressed concern for her son's safety. The Board asserts that the alleged incidents occurred in May 1998, December 1999 and January 2000 and should be dismissed as being filed out-of-time pursuant to N.J.S.A. 6:24-1.2. The C. holds that the Petitioner is permitted to advance her arguments regarding these incidents for the purpose of establishing a pattern of alleged inappropriate actions towards her son by the Board. The matter shall continue at the OAL for proceedings on merits of Petitioner's claim.

TIMELINESS
CD Helen Cheloc, Petitioner, v.
6/2000 Elizabeth Board of Education, Union County, Respondent.
CHE June 12, 2000 (#173-00)

For case summary, see **INCREMENTS**.

TIMELINESS
CD Cordell Wise, Petitioner, v.
9/2000 Trenton Board of Education, Mercer County, Respondent.
WIS September 11, 2000 (#301-00)

For case summary, see **CONTRACT RENEWALS**.

TRANSFERS
CD Donna Custode, Petitioner, v.
10/2000 Hackettstown Board of Education, Warren County, Respondent.
CUS October 30, 2000 (#349-00)

For case summary, see **POSITIONS, ABOLISHMENT.**

TRANSPORATION OF STUDENTS
CD "G.A.," on behalf of minor child, "B.A.," Petitioner, v.
11/2000 Ridgefield Board of Education, Bergen County, Respondent.
"G.A." November 9, 2000 (#363-00)

The C. concludes that the only safe and legal manner of transportation to and from "B.A.'s" public school is via vehicle transport. Local school districts are not obligated to enforce traffic laws or to provide sidewalks, overpasses, etc. to meet the requirements of safe travel. Districts have no affirmative duty to seek the safest route. "Nevertheless, if the only safe and legal means of transportation when measured from door to door exceeds two miles, children are entitled to transportation under N.J.S.A. 18A:39-1." Since the shortest route measured by vehicle transport exceeds two miles, Petitioner is eligible for transportation.

TRANSPORATION OF STUDENTS
CD "J.D.K." and "G.E.K.," on behalf of minor child,
8/2000 "J.D.K., Jr." and "M.S.D." and "R.D.M.D.," on behalf of
"J.D.K." minor children, "G.D." and "B.D.," Petitioners, v.
Estell Manor Board of Education, Atlantic County, Respondent.
August 25, 2000 (#269-00)

The Board ended bus service to Petitioners upon discovering that they resided more than 20 miles from the private schools in which their children were enrolled (N.J.S.A. 18A:39-1). Petitioners upon equitable doctrines to assist them in regaining bus transportation, arguing that the school abruptly terminated service without reasonable notice. The C. upholds the Board's decision and dismisses the Petitions of Appeal.

TRANSPORTATION OF STUDENTS
CD "J.F.N., Jr." and "J.N." on behalf of minor child, "C.N.,"
5/2000 Petitioners, v.
"J.F.N." Morris Hills Regional School District Board of Education,
Morris County, Respondent.
May 19, 2000 (#159-00)

Petitioner lives more than two and-a-half miles from school and is entitled to free transportation. The issue is whether the District acted arbitrarily, capriciously and unreasonably when it designated a particular location for a bus stop used by Petitioners' daughter. Petitioners allege that the bus stop is placed at a closed landfill and is dangerous and unsafe. After examining the situation, the C. concurs with the ALJ that, under the particular circumstances of this matter, Petitioners have demonstrated that the Board's refusal to accommodate their request to locate an alternative bus or van stop for "C.N." was arbitrary and capricious. The Board is directed to select a suitable alternative route allowing for van service to "C.N.'s" driveway.

TRANSPORTATION OF STUDENTS
CD Lakewood Board of Education, Ocean County, Petitioner, v.
3/2000 New Jersey State Department of Education, Office of Compliance,
LAK Respondent.
March 8, 2000 (#81-00)

xState Aid

Petitioner Board contests the conclusion of the Office of Compliance that it is required to repay the State $153,238.60 as a result of a transportation department audit conducted by the Office. The C. determines that the amount of state aid recoverable is $146,163.10.

TRANSPORTATION OF STUDENTS
CD Mount Holly Board of Education, Petitioner, v.
3/2000 New Jersey State Department of Education, Respondent.
MOU March 1, 2000 (#74-00)

xNonpublic Schools

Petitioner requests an interpretation of N.J.S.A. 18A:39-1. The C. determines that this statute "places an obligation on a regional school district to transport all students living within the bounds of the regional district to remote nonpublic schools, if any student within the regional district is so transported pursuant to law. The statute also unmistakably directs that the expense incurred by a regional district in providing for transportation of students below the grade level of the regional district is to be borne by the constituent districts comprising the regional district, prorated on a per pupil basis. Consequently, as a constituent member of a regional district which is required by law to transport nonpublic school students, petitioner is indisputably responsible for payment of that share of the regional district's transportation costs associated with those pupils attending nonpublic schools below grade 9 who reside in petitioner's local district." The C. determines that Petitioner is obligated to pay Rancocas Valley regional High School District its pro rata share of costs incurred in providing transportation services to eligible nonpublic school students below grade 9 who reside within Petitioner's school district.

TRANSPORTATION OF STUDENTS
CD West Windsor-Plainsboro Regional School District Board of
9/2000 Education, Mercer County, Mercer County, Petitioner, v.
WES Delran Board of Education, Burlington County, Respondent, and
Nutley Board of Education, Essex County, Petitioner, v.
Delran Board of Education, Burlington County, Respondent.
September 5, 2000 (#287-00)

Petitioner Boards seek to compel the Delran Board of Education to pay transportation costs of children placed by state agencies in group homes in Respondents' districts. The C. finds that N.J.S.A. 30:4C-26c states that children placed in group homes are to be accorded all of the "educational benefits" of the school district in which the group home sits, including pupil transportation. The C. also finds that the school district where the group home is located is responsible for providing child study team services (paid for by the resident district) to children placed in group homes within its borders. Therefore, the group home school district determines the child's educational program and placement which dictates the child's transportation needs and the district's transportation costs. The C. directs the Respondent Board to reimburse Petitioning Boards for the cost of transportation for the students.

TUITION
CD Burlington Board of Education, Burlington County, Petitioner, v.
6/2000 New Jersey Department of Education, Division of Finance,
BUR Respondent.
June 1, 2000 (#168-00)

The C. finds that district of residence on the date of the child's placement in a residential facility was Burlington. Petition dismissed.

TUITION
CD Deron School II, Petitioner, v.
3/2000 New Jersey State Department of Education, Office of Compliance,
DER Respondent.
March 8, 2000 (#82-00)

The C. finds that the Office of Compliance correctly disallowed costs for an uncertified teacher in calculating Deron's 1994-95 tuition rate.

TUITION
CD "J.K.H.," et al., Petitioners, v.
11/2000 Shore Regional High School District Board of Education,
"J.K.H." Monmouth County, and Red Bank Regional High School District Board of Education, Monmouth County.
November 29, 2000 (#391-00)

Petitioning parents and guardians assert that Respondent Boards have the obligation to pay tuition and transportation costs for their children to attend the visual performing arts program operated by the Red Bank Regional High School District. The C. finds that any special status Red Bank Regional enjoyed under N.J.S.A. 18A:54-7 because of its Area Vocational Technical School and Local Area Vocational School District designations was terminated when N.J.A.C. 6:46-2 was repealed in 1991. N.J.S.A. 18A:38-15 is now the controlling statute. Therefore, the C. finds that the Districts did not abuse their discretionary authority by refusing to pay tuition and transportation costs for their students to attend Red Bank Regional's vocational program.

TUITION
CD Ramapo-Indian Hills Regional School District Board of Education,
7/2000 Bergen County, Petitioner, v.
RAM Bergen County Vocational Technical School District Board of Education, Bergen County, Respondent.
July 10, 2000 (#222-00)

xVocational Education

The Petitioner Board challenges the legality of magnet schools or academies operated by the Respondent Board. It seeks a declaration that it has no legal obligation to pay tuition or related costs for resident students enrolled in any academy operated by the Respondent Board. The Petitioner Board asserts that the Voc-Tech has failed to obtain the approval of its programs by the C. The C. finds that the programs operated by Respondent's academies have been approved pursuant to N.J.A.C. 6:43-8.2. The C. determines that Petitioner's programs are not comparable to the programs provided in Respondent's academies. Petitioner is directed to remit tuition costs to Respondent for its resident students attending the academies.

TUTORING
CD "L.C.," on behalf of minor child, "P.C.," Petitioner, v.
8/2000 Montague Board of Education, Sussex County, Respondent.
"L.C." August 14, 2000 (#257-00)

Petitioner alleges that failures by the District caused her to provide a tutor for her daughter. She seeks reimbursement of costs associated with the tutoring. The C. dismisses the Petition as Petitioner has failed to provide specific bases for her claim.

VANDALISM
CD Nicholas Dentino, Petitioner, v.
5/2000 Haddonfield Board of Education, Camden County, Respondent.
DEN May 19, 2000 (#161-00E)

Petitioner challenges the Board's decision to suspend him for the balance of the school year for committing vandalism. Petitioner threw eggs at the school, pulled up shrubs around the school and broke a school window. He requests emergent relief in the form of expedited hearing because the suspension runs to the end of his senior year and he will be unable to return unless the matter is resolved. There is no procedural defect since Petitioner had a hearing by the Board in a timely manner and there is no dispute as to culpability. Petitioner is receiving home instruction, will be given all final examinations and, if academically qualified, will receive his diploma, but will not be permitted to participate in graduation exercises. The ALJ orders a minimum of ten hours of home instruction for Petitioner weekly and orders final examinations administered to him. The withdrawal of prom and graduation privileges is upheld as appropriate under the circumstances. The C. affirms and returns the matter to the OAL for further proceedings as may be necessary to bring it to a conclusion.

VIOLENCE
CD "A.S.," on behalf of minor child, "M.S.," Petitioner, v.
5/2000 Somerville Board of Education, Somerset County, Respondent.
"A.S." May 19, 2000 (#162-00)
Petitioner appeals his son's ten-day suspension from school and school-related activities because he allegedly threatened a teacher. In his creative writing class, the teacher directed pupils to write about how they wanted to be famous and why. "M.S." said out loud that he wanted to be famous for killing his teacher. He went through the balance of the school day without the matter being raised and he attended his prom during the weekend. On the following Monday, he was called before the school disciplinarian and told of his suspension. The C. finds that Petitioner has failed to satisfy the four-pronged standard for obtaining emergent relief. The matter shall continue to the OAL for further proceedings as deemed necessary.

VOCATIONAL EDUCATION
CD Ramapo-Indian Hills Regional School District Board of Education,
7/2000 Bergen County, Petitioner, v.
RAM Bergen County Vocational Technical School District Board of Education, Bergen County, Respondent.
July 10, 2000 (#222-00)
For case summary, see **TUITION**.

WORKERS' COMPENSATION
CD Sandra Schmidtke, Petitioner, v.
11/2000 Woodbridge Board of Education, Middlesex County, Respondent.
SCH November 8, 2000 (#361-00)

Petitioner avers that her days absent resulted from a work-related occurrence and protests the charging of these days to her accumulative sick leave. The Petition requests a determination of whether Petitioner's injury arose out of and in the course of her employment pursuant to N.J.S.A. 18A:30-2.1. This determination is within the authority of Workers' Compensation. Petitioner did not pursue her claim for work-related injury with the Division. The C. refrains from exercising jurisdiction regarding entitlement and damages under N.J.S.A. 18A:30-2.1 in this matter until the Division of Workers' Compensation makes the determination of a work-related injury/illness pursuant to N.J.S.A. 34:15-1.1 et seq. Petition dismissed.

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